PUBLIC PROCUREMENT

EEA - EFTA CASES 2006

Skolas iela 4-11	Phone: +371-7039-355	E-Mail: pgj@lexnet.dk
LV-1010 Riga, Latvia	Fax: +371-7039-240	Website: www.lexnet.dk
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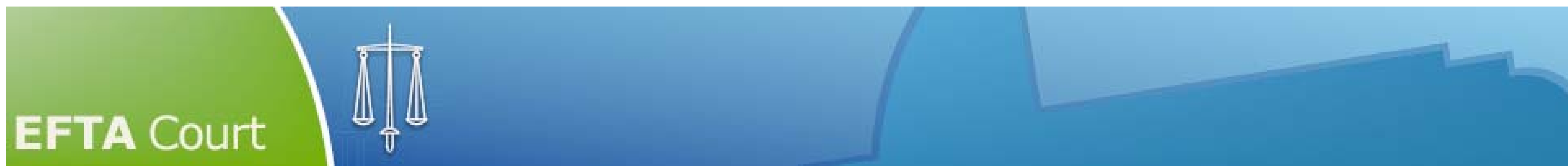

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ADVISORY OPINION OF THE COURT

12 May 1999*

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

In Case E-5/98

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (Supreme Court of Iceland) in a case on appeal between

Fagtún ehf.

and

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

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

THE COURT,

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

Registrar: Gunnar Selvik,

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

after considering the written observations submitted on behalf of:

– the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;

– the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsson, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;

– the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents;

having regard to the Report for the Hearing,

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

gives the following

Advisory Opinion

Facts and procedure

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

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

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

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

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

5 The Appellant sued Byrgi ehf. in damages, claiming compensation for expenses relating to the preparation of the tender and for lost profit. Héraðsdómur

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

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

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

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

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

Legal background

1. EEA law

10 Article 4 EEA reads:

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

11 Article 11 EEA reads:

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

12 Article 13 EEA reads:

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

2. National law

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

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

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

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

Questions

16 The following questions were referred to the EFTA Court:

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

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

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

Findings of the Court

The second question

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

Applicability of Article 11 EEA

20 The *Defendants* argue that measures can only be held to be contrary to Article 11 EEA if they are taken by an authority exercising its public power, they are binding in nature and they have certain legal effects. The building committee did not exercise any public power during the contractual negotiations. Consequently, this case does not concern a provision of a legislative act, an administrative rule, a recommendation or any other decision published or enacted by a public authority in a unilateral manner. Section 3 of the works contract was freely negotiated by the parties. In the view of the Defendants then, what is at issue is a contract of private law between private parties that is not subject to Article 11 EEA.

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

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

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

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

Interpretation of Article 11 EEA

25 The *Appellant* states that the inclusion of a provision according to which roof elements are to be produced in Iceland is considered to have an effect equivalent to a quantitative restriction when applied to imports of roof elements from another Contracting Party. No evaluation was made to determine whether the roof elements offered by the Appellant and originating in Norway would meet the standards laid down in the Building Regulation or qualify for an exemption from the provisions of that regulation. Moreover, the Icelandic building authorities have granted exemptions for the use of the roof elements at issue here on two occasions prior to the tender for Borgarholtsskóli and on at least one occasion since that tender for other, similar projects.

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

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

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

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

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

31 In the case at hand the contested clause was not part of the specifications that were the basis for the tender procedure, as was the situation in the cited judgments of the ECJ. The contested clause was inserted into the final contract at the contract stage after the bids in the tender had been received and considered, at the contracting authority's request. This can, however, not lead to a different

assessment with regard to the applicability of Article 11 EEA, as the post-tender negotiations cannot be separated from the procedure itself. The contract was concluded after a tender procedure under the Directive had been carried out. The contract is so closely linked to the preceding procedure that the principles underlying the Directive and the provisions of Article 11 EEA must apply to it.

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

Justification under Article 13 EEA

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

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

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

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

37 The *Court* notes that the arguments of the Defendants concerning a possible justification under Article 13 EEA cannot be upheld. If a Contracting Party claims to need protection from dangerous imported products, it will have to satisfy the Court that its actions are genuinely motivated by health concerns, that they are apt to achieve the desired objective and that there are no other means of achieving protection that are less restrictive of trade. In the case at hand, the Defendants have not shown that the use of roof elements built in Norway could lead to a danger for the health and life of humans within the meaning of Article 13 EEA. On the contrary, it is undisputed that the authorities in Iceland have granted an exemption for the use of the roof elements in other cases. Therefore, a provision which *a priori* favours certain products by a mere reference to their

origin cannot be considered as necessary or proportionate within the meaning of Article 13 EEA.

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

The first question

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

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

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

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

Costs

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

On those grounds,

THE COURT,

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

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

Bjørn Haug | Thór Vilhjálmsson | Carl Baudenbacher

Delivered in open court in Luxembourg on 12 May 1999.

Gunnar Selvik
Registrar

Bjørn Haug
President

REPORT FOR THE HEARING
in Case E-5/98

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (Supreme Court of Iceland) in a case on appeal between

Fagtún efh.

and

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

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

I. Introduction

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

II. Facts and procedure

2. In January 1995, an invitation to submit tenders for the award of a public contract for construction work for the school Borgarholtsskóli was sent out. The contracting authorities were the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, and tenders were to be submitted to the State Trading Centre (*Ríkiskaup*). The building committee was the purchaser of the work and was responsible for contacts with tenderers. Act No. 65/1993 relating to the procedures for the award of contracts (*Lög um framkvæmd útboða*)

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

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

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

5. The Appellant sued Byrgi ehf. in damages, claiming compensation for expenses relating to the preparation of the tender and for lost profit.

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

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

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

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

III. Questions

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

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

IV. Legal background

EEA law

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

11. Article 4 EEA reads:

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

12. Article 11 EEA reads:

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

Icelandic law

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

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

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

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

V. Written Observations

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

– the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;

– the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsson, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;

– the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents.

The first question

The Appellant

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

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

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

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

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

The Defendants

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

The Government of Norway

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

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

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

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

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

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

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

The EFTA Surveillance Authority

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

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

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

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

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

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

The Commission of the European Communities

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

The second question

The Appellant

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

32. Concerning the argument of the Defendants that they acted as a private party, the Appellant points out that the award of the contract was a matter of public law because the works were subject to Icelandic Act No. 63/1970 on awards of public works contracts and Directive 93/36 EEC. Furthermore, the works were financed by the State and the municipalities, the address of the building committee was at the Ministry of Education and the individuals composing the building committee were high-ranking officials of the Ministries of Education and Finance and the City of Reykjavík General Council. Referring to the case law of the ECJ,[7] the Appellant points out that Article 30 EC is applicable even though a private undertaking is acting on behalf of a government.

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

34. According to this term of the contract, all products that were not made in Iceland were excluded. Consequently, no subjective evaluation was made to determine whether the roof elements offered by the Appellant and originating in

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

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

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

Norway would meet the standards laid down in the Building Regulation or qualify for an exemption from the provisions of that regulation.

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

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

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

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

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

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

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

The Defendants

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

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

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

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

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

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

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

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

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

48. Furthermore, section 3 of the works contract should not be read as excluding imported roof elements. The English translation of section 3 in the works contract is inaccurate where it reads "produced in the country". It should have read "constructed in the country" or even "assembled in the country". The latter term is used in the English version of the request for an advisory opinion. The translation also appears to be imprecise where it says "it is agreed". An interpretation closer to the meaning of the Icelandic words "við það miðað"

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

would be "assumed" which is not as unconditional as the English translation indicates. In fact, no actual distinction is made between imported and domestic goods, since the import of foreign material for construction or assembly in the country is not excluded.

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

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

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

The Government of Norway

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

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

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

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

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

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

The EFTA Surveillance Authority

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

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

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

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

The Commission of the European Communities

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

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

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

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

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

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

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

Carl Baudenbacher
Judge-Rapporteur

ADVISORY OPINION OF THE COURT
1 April 1998[*]

(*Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity*)

In Case E-3/97

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 Nedre Romerike herredsrett (Nedre Romerike Municipal Court) for an Advisory Opinion in the case pending before it between

Jan and Kristian Jæger AS

Supported by the
Norwegian Association of Motor Car Dealers and Service Organisations

and

Opel Norge AS

on the interpretation of Article 53 of the EEA Agreement.

THE COURT,

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

Registrar: Asle Aarbakke, Legal Secretary

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[*] Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

– the plaintiff, represented by Counsel Pål Magne Bakka, Advokatfirmaet Harris, Bergen;

– the defendant, represented by Counsel Jon Lyng, Advokatfirmaet Lyng & Co., Oslo;

– the Government of the Kingdom of Norway, represented by Hege M. Hoff, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Rolf Helmich Pedersen, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Richard Lyal, Member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the defendant, the Norwegian Government, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 19 February 1998,

gives the following

Advisory Opinion

Facts and Procedure

1 By an order dated 2 September 1997, registered at the Court on 8 September 1997, Nedre Romerike herredsrett, a Norwegian municipal court, made a Request for an Advisory Opinion in a case brought before it by Jan and Kristian Jæger AS, plaintiff, against Opel Norge AS, defendant. The case concerns the refusal to accept a new dealer for Opel cars in Norway.

2 The plaintiff, Jan and Kristian Jæger AS (hereinafter "Jæger"), is a wholly-owned subsidiary of Jæger-gruppen AS (the "Jæger Group"). Jan and Kristian Jæger are shareholders in the Jæger Group, which is a significant purchaser and dealer in different makes of motor vehicles, including Toyota, BMW, Rover and Land Rover.

3 The defendant, Opel Norge AS (“Opel”), is wholly-owned by General Motors Co. of the United States of America. It has 53 independent dealers in Norway. A

standard dealership agreement is entered into with the dealers, normally for five years at a time. These agreements conform as much as possible to Opel's standard European dealership agreement.

4 On 13 December 1995, Jæger brought an action against Opel claiming that Opel had entered into a dealership agreement with it or, subsidiarily, that Opel was under an obligation to do so. The Norwegian Association of Motor Car Dealers and Service Organisations declared itself an intervener in support of Jæger by pleadings of 9 December 1996.

5 During the handling of the dispute by Nedre Romerike herredsrett, disagreement arose as to the interpretation of Article 53(1) EEA. The question is whether the provision prohibits certain terms in a motor vehicle dealership agreement.

6 In the spring of 1994, Jan and Kristian Jæger entered into negotiations with Opel for the establishment of a new Opel dealership in the Bergen area.

7 At a meeting in May 1994, the parties agreed that any such dealership should be held by a new company with its own management and Board of Directors, independent of the other companies in the Jæger Group and occupying premises separate from those of other companies in that group.

8 There was an exchange of letters between Jan Jæger on the one hand and Opel on the other regarding the shareholder structure in the new company. A new meeting was held on 9 May 1995. Following that meeting, Opel asked Jan and Kristian Jæger to apply for a dealership. In a letter of 22 May 1995, Jan and Kristian Jæger applied for an Opel dealership for the Bergen area on behalf of a new company which was to be created.

9 According to the application, Kristian Jæger would be General Manager of the new company and would hold 51% of the shares. His father, Jan Jæger, would hold the remaining 49% and would be Chairman of the Board of Directors.

10 By letter of 29 June 1995, Opel put forward an offer of dealership to Kristian and Jan Jæger on that basis. In accordance with normal practice, the offer was made to the person who was to be the General Manager of the new company. It was a condition of the offer that Kristian and Jan Jæger were to sell their shares in the Jæger Group by 31 December 1996 and that they could not be involved with competing products.

11 The following clauses were contained in the offer from Opel:

> "2. The General Manager referred to in § 3 of the Agreement will be Kristian Jæger who, from the outset, will hold 51% of the company's shares. Jan Jæger will hold 49% of the shares as of the time the company is established and will be Chairman of the Board of Directors. Kristian Jæger is authorized to bind the company alone or together with the Chairman of the Board of Directors. It is a condition that Kristian Jæger will have right of first refusal at face value on the

remainder of the shares beyond his current 51%. It is further a condition that both Kristian Jæger and Jan Jæger are to be bought out of the Jæger group no later than 31 December 1996.

3. With reference to point 2, Kristian Jæger, Jan Jæger and the new Opel dealer may not become involved with competing products."

12 In a letter of 18 September 1995, the offer was formally accepted by Jan and Kristian Jæger on behalf of the company being created. The acceptance conformed to the offer on all points except for the provisions on ownership structure.

13 Opel did not accept the change in relation to the offer. The standard agreement has not been signed by either of the parties.

14 The parties do not agree as to whether, under Norwegian contract law, a binding dealership agreement has been entered into. They furthermore disagree as to whether Opel has imposed the condition regarding shareholder structure in a discriminatory manner, given that the General Managers' ownership shares in Opel's dealer companies in Norway vary from 0% to 100%.

15 Nedre Romerike herredsrett decided to refer a Request for an Advisory Opinion on the following questions to the EFTA Court:

1.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding a certain shareholder structure of the dealer?

1.b If so, will this be applicable regardless of the aim or effects of the condition?

1.c Did such a prohibition exist in September 1995?

2.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding the owners and/or general manager in the dealer company holding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles?

2.b If so, is this applicable regardless of the aim or effects of the condition?

2.c Did such a prohibition exist in September 1995?

3. Does it follow from Article 53(1) EEA that an importer of motor vehicles in September 1995 had an obligation to enter into a

dealership agreement with any or all who wished to be dealers and who otherwise met the qualitative criteria the importer could lawfully impose on dealers?

4. *Is Article 53(1) EEA to be construed to the effect that negotiations about an agreement or an agreement to enter into an agreement is tantamount to an "agreement" and, consequently, sufficient to bring the matter within the scope of Article 53(1)?*

5. *Is Article 53(1) EEA to be construed to the effect that a refusal to accept a dealer falls to be examined under Article 53 when that refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other, existing dealers?*

6. *Is Article 53(2) to be construed to the effect that if a condition is contrary to Article 53(1) and/or the rules on selective distribution, the entire contract is then of no legal force or effect?*

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

Legal background

17 The provisions in question are Article 53 EEA, Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ No L 15, 18.1.1985, p. 16), hereinafter referred to as "Regulation 123/85", and Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, (OJ No L 145, 29.6.1995, p. 25), hereinafter referred to as "Regulation 1475/95".

18 Article 53 EEA reads as follows:

"1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
– any agreement or category of agreements between undertakings;
– any decision or category of decisions by associations of undertakings;
– any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

19 Article 53 EEA is identical in substance to Article 85 EC. Thus, Article 6 EEA and Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice are applicable when interpreting Article 53 EEA.

20 Certain agreements in the field of motor vehicle distribution have been exempted from the scope of Article 85 EC and Article 53 EEA by virtue of Regulation 123/85, subsequently replaced by Regulation 1475/95, see below.

Applicability in time

21 Article 53 EEA has been in force in the EFTA States of the EEA since the entry into force of the EEA Agreement on 1 January 1994.

22 Regulation 123/85 was part of the EEA Agreement when it entered into force (Act referred to in part B, No. 4, Annex XIV EEA) and was to remain in force, according to Article 14 of that Regulation, until 30 June 1995.

23 Within the Community, the applicability of Regulation 123/85 was extended until 30 September 1995 by virtue of Article 13 of Regulation 1475/95. Regulation 1475/95 replaced Regulation 123/85 effective 1 October 1995. Article 7 of Regulation 1475/95 provides that agreements in force on 1 October 1995 which satisfied the conditions in Regulation 123/85 were to remain valid until 30 September 1996.

24 Regulation 1475/95 was implemented in the EEA Agreement pursuant to Article 98 EEA by Joint Committee Decision No. 46/96 of 19 July 1996 (Act referred to in part B, No. 4a, Annex XIV EEA). According to that decision, Regulation 1475/95 entered into force in the EEA on 1 August 1996, but would have effect as of 1 October 1995. However, the Joint Committee Decision empowered the individual EFTA States to adopt transitional measures for the period from 1 July 1995 to 19 July 1996, in so far as was necessary for constitutional reasons.

25 It is, in principle, a matter for the national court to determine the extent to which Norway availed itself of the possibility of adopting transitional measures in its national legislation for the period in question. However, the Court notes that, according to information submitted by the Norwegian Government, the following positions with regard to transitional measures seem to have been adopted:

a) it was decided not to extend the applicability of Regulation 123/85 beyond 30 June 1995;
b) it was decided not to apply Regulation 1475/95 before 19 July 1996, with the consequence that the transitional provision in Article 7 of that Regulation did not apply.

26 If the national court finds that this description of national transitional measures is correct, the situation in Norway may be described as follows: from 1 January 1994 until 30 June 1995, Article 53 EEA was applicable, with the exemptions provided for in Regulation 123/85. From 1 July 1995 until 19 July 1996 only Article 53 EEA was applicable, with no block exemptions. Since 19 July 1996, Article 53 EEA has been applicable, with the exemptions provided for in Regulation 1475/95.

27 It is contested in the present case whether an agreement was concluded in September 1995 by virtue of Opel's formal offer and Jæger's purported acceptance thereof. Based on the information provided by the Norwegian Government concerning the adoption of transitional measures, the alleged agreement in September 1995 falls to be considered under Article 53 EEA and relevant case law alone.

28 The Court notes that the national court, in its first, second and third questions, asks specifically about the situation in September 1995. The fourth, fifth and sixth questions are general questions about the interpretation of Article 53 EEA and not about either of the two block exemptions. The Court will limit its Advisory Opinion accordingly.

29 The defendant submits that even if Regulation 123/85 was not formally in force in Norway in September 1995, it should be considered applicable for reasons of homogeneity with Community law.

30 That argument cannot be accepted. It is for the EEA Joint Committee to implement new Community legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement. And although homogeneity is one of the fundamental principles of the EEA Agreement, it follows from the structure of the Agreement and the legislative procedure provided for therein that this might not always be fully achieved in terms of simultaneous application of legislative measures. Thus, Article 102 EEA provides that decisions of the EEA Joint Committee shall be made "as closely as possible" to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application within the Community and EFTA pillars. The decision of the Joint Committee relevant to the present case implies that during a transitional period there would not necessarily be full homogeneity, and there is no basis for challenging the validity of that decision.

31 The defendant further submits that even though no block exemptions were formally in force in Norway in September 1995, Article 53 EEA should be interpreted in the light of Regulation 123/85 for reasons of homogeneity.

32 The Court finds that one cannot interpret the general prohibition in Article 53(1) EEA in order to bring it within the terms of a block exemption which, in itself, is not an interpretation of the provision but an exemption, i.e. something which derogates from the provision.

The fourth question

33 By its fourth question, which the Court considers should be dealt with first, the national court seeks to ascertain the scope of application of Article 53(1) EEA which prohibits *inter alia* all agreements between undertakings and concerted practices, which may affect trade between Contracting Parties, and have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

34 While the *plaintiff* argues that Article 53 EEA applies to situations where, in a gradual process of concluding an agreement, one of the parties has given a legally binding offer, as well as to all conditions and understandings within that process, the *Commission of the European Communities* and the *EFTA Surveillance Authority* support the *defendant's* view, *viz.*, that Article 53(1) EEA applies to agreements and not to negotiations which do not culminate in an agreement.

35 The *Court* notes that the concept of “agreement” in Article 53(1) EEA is an autonomous concept, which does not fully correspond to the concept of “agreement” in different national legal systems. According to decisions of the ECJ and CFI regarding the concept in Article 85(1) EC, the minimum requirement for there to be an “agreement” within the meaning of the provision is an expression of a joint intention of the parties involved to conduct themselves on the market in a specific way, the object or effect of the conduct being the prevention, restriction or

distortion of competition (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86; and of the CFI in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

36 The Court further notes that negotiations which have not yet culminated in an expression of a joint intention are not covered by the concept “agreement” in Article 53(1) EEA. Nor does the provision apply to unilateral conduct of an undertaking, including offers made for the conclusion of a contract as long as the offer has not been accepted by other party in the sense of expressing an intention to adhere to the provisions in the offer.

37 For the sake of completeness, the Court notes that the offer for a contract made by Opel was accepted by Jan and Kristian Jæger on all points except on those allegedly in conflict with Article 53 EEA. If, under national contract law, an agreement is found to have been concluded but without the contested clauses, such an agreement would not be contrary to Article 53(1) EEA since it would not contain the allegedly illegal terms.

38 The answer to the fourth question must therefore be that negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties’ having reached a joint intention to conduct themselves on the market in a specific way.

The fifth question

39 It is argued by the *plaintiff* that the applicability of Article 53(1) EEA extends to conduct of an undertaking which, although seemingly unilateral, relates to the undertaking’s agreements with third parties. This contention seems to be the basis for the fifth question of the national court, which asks whether a refusal to accept a dealer falls to be examined under Article 53 EEA when the refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other dealers.

40 In this connection, the plaintiff refers to Case C-107/82 *AEG* v *Commission* [1983] ECR 3151, where the ECJ found that a refusal to approve a distributor for a system of selective distribution was not unilateral conduct but formed part of the contractual relations between the undertaking and resellers, since the admission of a distributor was based on the acceptance, tacit or express, by the contracting parties of the policy pursued by the undertaking, which required the exclusion from the network of all distributors which qualified for admission but were not prepared to adhere to the policy.

41 For the purpose of determining whether Article 53(1) EEA applies to a situation such as in the present case, the *Court* finds that the criteria established in the above-mentioned case *AEG* v *Commission* are relevant.

42 The answer to the fifth question must be that where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the undertaking and its dealers which fall to be examined under Article 53 EEA.

43 The Court adds that, for an analysis of a distribution system under Article 53 EEA, the essential assessment is whether prevention, restriction or distortion of competition follows from agreements or concerted practices. The assessment must also take into account the extent to which restrictions on competition inherent in the different arrangements can be accepted as enhancing competition and being beneficial to the consumer. The categorization of the different systems is of lesser importance.

44 It is for the national court to assess whether the conditions set out above are met in the case before it.

The third question

45 With its third question, the national court seeks to ascertain whether under Article 53(1) EEA an importer of motor vehicles, in September 1995, was under an obligation to enter into a dealership agreement with any or all who wished to become dealers and who otherwise met the qualitative criteria which the importer could lawfully impose on dealers.

46 The *plaintiff* submits that Article 53(1) EEA must be interpreted so that an importer of new motor vehicles in September 1995 had an obligation to enter into dealership agreements with some or all of those who wished to be dealers and met the qualitative criteria which the importer could lawfully impose on a dealer.

47 The *defendant,* the *EFTA Surveillance Authority* and the *Commission of the European Communities* are of the opinion that the EEA Agreement does not impose on importers of cars any duty to conclude a contract with persons or companies wishing to become new car dealers in an area where there is room for several dealers.

48 The *Court* notes that, in the case of certain selective distribution systems, an importer, in order not to infringe Article 53(1) EEA, may become obliged to accept all potential dealers who meet qualitative criteria imposed by the importer. Thus, depending on the circumstances, a refusal to accept a dealer may constitute an infringement of Article 53(1) EEA. If the distributor nevertheless refuses to comply with that requirement, the legal consequences may be, for instance, that

fines are levied, or that the distributor is denied an individual exemption in procedures before the EFTA Surveillance Authority or the Commission of the European Communities (see Article 56 EEA).

49 But there is no basis under Article 53 EEA for imposing upon an unwilling distributor a duty to enter into a specific dealership agreement (see the judgment of the CFI in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223). The situation might be different under Article 54 EEA, but there is no indication that that provision applies in the present case.

50 The Court adds that a denial of entering into an agreement may have various legal consequences under applicable national laws, such as an obligation to make good the damage caused to a third party, or a possible obligation to enter into a contract. Consequently, it is possible that a national court may have the power under the rules of national law to order one trader to enter into a contract with another. This is to be determined under national law.

51 The answer to the third question must therefore be that Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.

The first and second questions

52 By its first and second questions, the national court asks whether certain conditions in a motor vehicle dealership agreement requiring a specific ownership structure in the dealer company and restricting the owners' right to have ownership interests in other companies involved in car dealing are covered by the prohibition in Article 53(1) EEA.

53 The Court notes that the national court asks about “Article 53(1) EEA, cf. the rules on selective distribution”, referring for the latter expression to the interpretation of the general prohibition developed in the case *Metro* v *Commission* [1977] ECR 1875 and subsequent case law. The Court notes, however, that the questions do not relate to the applicability of the block exemption in Regulation 123/85.

54 The *plaintiff* points out that the General Manager was to own at least 51% of the shares and that the Chairman of the Board was expected to hold the remaining shares. The 51% requirement prevents the dealer company from joining a group of dealers, in particular from becoming a subsidiary in a group which deals in motor vehicles of other makes through other subsidiaries. The clause furthermore prevents groups from dealing in new motor vehicles of other makes. The conditions on ownership structure do not consist of objective criteria of a qualitative nature relating to the technical qualifications of the dealer or its staff

within the meaning of the *Metro* judgment of the ECJ, and they are not indispensable within the meaning of that judgment. The plaintiff furthermore states that Opel has admitted that its practice concerning imposing conditions on ownership structure differs with regard to “new” and “old” dealers. The plaintiff concludes from this that Opel's practice is obviously discriminatory.

55 With respect to the requirement forbidding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles, the plaintiff submits that the real object of this condition is to break up a strong competitor who, over many years, has demonstrated the ability to build up sales of different car makes. It must be considered that the object of such a condition is to ensure that the dealer and even the shareholders in the dealer company may only deal in one make of car. This distorts competition because it renders impossible multi-brand dealerships and the building up of a strong dealer stage, thereby weakening inter-brand competition.

56 The *defendant* is of the opinion that the distribution system operated by it in Norway is not an open selective distribution system of the kind dealt with by the ECJ in its judgments in *Metro* and *AEG*. However, in any case it is submitted that the criteria applied by it in the case at hand regarding ownership structure in connection with the selection of its dealers must be viewed as non-discriminatory and necessary to ensure reasonable distribution of such advanced technical products as cars and therefore in conformity with the principles applied by the ECJ in its *Metro* judgment. The ownership structure clause is, in the defendant‘s view, a necessary tool to ensure that the dealer is able to fulfil its duties under the contract. The defendant states that the EEA Agreement does not prohibit an importer and a new, potential dealer from agreeing on a condition for future co-operation to the effect that the owner and general manager are not to hold shares in competing operations or are not to engage in competing operations. This requirement helps to build up a community of interest between the ownership interests and management. This enhances the dealerships' economic basis, productivity, the technical and economic development of the products and services and is in the interest of consumers.

57 In its written observations, the *EFTA Surveillance Authority* stated, with reference to the assumption in the request for an advisory opinion, that a selective distribution system was established. It referred to the *AEG* judgment of the ECJ, and submitted that Article 53(1) EEA was infringed if Opel denied access for potential dealers who fulfilled the qualitative criteria which Opel could lawfully set. At the oral hearing, based on further information then available, the EFTA Surveillance Authority pointed out that the system operated by Opel does not appear to be such a system.

58 With regard to the clauses in question, the EFTA Surveillance Authority submits that the condition of a certain shareholder structure would by itself in most cases amount to a restriction of competition within the meaning of Article 53(1) EEA. The restrictive effect of such a condition seems to be strengthened due to the

nature of the business in question. The establishment of a dealership company will often require a substantial amount of capital which, in turn, may restrict potential dealers from applying for dealerships, due to the condition on shareholder structure. A dealership company will frequently be unable to finance the whole activity through loans, but will have to possess a certain amount of equity capital in order to obtain loans and thus operate a business. Even if it were economically possible to start a new business without equity capital, national legislation in many EEA States requires that economic activities may only be carried out if certain requirements as to minimum equity capital are fulfilled.

59 A condition which requires a specific shareholder structure may also imply a restriction on the possibility for shareholders' to sell their shares. If this condition implies that the owner or owners may only sell their shares to the other owners of the dealership company, or only with the prior consent of the supplier, such a condition may also imply certain foreclosure effects for new, potential dealers since it may be difficult to enter the market through the acquisition of shares in existing companies. The EFTA Surveillance Authority concludes that such a condition would, in most cases and regardless of the aim, constitute a restriction within the meaning of Article 53(1) EEA and would thus be contrary to that Article if the agreement also affects trade and competition.

60 The requirement imposed on the owner and the General Manager not to own shares in other companies retailing cars, or companies owning parts of such undertakings, is not a qualitative criterion within the meaning of *Metro* but rather amounts to a restriction of competition within the meaning of Article 53(1) EEA, regardless of the aim of the condition.

61 The *Commission of the European Communities* submits that the *Metro* doctrine of the ECJ on selective distribution agreements is not of direct relevance to the present case. Opel does not operate a selective distribution system which is open to all dealers who want to join the system. It operates a system in which one dealer or a small number of dealers in each area are appointed. According to the Commission, distribution agreements in the motor vehicle sector, including the one in the present case, may be characterized as being "between selective distribution agreements ... and exclusive distribution agreements, but ... rather closer to the latter".

62 As regards the clauses in question, the Commission is of the opinion that a distinction must be drawn between the ownership clause and the requirement that Jan and Kristian Jæger dissolve all links with the Jæger Group. A clause requiring the General Manager of a car dealership to hold at least 51% of the shares in the dealership company may, depending on the circumstances, constitute a restriction of competition. This may, however, not be the case where the clause merely serves to identify the individuals with whom the supplier has negotiated the dealership agreement and to ensure that those persons retain effective control of the corporate entity.

63 In the view of the Commission, the requirement that all connections with the Jæger Group should be severed goes beyond what is necessary to establish a distinct legal entity and is therefore restrictive of competition and prohibited by Article 53(1) EEA.

64 The *Court* notes that the request for an advisory opinion describes the distribution system operated by Opel in Norway as a "selective distribution system" within the meaning of the *Metro* judgment of the ECJ and subsequent case law of the ECJ.

65 In *Metro,* the ECJ held that a selective distribution system for high-quality and technically advanced consumables is permissible, provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

66 In its subsequent judgment in *AEG,* the ECJ held that the operation of a selective distribution system based on criteria other than those mentioned in *Metro* constitutes an infringement of Article 85(1) EC, and that this is also the case when a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith. According to the ECJ, such a practice must be considered unlawful when a manufacturer refuses to approve distributors who satisfy the qualitative criteria of the system, with a view to maintaining a high level of prices or excluding certain modern channels of distribution.

67 In the Court's view, it is not necessary for the answers to the first and the second questions to determine the nature of Opel's distribution system in Norway, as the clauses in question are not of a qualitative nature such as those accepted by the ECJ in *Metro* and *AEG*. However, the Court adds that it is of the view that the system operated by the defendant is not a “simple” selective distribution system within the meaning of the *Metro* and *AEG* decisions of the ECJ. Consequently, the principles developed in those judgments, in particular the requirement that all suitable qualified resellers are to be admitted to the system, are not directly applicable to selective distribution systems for motor vehicles. Motor vehicles are consumer durables requiring expert maintenance and repair. In order to provide such servicing, the co-operation of manufacturers with selected dealers and repairers cannot be extended to an unlimited number of dealers and repairers.

68 In the Court’s view, the object and effect of a clause requiring the dealer to terminate all connections with a dealer group must be to prevent the dealer from selling vehicles of other makes. This amounts to a non-compete clause. That such a provision is restrictive of competition cannot be doubted; see, for comparison, Article 3, paragraph 1 d of Commission Regulation (EEC) No 4087/88 on the application of Article 85(3) of the Treaty to categories of franchise agreements, where a similar clause is deemed to be a restriction of competition but is

exempted for franchise agreements. The Court considers that a non-compete clause such as the one in question here goes beyond the one exempted in Article 3, paragraph 1 d of the Franchising Block Exemption Regulation.

69 The opinion that the percentage clause is in itself not restrictive of competition is obviously based on the assumption that the personal bond between the parties is a decisive element in a dealer relationship. According to this view, a possible negative impact on competition would be outweighed by the pro-competitive effects of the clause. This might be true in certain circumstances. However, in the case at hand, the percentage clause must be read in its context, which includes the group clause. It is thus capable of intensifying the restrictive effects of the latter.

70 When a dealer is prevented from having any corporate law connection with another company, it must be assumed that the chances of a dealer successfully starting a new business will in most cases be reduced. Additionally, the condition in question is also able to prevent other potential dealers from getting access to qualified persons who could, in addition to providing capital, bring valuable knowledge of the trade to other potential dealer companies.

71 The Court considers that the clauses in question have as their object and effect to restrict competition, in particular inter-brand competition. Given the fact that the agreement is part of a network of other dealership agreements, the effect is also appreciable (cf. Case C-234/89 *Delimitis* [1991] ECR I-935). As the agreement relates to international transactions, it may furthermore affect trade between the Contracting Parties (cf. Case 42/84 *Remia* v *Commission* [1985] ECR 2545; Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131; Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021).

72 For the sake of comparison, the Court notes that, under the block exemption in Regulation 1475/95, which entered into force in Norway on 19 July 1996, a provision preventing a car dealer from selling other brands would not be exempt from the prohibition in Article 53(1) EEA. The Regulation is based on the idea of giving dealers greater commercial independence vis-à-vis manufacturers. The most important reform of this Regulation, compared to the block exemption in Regulation 123/85, consists of a significant loosening of the ban on dealing in competing products. Unlike Regulation 123/85, Regulation 1475/95 does not allow the imposition of a single-make rule. The new Regulation provides for the possibility of multi-brand dealerships, so long as different makes are sold in different premises, under different management in the form of a distinct legal entity, and in a manner which avoids confusion between makes.

73 In questions 1.b and 2.b, the national court asks whether a prohibition under Article 53(1) EEA will be applicable regardless of the aim or effects of the condition.

74 Article 53(1) EEA sets out as one of its conditions that the agreements have as their object or effect the prevention, restriction or distortion of competition. Consequently, such aim or effects of the contractual condition must be present for the prohibition in Article 53(1) EEA to apply.

75 Consequently, the first and the second questions must be answered as set out in the operative part below.

The sixth question

76 According to Article 53(2) EEA, agreements or decisions prohibited pursuant to Article 53(1) EEA shall be automatically void. By its sixth question, the national court asks whether this applies to the agreement as a whole or only to those clauses in an agreement that infringe Article 53(1) EEA.

77 The answer to that question follows from settled case law of the ECJ. The automatic nullity in consequence of breaches of Article 85(1) EC, and thus Article 53(1) EEA, applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself, see the judgment of the ECJ in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235. Consequently, any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the EEA Agreement, fall outside EEA law. It is for the national court to determine in accordance with the relevant national law the extent and consequences, for the contractual relations as a whole, of the nullity of certain contractual provisions by virtue of Article 53(2), see the judgment of the ECJ in Case 10/86 *VAG France* v *Magne* [1986] ECR 4071.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Nedre Romerike herredsrett by an order of 2 September 1997, hereby gives the following Advisory Opinion:

1. a) A clause in a contract for the distribution of motor vehicles requiring the General Manager of the dealership company to hold 51% or more of the shares in that company may, depending on the circumstances, not be restrictive of competition within the meaning of Article 53(1) EEA. Taken together with a clause prohibiting ownership of shares in other car dealer companies, however, it is capable of being restrictive of competition within the meaning of Article 53(1) EEA.

b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

c) The general prohibition in Article 53(1) EEA applied in September 1995.

2. a) A clause in a contract for the distribution of motor vehicles preventing the shareholders in the corporate entity operating the dealership from holding ownership interests in other companies dealing in motor vehicles is capable of being restrictive of competition within the meaning of Article 53(1) EEA.

b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

c) The general prohibition in Article 53(1) EEA applied in September 1995.

3. Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.

4. Negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties' having reached a joint intention to conduct themselves on the market in a specific way.

5. Where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the importer and its dealers which fall to be examined under Article 53 EEA.

6. **Article 53(2) EEA applies only to those parts of the agreement which bring it into conflict with the prohibition in Article 53(1) EEA. It is for the national court to determine whether those parts which are contrary to Article 53(1) EEA are severable from the rest of the contract and whether there remains a contract capable of performance.**

Bjørn Haug   Thór Vilhjálmsson   Carl Baudenbacher

Delivered in open court in Luxembourg on 1 April 1998.

Asle Aarbakke   Bjørn Haug
Registrar   President
Legal Secretary

ADVISORY OPINION OF THE COURT
1 April 1998*

(*Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity*)

In Case E-3/97

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 Nedre Romerike herredsrett (Nedre Romerike Municipal Court) for an Advisory Opinion in the case pending before it between

Jan and Kristian Jæger AS

Supported by the
Norwegian Association of Motor Car Dealers and Service Organisations

and

Opel Norge AS

on the interpretation of Article 53 of the EEA Agreement.

THE COURT,

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

Registrar: Asle Aarbakke, Legal Secretary

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* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

– the plaintiff, represented by Counsel Pål Magne Bakka, Advokatfirmaet Harris, Bergen;

– the defendant, represented by Counsel Jon Lyng, Advokatfirmaet Lyng & Co., Oslo;

– the Government of the Kingdom of Norway, represented by Hege M. Hoff, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Rolf Helmich Pedersen, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Richard Lyal, Member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the defendant, the Norwegian Government, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 19 February 1998,

gives the following

Advisory Opinion

Facts and Procedure

1 By an order dated 2 September 1997, registered at the Court on 8 September 1997, Nedre Romerike herredsrett, a Norwegian municipal court, made a Request for an Advisory Opinion in a case brought before it by Jan and Kristian Jæger AS, plaintiff, against Opel Norge AS, defendant. The case concerns the refusal to accept a new dealer for Opel cars in Norway.

2 The plaintiff, Jan and Kristian Jæger AS (hereinafter "Jæger"), is a wholly-owned subsidiary of Jæger-gruppen AS (the "Jæger Group"). Jan and Kristian Jæger are shareholders in the Jæger Group, which is a significant purchaser and dealer in different makes of motor vehicles, including Toyota, BMW, Rover and Land Rover.

3 The defendant, Opel Norge AS (“Opel”), is wholly-owned by General Motors Co. of the United States of America. It has 53 independent dealers in Norway. A

standard dealership agreement is entered into with the dealers, normally for five years at a time. These agreements conform as much as possible to Opel's standard European dealership agreement.

4 On 13 December 1995, Jæger brought an action against Opel claiming that Opel had entered into a dealership agreement with it or, subsidiarily, that Opel was under an obligation to do so. The Norwegian Association of Motor Car Dealers and Service Organisations declared itself an intervener in support of Jæger by pleadings of 9 December 1996.

5 During the handling of the dispute by Nedre Romerike herredsrett, disagreement arose as to the interpretation of Article 53(1) EEA. The question is whether the provision prohibits certain terms in a motor vehicle dealership agreement.

6 In the spring of 1994, Jan and Kristian Jæger entered into negotiations with Opel for the establishment of a new Opel dealership in the Bergen area.

7 At a meeting in May 1994, the parties agreed that any such dealership should be held by a new company with its own management and Board of Directors, independent of the other companies in the Jæger Group and occupying premises separate from those of other companies in that group.

8 There was an exchange of letters between Jan Jæger on the one hand and Opel on the other regarding the shareholder structure in the new company. A new meeting was held on 9 May 1995. Following that meeting, Opel asked Jan and Kristian Jæger to apply for a dealership. In a letter of 22 May 1995, Jan and Kristian Jæger applied for an Opel dealership for the Bergen area on behalf of a new company which was to be created.

9 According to the application, Kristian Jæger would be General Manager of the new company and would hold 51% of the shares. His father, Jan Jæger, would hold the remaining 49% and would be Chairman of the Board of Directors.

10 By letter of 29 June 1995, Opel put forward an offer of dealership to Kristian and Jan Jæger on that basis. In accordance with normal practice, the offer was made to the person who was to be the General Manager of the new company. It was a condition of the offer that Kristian and Jan Jæger were to sell their shares in the Jæger Group by 31 December 1996 and that they could not be involved with competing products.

11 The following clauses were contained in the offer from Opel:

> "2. The General Manager referred to in § 3 of the Agreement will be Kristian Jæger who, from the outset, will hold 51% of the company's shares. Jan Jæger will hold 49% of the shares as of the time the company is established and will be Chairman of the Board of Directors. Kristian Jæger is authorized to bind the company alone or together with the Chairman of the Board of Directors. It is a condition that Kristian Jæger will have right of first refusal at face value on the

remainder of the shares beyond his current 51%. It is further a condition that both Kristian Jæger and Jan Jæger are to be bought out of the Jæger group no later than 31 December 1996.

3. With reference to point 2, Kristian Jæger, Jan Jæger and the new Opel dealer may not become involved with competing products."

12 In a letter of 18 September 1995, the offer was formally accepted by Jan and Kristian Jæger on behalf of the company being created. The acceptance conformed to the offer on all points except for the provisions on ownership structure.

13 Opel did not accept the change in relation to the offer. The standard agreement has not been signed by either of the parties.

14 The parties do not agree as to whether, under Norwegian contract law, a binding dealership agreement has been entered into. They furthermore disagree as to whether Opel has imposed the condition regarding shareholder structure in a discriminatory manner, given that the General Managers' ownership shares in Opel's dealer companies in Norway vary from 0% to 100%.

15 Nedre Romerike herredsrett decided to refer a Request for an Advisory Opinion on the following questions to the EFTA Court:

1.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding a certain shareholder structure of the dealer?

1.b If so, will this be applicable regardless of the aim or effects of the condition?

1.c Did such a prohibition exist in September 1995?

2.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding the owners and/or general manager in the dealer company holding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles?

2.b If so, is this applicable regardless of the aim or effects of the condition?

2.c Did such a prohibition exist in September 1995?

3. Does it follow from Article 53(1) EEA that an importer of motor vehicles in September 1995 had an obligation to enter into a

dealership agreement with any or all who wished to be dealers and who otherwise met the qualitative criteria the importer could lawfully impose on dealers?

4. *Is Article 53(1) EEA to be construed to the effect that negotiations about an agreement or an agreement to enter into an agreement is tantamount to an "agreement" and, consequently, sufficient to bring the matter within the scope of Article 53(1)?*

5. *Is Article 53(1) EEA to be construed to the effect that a refusal to accept a dealer falls to be examined under Article 53 when that refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other, existing dealers?*

6. *Is Article 53(2) to be construed to the effect that if a condition is contrary to Article 53(1) and/or the rules on selective distribution, the entire contract is then of no legal force or effect?*

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

Legal background

17 The provisions in question are Article 53 EEA, Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ No L 15, 18.1.1985, p. 16), hereinafter referred to as "Regulation 123/85", and Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, (OJ No L 145, 29.6.1995, p. 25), hereinafter referred to as "Regulation 1475/95".

18 Article 53 EEA reads as follows:

"1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
– any agreement or category of agreements between undertakings;
– any decision or category of decisions by associations of undertakings;
– any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

19 Article 53 EEA is identical in substance to Article 85 EC. Thus, Article 6 EEA and Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice are applicable when interpreting Article 53 EEA.

20 Certain agreements in the field of motor vehicle distribution have been exempted from the scope of Article 85 EC and Article 53 EEA by virtue of Regulation 123/85, subsequently replaced by Regulation 1475/95, see below.

Applicability in time

21 Article 53 EEA has been in force in the EFTA States of the EEA since the entry into force of the EEA Agreement on 1 January 1994.

22 Regulation 123/85 was part of the EEA Agreement when it entered into force (Act referred to in part B, No. 4, Annex XIV EEA) and was to remain in force, according to Article 14 of that Regulation, until 30 June 1995.

23 Within the Community, the applicability of Regulation 123/85 was extended until 30 September 1995 by virtue of Article 13 of Regulation 1475/95. Regulation 1475/95 replaced Regulation 123/85 effective 1 October 1995. Article 7 of Regulation 1475/95 provides that agreements in force on 1 October 1995 which satisfied the conditions in Regulation 123/85 were to remain valid until 30 September 1996.

24 Regulation 1475/95 was implemented in the EEA Agreement pursuant to Article 98 EEA by Joint Committee Decision No. 46/96 of 19 July 1996 (Act referred to in part B, No. 4a, Annex XIV EEA). According to that decision, Regulation 1475/95 entered into force in the EEA on 1 August 1996, but would have effect as of 1 October 1995. However, the Joint Committee Decision empowered the individual EFTA States to adopt transitional measures for the period from 1 July 1995 to 19 July 1996, in so far as was necessary for constitutional reasons.

25 It is, in principle, a matter for the national court to determine the extent to which Norway availed itself of the possibility of adopting transitional measures in its national legislation for the period in question. However, the Court notes that, according to information submitted by the Norwegian Government, the following positions with regard to transitional measures seem to have been adopted:

a) it was decided not to extend the applicability of Regulation 123/85 beyond 30 June 1995;
b) it was decided not to apply Regulation 1475/95 before 19 July 1996, with the consequence that the transitional provision in Article 7 of that Regulation did not apply.

26 If the national court finds that this description of national transitional measures is correct, the situation in Norway may be described as follows: from 1 January 1994 until 30 June 1995, Article 53 EEA was applicable, with the exemptions provided for in Regulation 123/85. From 1 July 1995 until 19 July 1996 only Article 53 EEA was applicable, with no block exemptions. Since 19 July 1996, Article 53 EEA has been applicable, with the exemptions provided for in Regulation 1475/95.

27 It is contested in the present case whether an agreement was concluded in September 1995 by virtue of Opel's formal offer and Jæger's purported acceptance thereof. Based on the information provided by the Norwegian Government concerning the adoption of transitional measures, the alleged agreement in September 1995 falls to be considered under Article 53 EEA and relevant case law alone.

28 The Court notes that the national court, in its first, second and third questions, asks specifically about the situation in September 1995. The fourth, fifth and sixth questions are general questions about the interpretation of Article 53 EEA and not about either of the two block exemptions. The Court will limit its Advisory Opinion accordingly.

29 The defendant submits that even if Regulation 123/85 was not formally in force in Norway in September 1995, it should be considered applicable for reasons of homogeneity with Community law.

30 That argument cannot be accepted. It is for the EEA Joint Committee to implement new Community legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement. And although homogeneity is one of the fundamental principles of the EEA Agreement, it follows from the structure of the Agreement and the legislative procedure provided for therein that this might not always be fully achieved in terms of simultaneous application of legislative measures. Thus, Article 102 EEA provides that decisions of the EEA Joint Committee shall be made "as closely as possible" to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application within the Community and EFTA pillars. The decision of the Joint Committee relevant to the present case implies that during a transitional period there would not necessarily be full homogeneity, and there is no basis for challenging the validity of that decision.

31 The defendant further submits that even though no block exemptions were formally in force in Norway in September 1995, Article 53 EEA should be interpreted in the light of Regulation 123/85 for reasons of homogeneity.

32 The Court finds that one cannot interpret the general prohibition in Article 53(1) EEA in order to bring it within the terms of a block exemption which, in itself, is not an interpretation of the provision but an exemption, i.e. something which derogates from the provision.

The fourth question

33 By its fourth question, which the Court considers should be dealt with first, the national court seeks to ascertain the scope of application of Article 53(1) EEA which prohibits *inter alia* all agreements between undertakings and concerted practices, which may affect trade between Contracting Parties, and have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

34 While the *plaintiff* argues that Article 53 EEA applies to situations where, in a gradual process of concluding an agreement, one of the parties has given a legally binding offer, as well as to all conditions and understandings within that process, the *Commission of the European Communities* and the *EFTA Surveillance Authority* support the *defendant's* view, *viz.*, that Article 53(1) EEA applies to agreements and not to negotiations which do not culminate in an agreement.

35 The *Court* notes that the concept of "agreement" in Article 53(1) EEA is an autonomous concept, which does not fully correspond to the concept of "agreement" in different national legal systems. According to decisions of the ECJ and CFI regarding the concept in Article 85(1) EC, the minimum requirement for there to be an "agreement" within the meaning of the provision is an expression of a joint intention of the parties involved to conduct themselves on the market in a specific way, the object or effect of the conduct being the prevention, restriction or

distortion of competition (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86; and of the CFI in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

36 The Court further notes that negotiations which have not yet culminated in an expression of a joint intention are not covered by the concept “agreement” in Article 53(1) EEA. Nor does the provision apply to unilateral conduct of an undertaking, including offers made for the conclusion of a contract as long as the offer has not been accepted by other party in the sense of expressing an intention to adhere to the provisions in the offer.

37 For the sake of completeness, the Court notes that the offer for a contract made by Opel was accepted by Jan and Kristian Jæger on all points except on those allegedly in conflict with Article 53 EEA. If, under national contract law, an agreement is found to have been concluded but without the contested clauses, such an agreement would not be contrary to Article 53(1) EEA since it would not contain the allegedly illegal terms.

38 The answer to the fourth question must therefore be that negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties’ having reached a joint intention to conduct themselves on the market in a specific way.

The fifth question

39 It is argued by the *plaintiff* that the applicability of Article 53(1) EEA extends to conduct of an undertaking which, although seemingly unilateral, relates to the undertaking’s agreements with third parties. This contention seems to be the basis for the fifth question of the national court, which asks whether a refusal to accept a dealer falls to be examined under Article 53 EEA when the refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other dealers.

40 In this connection, the plaintiff refers to Case C-107/82 *AEG* v *Commission* [1983] ECR 3151, where the ECJ found that a refusal to approve a distributor for a system of selective distribution was not unilateral conduct but formed part of the contractual relations between the undertaking and resellers, since the admission of a distributor was based on the acceptance, tacit or express, by the contracting parties of the policy pursued by the undertaking, which required the exclusion from the network of all distributors which qualified for admission but were not prepared to adhere to the policy.

41 For the purpose of determining whether Article 53(1) EEA applies to a situation such as in the present case, the *Court* finds that the criteria established in the above-mentioned case *AEG* v *Commission* are relevant.

42 The answer to the fifth question must be that where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the undertaking and its dealers which fall to be examined under Article 53 EEA.

43 The Court adds that, for an analysis of a distribution system under Article 53 EEA, the essential assessment is whether prevention, restriction or distortion of competition follows from agreements or concerted practices. The assessment must also take into account the extent to which restrictions on competition inherent in the different arrangements can be accepted as enhancing competition and being beneficial to the consumer. The categorization of the different systems is of lesser importance.

44 It is for the national court to assess whether the conditions set out above are met in the case before it.

The third question

45 With its third question, the national court seeks to ascertain whether under Article 53(1) EEA an importer of motor vehicles, in September 1995, was under an obligation to enter into a dealership agreement with any or all who wished to become dealers and who otherwise met the qualitative criteria which the importer could lawfully impose on dealers.

46 The *plaintiff* submits that Article 53(1) EEA must be interpreted so that an importer of new motor vehicles in September 1995 had an obligation to enter into dealership agreements with some or all of those who wished to be dealers and met the qualitative criteria which the importer could lawfully impose on a dealer.

47 The *defendant,* the *EFTA Surveillance Authority* and the *Commission of the European Communities* are of the opinion that the EEA Agreement does not impose on importers of cars any duty to conclude a contract with persons or companies wishing to become new car dealers in an area where there is room for several dealers.

48 The *Court* notes that, in the case of certain selective distribution systems, an importer, in order not to infringe Article 53(1) EEA, may become obliged to accept all potential dealers who meet qualitative criteria imposed by the importer. Thus, depending on the circumstances, a refusal to accept a dealer may constitute an infringement of Article 53(1) EEA. If the distributor nevertheless refuses to comply with that requirement, the legal consequences may be, for instance, that

fines are levied, or that the distributor is denied an individual exemption in procedures before the EFTA Surveillance Authority or the Commission of the European Communities (see Article 56 EEA).

49 But there is no basis under Article 53 EEA for imposing upon an unwilling distributor a duty to enter into a specific dealership agreement (see the judgment of the CFI in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223). The situation might be different under Article 54 EEA, but there is no indication that that provision applies in the present case.

50 The Court adds that a denial of entering into an agreement may have various legal consequences under applicable national laws, such as an obligation to make good the damage caused to a third party, or a possible obligation to enter into a contract. Consequently, it is possible that a national court may have the power under the rules of national law to order one trader to enter into a contract with another. This is to be determined under national law.

51 The answer to the third question must therefore be that Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.

The first and second questions

52 By its first and second questions, the national court asks whether certain conditions in a motor vehicle dealership agreement requiring a specific ownership structure in the dealer company and restricting the owners' right to have ownership interests in other companies involved in car dealing are covered by the prohibition in Article 53(1) EEA.

53 The Court notes that the national court asks about "Article 53(1) EEA, cf. the rules on selective distribution", referring for the latter expression to the interpretation of the general prohibition developed in the case *Metro* v *Commission* [1977] ECR 1875 and subsequent case law. The Court notes, however, that the questions do not relate to the applicability of the block exemption in Regulation 123/85.

54 The *plaintiff* points out that the General Manager was to own at least 51% of the shares and that the Chairman of the Board was expected to hold the remaining shares. The 51% requirement prevents the dealer company from joining a group of dealers, in particular from becoming a subsidiary in a group which deals in motor vehicles of other makes through other subsidiaries. The clause furthermore prevents groups from dealing in new motor vehicles of other makes. The conditions on ownership structure do not consist of objective criteria of a qualitative nature relating to the technical qualifications of the dealer or its staff

within the meaning of the *Metro* judgment of the ECJ, and they are not indispensable within the meaning of that judgment. The plaintiff furthermore states that Opel has admitted that its practice concerning imposing conditions on ownership structure differs with regard to “new” and “old” dealers. The plaintiff concludes from this that Opel's practice is obviously discriminatory.

55 With respect to the requirement forbidding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles, the plaintiff submits that the real object of this condition is to break up a strong competitor who, over many years, has demonstrated the ability to build up sales of different car makes. It must be considered that the object of such a condition is to ensure that the dealer and even the shareholders in the dealer company may only deal in one make of car. This distorts competition because it renders impossible multi-brand dealerships and the building up of a strong dealer stage, thereby weakening inter-brand competition.

56 The *defendant* is of the opinion that the distribution system operated by it in Norway is not an open selective distribution system of the kind dealt with by the ECJ in its judgments in *Metro* and *AEG*. However, in any case it is submitted that the criteria applied by it in the case at hand regarding ownership structure in connection with the selection of its dealers must be viewed as non-discriminatory and necessary to ensure reasonable distribution of such advanced technical products as cars and therefore in conformity with the principles applied by the ECJ in its *Metro* judgment. The ownership structure clause is, in the defendant‘s view, a necessary tool to ensure that the dealer is able to fulfil its duties under the contract. The defendant states that the EEA Agreement does not prohibit an importer and a new, potential dealer from agreeing on a condition for future co-operation to the effect that the owner and general manager are not to hold shares in competing operations or are not to engage in competing operations. This requirement helps to build up a community of interest between the ownership interests and management. This enhances the dealerships' economic basis, productivity, the technical and economic development of the products and services and is in the interest of consumers.

57 In its written observations, the *EFTA Surveillance Authority* stated, with reference to the assumption in the request for an advisory opinion, that a selective distribution system was established. It referred to the *AEG* judgment of the ECJ, and submitted that Article 53(1) EEA was infringed if Opel denied access for potential dealers who fulfilled the qualitative criteria which Opel could lawfully set. At the oral hearing, based on further information then available, the EFTA Surveillance Authority pointed out that the system operated by Opel does not appear to be such a system.

58 With regard to the clauses in question, the EFTA Surveillance Authority submits that the condition of a certain shareholder structure would by itself in most cases amount to a restriction of competition within the meaning of Article 53(1) EEA. The restrictive effect of such a condition seems to be strengthened due to the

nature of the business in question. The establishment of a dealership company will often require a substantial amount of capital which, in turn, may restrict potential dealers from applying for dealerships, due to the condition on shareholder structure. A dealership company will frequently be unable to finance the whole activity through loans, but will have to possess a certain amount of equity capital in order to obtain loans and thus operate a business. Even if it were economically possible to start a new business without equity capital, national legislation in many EEA States requires that economic activities may only be carried out if certain requirements as to minimum equity capital are fulfilled.

59 A condition which requires a specific shareholder structure may also imply a restriction on the possibility for shareholders' to sell their shares. If this condition implies that the owner or owners may only sell their shares to the other owners of the dealership company, or only with the prior consent of the supplier, such a condition may also imply certain foreclosure effects for new, potential dealers since it may be difficult to enter the market through the acquisition of shares in existing companies. The EFTA Surveillance Authority concludes that such a condition would, in most cases and regardless of the aim, constitute a restriction within the meaning of Article 53(1) EEA and would thus be contrary to that Article if the agreement also affects trade and competition.

60 The requirement imposed on the owner and the General Manager not to own shares in other companies retailing cars, or companies owning parts of such undertakings, is not a qualitative criterion within the meaning of *Metro* but rather amounts to a restriction of competition within the meaning of Article 53(1) EEA, regardless of the aim of the condition.

61 The *Commission of the European Communities* submits that the *Metro* doctrine of the ECJ on selective distribution agreements is not of direct relevance to the present case. Opel does not operate a selective distribution system which is open to all dealers who want to join the system. It operates a system in which one dealer or a small number of dealers in each area are appointed. According to the Commission, distribution agreements in the motor vehicle sector, including the one in the present case, may be characterized as being "between selective distribution agreements ... and exclusive distribution agreements, but ... rather closer to the latter".

62 As regards the clauses in question, the Commission is of the opinion that a distinction must be drawn between the ownership clause and the requirement that Jan and Kristian Jæger dissolve all links with the Jæger Group. A clause requiring the General Manager of a car dealership to hold at least 51% of the shares in the dealership company may, depending on the circumstances, constitute a restriction of competition. This may, however, not be the case where the clause merely serves to identify the individuals with whom the supplier has negotiated the dealership agreement and to ensure that those persons retain effective control of the corporate entity.

63 In the view of the Commission, the requirement that all connections with the Jæger Group should be severed goes beyond what is necessary to establish a distinct legal entity and is therefore restrictive of competition and prohibited by Article 53(1) EEA.

64 The *Court* notes that the request for an advisory opinion describes the distribution system operated by Opel in Norway as a "selective distribution system" within the meaning of the *Metro* judgment of the ECJ and subsequent case law of the ECJ.

65 In *Metro,* the ECJ held that a selective distribution system for high-quality and technically advanced consumables is permissible, provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

66 In its subsequent judgment in *AEG,* the ECJ held that the operation of a selective distribution system based on criteria other than those mentioned in *Metro* constitutes an infringement of Article 85(1) EC, and that this is also the case when a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith. According to the ECJ, such a practice must be considered unlawful when a manufacturer refuses to approve distributors who satisfy the qualitative criteria of the system, with a view to maintaining a high level of prices or excluding certain modern channels of distribution.

67 In the Court's view, it is not necessary for the answers to the first and the second questions to determine the nature of Opel's distribution system in Norway, as the clauses in question are not of a qualitative nature such as those accepted by the ECJ in *Metro* and *AEG*. However, the Court adds that it is of the view that the system operated by the defendant is not a “simple” selective distribution system within the meaning of the *Metro* and *AEG* decisions of the ECJ. Consequently, the principles developed in those judgments, in particular the requirement that all suitable qualified resellers are to be admitted to the system, are not directly applicable to selective distribution systems for motor vehicles. Motor vehicles are consumer durables requiring expert maintenance and repair. In order to provide such servicing, the co-operation of manufacturers with selected dealers and repairers cannot be extended to an unlimited number of dealers and repairers.

68 In the Court’s view, the object and effect of a clause requiring the dealer to terminate all connections with a dealer group must be to prevent the dealer from selling vehicles of other makes. This amounts to a non-compete clause. That such a provision is restrictive of competition cannot be doubted; see, for comparison, Article 3, paragraph 1 d of Commission Regulation (EEC) No 4087/88 on the application of Article 85(3) of the Treaty to categories of franchise agreements, where a similar clause is deemed to be a restriction of competition but is

exempted for franchise agreements. The Court considers that a non-compete clause such as the one in question here goes beyond the one exempted in Article 3, paragraph 1 d of the Franchising Block Exemption Regulation.

69 The opinion that the percentage clause is in itself not restrictive of competition is obviously based on the assumption that the personal bond between the parties is a decisive element in a dealer relationship. According to this view, a possible negative impact on competition would be outweighed by the pro-competitive effects of the clause. This might be true in certain circumstances. However, in the case at hand, the percentage clause must be read in its context, which includes the group clause. It is thus capable of intensifying the restrictive effects of the latter.

70 When a dealer is prevented from having any corporate law connection with another company, it must be assumed that the chances of a dealer successfully starting a new business will in most cases be reduced. Additionally, the condition in question is also able to prevent other potential dealers from getting access to qualified persons who could, in addition to providing capital, bring valuable knowledge of the trade to other potential dealer companies.

71 The Court considers that the clauses in question have as their object and effect to restrict competition, in particular inter-brand competition. Given the fact that the agreement is part of a network of other dealership agreements, the effect is also appreciable (cf. Case C-234/89 *Delimitis* [1991] ECR I-935). As the agreement relates to international transactions, it may furthermore affect trade between the Contracting Parties (cf. Case 42/84 *Remia* v *Commission* [1985] ECR 2545; Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131; Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021).

72 For the sake of comparison, the Court notes that, under the block exemption in Regulation 1475/95, which entered into force in Norway on 19 July 1996, a provision preventing a car dealer from selling other brands would not be exempt from the prohibition in Article 53(1) EEA. The Regulation is based on the idea of giving dealers greater commercial independence vis-à-vis manufacturers. The most important reform of this Regulation, compared to the block exemption in Regulation 123/85, consists of a significant loosening of the ban on dealing in competing products. Unlike Regulation 123/85, Regulation 1475/95 does not allow the imposition of a single-make rule. The new Regulation provides for the possibility of multi-brand dealerships, so long as different makes are sold in different premises, under different management in the form of a distinct legal entity, and in a manner which avoids confusion between makes.

73 In questions 1.b and 2.b, the national court asks whether a prohibition under Article 53(1) EEA will be applicable regardless of the aim or effects of the condition.

74 Article 53(1) EEA sets out as one of its conditions that the agreements have as their object or effect the prevention, restriction or distortion of competition. Consequently, such aim or effects of the contractual condition must be present for the prohibition in Article 53(1) EEA to apply.

75 Consequently, the first and the second questions must be answered as set out in the operative part below.

The sixth question

76 According to Article 53(2) EEA, agreements or decisions prohibited pursuant to Article 53(1) EEA shall be automatically void. By its sixth question, the national court asks whether this applies to the agreement as a whole or only to those clauses in an agreement that infringe Article 53(1) EEA.

77 The answer to that question follows from settled case law of the ECJ. The automatic nullity in consequence of breaches of Article 85(1) EC, and thus Article 53(1) EEA, applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself, see the judgment of the ECJ in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235. Consequently, any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the EEA Agreement, fall outside EEA law. It is for the national court to determine in accordance with the relevant national law the extent and consequences, for the contractual relations as a whole, of the nullity of certain contractual provisions by virtue of Article 53(2), see the judgment of the ECJ in Case 10/86 *VAG France* v *Magne* [1986] ECR 4071.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Nedre Romerike herredsrett by an order of 2 September 1997, hereby gives the following Advisory Opinion:

1. **a) A clause in a contract for the distribution of motor vehicles requiring the General Manager of the dealership company to hold 51% or more of the shares in that company may, depending on the circumstances, not be restrictive of competition within the meaning of Article 53(1) EEA. Taken together with a clause prohibiting ownership of shares in other car dealer companies, however, it is capable of being restrictive of competition within the meaning of Article 53(1) EEA.**

   b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

   c) The general prohibition in Article 53(1) EEA applied in September 1995.

2. **a) A clause in a contract for the distribution of motor vehicles preventing the shareholders in the corporate entity operating the dealership from holding ownership interests in other companies dealing in motor vehicles is capable of being restrictive of competition within the meaning of Article 53(1) EEA.**

   b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

   c) The general prohibition in Article 53(1) EEA applied in September 1995.

3. **Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.**

4. **Negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties' having reached a joint intention to conduct themselves on the market in a specific way.**

5. **Where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the importer and its dealers which fall to be examined under Article 53 EEA.**

6. **Article 53(2) EEA applies only to those parts of the agreement which bring it into conflict with the prohibition in Article 53(1) EEA. It is for the national court to determine whether those parts which are contrary to Article 53(1) EEA are severable from the rest of the contract and whether there remains a contract capable of performance.**

Bjørn Haug	Thór Vilhjálmsson	Carl Baudenbacher

Delivered in open court in Luxembourg on 1 April 1998.

Asle Aarbakke Registrar Legal Secretary	Bjørn Haug President

REPORT FOR THE HEARING
in Case E-3/97

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 Nedre Romerike Municipal Court (Nedre Romerike Herredsrett) for an Advisory Opinion in the case pending before it between

Jan and Kristian Jæger AS

and

Opel Norge AS

on the interpretation of Article 53(1) of the EEA Agreement.

I. Introduction

1. By an order dated 2 September 1997, registered at the Court on 8 September 1997, Nedre Romerike Herredsrett, a Norwegian municipal court, made a Request for an Advisory Opinion in a case brought before it by Jan and Kristian Jæger AS against Opel Norge AS. The case concerns the refusal to accept a new dealer in a system with selective distribution of motor vehicles.

II. Legal background

2. Rules concerning selective distribution of motor vehicles are included in Commission Regulations 123/85[1] and 1475/95[2]. Regulation 123/85 was part of the EEA Agreement when it entered into force on 1 January 1994[3]. The validity of Regulation 123/85 was extended until 30 September 1995. This extension has

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[1] Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, hereinafter referred to as "Regulation 123/85" (OJ No L 15, 18.1.1985, p. 16).

[2] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, hereinafter referred to as "Regulation 1475/95" (OJ No L 145, 28.6.1995, p. 25).

[3] Act referred to in part B, No. 4, Annex XIV EEA.

not been provided for in the EEA context. Regulation 1475/95, which replaces Regulation 123/85, was implemented into the EEA Agreement in accordance with Article 98 EEA by Joint Committee Decision No. 46/96 of 19 July 1996[4]. At the time of the dispute between the parties, Regulation 123/85, according to its wording, had ceased to apply in the EEA, without Regulation 1475/95 having entered into force. Following Article 3 of Joint Committee Decision No. 46/96 of 19 July 1996, Regulation 1475/95 did not enter into force in the EEA until 1 August 1996, and should be applied with effect as of 1 October 1995.

III. Facts and Procedure

3. The plaintiff, *Jan and Kristian Jæger AS*, is a wholly-owned subsidiary of Jæger-gruppen AS. Jan and Kristian Jæger are shareholders in this group, which is a significant purchaser and dealer in different makes of motor vehicles.

4. On 13 December 1995, Jan and Kristian Jæger AS brought an action against Opel Norge AS (hereinafter “Opel”) claiming that Opel had entered into a dealership agreement with it and, subsidiarily, that Opel was under an obligation to enter into a dealership agreement with it. The Norwegian Association of Motor Car Dealers and Service Organisations declared itself an intervener by pleadings of 9 December 1996.

5. During the handling of the dispute by Nedre Romerike Herredsrett, disagreement has arisen as to the interpretation of Article 53(1) EEA. The question is whether the provision prohibits terms of an agreement relating to ownership of motor vehicle dealers.

6. The defendant, Opel, is wholly-owned by General Motors Co. of the United States. Opel has 53 independent dealers in Norway. A standard dealership agreement is entered into with the dealers, normally for five years at a time. These agreements conform as much as possible to Opel’s standard European dealership agreement.

7. In the spring of 1994, Jæger-gruppen AS entered into negotiations with Opel for the establishment of a new Opel dealership in the Bergen area. At a meeting in May 1994, the parties agreed that any such dealership should be held by a new company with its own management and Board of Directors independent of the other companies in the Jæger group and that it should occupy premises separate from those of other companies in this group. There was some exchange of letters between Jan Jæger on the one hand and Opel on the other regarding the shareholder structure in the new company. A new meeting was held on 9 May 1995. Following that meeting, Opel asked Jan and Kristian Jæger to apply for a dealership. In a letter of 22 May 1995, Jan and Kristian Jæger applied, on behalf

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[4] Act referred to in part B, No. 4a, Annex XIV EEA.

of a new company which was to be created, for an Opel dealership for the Bergen area. According to the application, Kristian Jæger would be General Manager of the new company and would hold 51% of the shares. His father, Jan Jæger, would hold the remaining 49% and be Chairman of the Board of Directors.

8. By letter of 29 June 1995, Opel put forward an offer of dealership to Kristian and Jan Jæger on that basis. In accordance with normal practice, the offer was made to the person who was to be the General Manager of the new company. It was a condition of the offer that Kristian and Jan Jæger were to sell their shares in the Jæger group by 31 December 1996 and that they could not be involved with competing products. The offer was formally accepted by Jan and Kristian Jæger on behalf of the company being created in a letter of 18 September 1995. The acceptance conformed to the offer on all points except for the provisions on ownership structure.

9. Opel did not accept the change in relation to the offer. The standard agreement has not been signed by any of the parties

10. The parties do not agree as to whether under Norwegian contract law a binding dealership agreement has been entered into and, consequently, whether Opel has an obligation towards Jan and Kristian Jæger AS to conclude a contract. They furthermore disagree as to whether Opel has imposed the condition regarding shareholder structure in a discriminatory manner, given that the General Managers' ownership shares in Opel's dealer companies vary from 0% to 100%.

11. Nedre Romerike Herredsrett has decided to submit a Request for an Advisory Opinion on these questions to the EFTA Court.

IV. Questions

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

1) a. Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding a certain shareholder structure of the dealer?
   b. If so, will this be applicable regardless of the aim or effects of the condition?
   c. Did such a prohibition exist in September 1995?

2) a. Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding the owners and/or general manager in the dealer company holding ownership interests in other companies which deal and/or hold

ownership interests in other companies which deal in motor vehicles?

b. If so, is this applicable regardless of the aim or effects of the condition?

c. Did such a prohibition exist in September 1995?

3) Does it follow from Article 53(1) EEA that an importer of motor vehicles in September 1995 had an obligation to enter into a dealership agreement with any or all who wished to be dealers and who otherwise met the qualitative criteria the importer could lawfully impose on dealers?

4) Is Article 53(1) EEA to be construed to the effect that negotiations about an agreement or an agreement to enter into an agreement is tantamount to an "agreement" and, consequently, sufficient to bring the matter within the scope of Article 53(1)?

5) Is Article 53(1) EEA to be construed to the effect that a refusal to accept a dealer falls to be examined under Article 53 when that refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other, existing dealers?

6) Is Article 53(2) to be construed to the effect that if a condition is contrary to Article 53(1) and/or the rules on selective distribution, the entire contract is then of no legal force or effect?

V. Written observations

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

- the plaintiff, represented by Counsel Counsel Pål Magne Bakka, Advokatfirma Harris, Bergen,

- the defendant, represented by Counsel Jon Lyng, Advokatfirma Lyng & Co., Oslo;

- the Government of the Kingdom of Norway, represented by Hege M. Hoff, acting as Agent;

- the EFTA Surveillance Authority, represented by Rolf Helmich Pedersen, Officer, Legal & Executive Affairs, acting as Agent;

- the Commission of the European Communities, represented by Richard Lyal, Member of its Legal Service, acting as Agent.

1. Jan and Kristian Jæger AS

14. The *plaintiff* states that the case law of the ECJ[5] on selective distribution is, together with Article 53 EEA, of particular significance for the present case.

15. One of the consequences of a condition on a specific ownership structure in a company is that the dealership company is prevented from joining a group, for example, as a wholly-owned subsidiary in a group which then, through other subsidiaries, deals in new motor vehicles of other makes[6].

16. According to the plaintiff, such clauses have a clear competition-distorting object and effect. The conditions impose requirements on the dealer which, according to case law on selective distribution, go considerably further than is necessary to protect the reputation of the brand name. Furthermore, the conditions are applied in an arbitrary and discriminatory fashion.

17. The real object of these conditions is to break up a strong competitor who, through a number of years, has demonstrated the ability to build up different makes.

18. In any event, the object of such a condition must be considered to be to ensure that the dealer only deals in one make of car. This distorts competition because it renders impossible (1) multi-brand dealerships and (2) building up of a strong dealer stage. Both of these aims are fundamental considerations in the new Regulation 1475/95. Avoiding a “conflict of interest” is not a concern which can make it lawful.

19. The requirement that the General Manager is to own at least 51% of the shares (and the Chairman of the Board 49%) *ex lege* prevents the dealer company from becoming a subsidiary in a group. Furthermore, it will prevent groups from dealing in new motor vehicles.

20. The plaintiff states that groups are particularly widespread and this form of business organization is an important instrument for effective, appropriate organization of a business operation. An example is multi-brand dealerships. Others are dealerships for new and used motor vehicles, or motor vehicles and machines as well as property ownership.

21. Thus, the condition will have the main effect of distorting the structure at the dealer stage, since large, financially strong groups will have to refrain from

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5 Case 26/76 *Metro* v *Commission* [1977] ECR 1875 (hereinafter “*Metro*”).

6 The Jæger group is one of Norway’s largest car dealers and deals in *inter alia* Toyota, BMW, Rover and Land Rover.

becoming dealers. The dealer stage will consist of relatively small businesses and become considerably more dependent on the supplier than a dealer which is part of a strong group would. A weaker dealer stage will carry less weight for building up its organization and competing with other makes of cars. Inter-brand competition will be weakened. In addition, a weak dealer stage with its essential operations linked to one supplier will be much more vulnerable to tactics and pressure from the supplier, with all forms of concerted practices which, as a whole, reduce competition between different brand dealers.

22. The first effect of the buy-out requirement will be that the dealer company will not be able to have any corporate law connection to groups which deal in other new motor vehicles of other makes, in this case the Jæger group. Secondly, it implies that not even the shareholders in the dealer company can have any such corporate law connections.

23. Referring to case law of the ECJ[7], the plaintiff is of the opinion that the conditions on ownership structure do not consist of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and its staff.

24. The plaintiff is of the opinion that Article 53 EEA clearly applies to a situation where the supplier deliberately enforces a condition on ownership structure in a different manner in relation to the "new" and the "old" dealers. This applies to the requirement that the General Manager hold 51% of the shares, in which Opel has admitted its practice varies.

25. The supplier shall not impose conditions which go further than what is "indispensable". Lawful conditions must be imposed in the same fashion on all dealers. The plaintiff concludes from this that Opel's practice is obviously discriminatory.

26. Since "gentlemen's agreements" and other, non-binding understandings[8] have been covered under Article 85 EC, the above situation must clearly be considered as one which comes within the scope of Article 53 EEA. *A fortiori* must this be so when even "concerted practices" make Article 53 EEA applicable.

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7 Case 26/76 Metro SB-Groβmärkte GmbH & Co.KG v Commission of the European Communities [1977] ECR 1875.

8 Case 41/69 ACF Chemiefarma NV v Commission of the European Communities [1970] ECR 661.

27. The plaintiff refers to the *AEG*[9] and the *Ford*[10] case. From these judgments, the plaintiff maintains that it follows that unilateral legal situations, where a private-law binding contractual relationship does not exist, are to be considered as tied to or stemming from an agreement and thereby subject to Article 53 EEA. This is particularly true of distribution systems. In the present case, it is the existence of the supplier's agreements with third parties which makes Article 53 EEA applicable.

28. Following case law of the ECJ[11], the plaintiff considers that the automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself.

29. In addition to the effect of invalidity, the breach of the law in the present case has the effect of the agreement being considered entered into or, alternatively, that Opel is under an obligation to conclude an agreement. This follows from the *Metro* and *AEG* judgments and the absence of a block exemption in September 1995.

30. The plaintiff suggests answering the questions as follows:

Question 1:
Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions regarding a given shareholder structure of the dealer which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a competition-distorting effect, judged both per se and in context, and are prohibited.
An independent, additional ground for considering the condition as prohibited will be present where an importer has not required all dealers to meet the condition formally and in fact without undue delay, including not treating differently dealers who joined the system before or after 1986.
The concern of avoiding a "conflict of interest" does not make the condition lawful.
The prohibitions applied in September 1995 and apply today.

Question 2:
Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions to the effect that the owners of the dealer are to sell off their (direct or indirect) ownership interest in other dealer companies which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a

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9 Case 107/82 AEG-Telefunken AG v Commission of the European Communities [1983] ECR 3151.

10 Joined Cases 25 and 26/84 Ford Werke AG and Ford of Europe Inc. v Commission of the European Communities [1985] ECR 2725.

11 Case 56/65 Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235.

competition-distorting effect, judged both per se and in context, and are prohibited.
An independent, additional ground for considering the condition as prohibited will be present where an importer has not required all dealers to meet the condition formally and in fact without undue delay, including not treating differently dealers who joined the system before or after 1986.
The concern of avoiding a "conflict of interest" does not make the condition lawful.
The prohibitions applied in September 1995 and apply today.

Question 3:
Article 53(1) EEA, cf. 53 (2) EEA, must be interpreted so that an importer of new motor vehicles in September 1995 had an obligation to enter into dealership agreements with some or all of those who wished to be dealers and met the qualitative criteria which the importer could lawfully impose on a dealer.

Question 4:
Article 53(1) EEA, cf. Article 6, must be interpreted so that where parties in a process of concluding an agreement have come so far that one of the parties has given a legally-binding offer, Article 53 will apply to that offer. In addition, Article 53(1) EEA, cf. Article 6, is applicable to all conditions, pre-conditions and understandings which are laid down in the course of a gradual process of concluding an agreement.

Question 5:
When a refusal to accept a dealer can serve to enforce a competition-distorting policy or contractual practice between the importer and other, existing dealers, the refusal must be assessed under Article 53 EEA.

Question 6:
Article 53 (2) EEA cannot be considered as authorizing total invalidity in a case of a condition on ownership structure in a selective distribution system for new motor vehicles.

2. Opel Norge AS

31. The *defendant* is of the opinion that neither Article 53 EEA nor the rules regarding selective distribution apply to a case such as the one at hand, where the parties have not moved beyond the negotiations stage. During the negotiations the opposite parties of Opel Norge As were the two individuals Jan and Kristian Jæger.

32. Referring to the *Metro* judgment of the ECJ, the defendant submits that the criteria applied by Opel Norge AS regarding ownership structure in connection with the selection of its dealers must be viewed as non-discriminatory and necessary to ensure reasonable distribution of advanced technical products such as cars.

33. In the view of the defendant, the wording of the question “upon entering into … imposing conditions” is imprecise. The formulation has no relevance for the factual situation in the case and the problem is hypothetical, since no agreement has been entered into or concluded by the parties. Furthermore, the defendant is of the view that the formulation of the question: “imposing conditions regarding a certain shareholder structure” is imprecise.

34. For the defendant, Article 53(1) EEA and the rules on selective distribution do not apply in a situation where an importer and the potential dealer have not entered into a binding agreement on the establishment of a dealer relationship. Nor do the provisions referred to in the question generally preclude importers of motor vehicles from choosing their dealers based on non-discriminatory qualitative criteria in order to ensure reasonable distribution of the motor vehicles and services related thereto, including conditions as to who are to be shareholders in the dealership company and the specific share distribution among the shareholders.

35. The defendant states that, under Norwegian law, there was a period with a “break” from 30 June 1995 until 19 July 1996, when the Regulations were implemented under Norwegian law.

36. The defendant is of the view that the presumption principle must be particularly strong in a situation where Norway can be condemned for breach of treaty due to failure to implement and which can harm politically important relationships of trust with the EU. The defendant submits that a reinforced presumption principle can also be grounded in the duty of loyalty under Article 3 EEA.

37. The defendant considers that it must be possible to deduce from this a duty for Norwegian courts, in accordance with the EU law principle on interpretation in accordance with directives, to interpret national law as much as possible in accordance with non-implemented directives. Under the EEA, the duty must apply not only in relation to directives but also in relation to regulations.

38. It would be entirely unreasonable if agreements between private parties which were formerly valid and in accordance with the block exemption were to be deemed invalid and thereby without legal effect for the period from 30 June 1995 until 19 July 1996.

39. For the defendant, it is obvious that for September 1995 there exists no prohibition against importers of motor vehicles choosing dealers based on conditions as to who is to be shareholders in the dealership company, and the specific share distribution among them. Considerations of harmonization of the rules in the EU with the rules in the European Economic Area point towards the block exemption in Regulation 123/85 having been replaced by the new block exemption in Regulation 1475/95; this also applies for Norway.

40. Furthermore, the EEA Agreement does not prohibit an importer and a new, potential dealer from agreeing that a condition for further negotiations on future co-operation is that the owner and general manager are not to hold shares in competing operations or are not to engage in competing operations.

41. The defendant is of the opinion that question 3 is also imprecise and that the formulation is unfortunate. For the defendant, it is unclear what the person asking the question refers to by the term “met the qualitative criteria the importer could lawfully impose on dealers”. In any case, the EEA Agreement does not impose on importers of cars a duty to conclude a contract with companies wishing to become new car dealers in an area where there is room for several dealers.

42. Furthermore, Article 53(1) EEA may not be interpreted as also applying to situations in which two parties are in negotiations without having completed them and where no contractual relationship has been established and where no *de facto* business collaboration has been entered into, either, or no implied agreement exists between the parties.

43. For Opel it is not “an anti-competitive policy” to impose requirements to the effect that a General Manager must have an ownership interest which is dominant and as strong as possible. In the view of Opel, this requirement is economically important and legitimate. Furthermore, it is capable of strengthening the economy and power of the dealers and thereby their competitiveness, which serves consumers. Opel is of the view that the requirements help to build up the community of interest between the ownership interests and management, and that this enhances the dealerships’ economic basis, productivity, the technical and economic development of the products and services, and that this is in the interest of consumers.

44. With respect to question 6 as well, the defendant’s comment is that the formulation of the question is imprecise and hypothetical. No agreement has been entered into by the parties and it is also an incorrect use of terminology to use the expression "condition". The essential point is that the relevant factual and legal issue is not covered by question 6.

45. The defendant submits that Article 53(1) EEA, cf. (2), gives no authority to intervene in a negotiation situation between two parties, so that a pre-condition in an offer from one party to enter into an agreement may be viewed as unlawful with the consequence that the party in question is legally bound to enter into an agreement without this condition.

46. The defendant has fundamental objections to the formulation of the questions and is of the view that a number of them must be reformulated. In the view of the defendant, the questions 1) b. and 2) b. should not be answered without further clarification from the plaintiff.

3. The Norwegian Government

47. The *Norwegian Government* concentrates its written observations on questions 1) c. and 2) c. and argues that no group exemption for distribution and servicing agreements existed in Norwegian law in the period 1 July 1995 to 19 July 1996. This opinion is based on the fact that a new act of Community law is not part of the EEA Agreement until the EEA Joint Committee has decided that it is to be incorporated into the Agreement. A new act of Community law cannot be made applicable to Norwegian nationals and enterprises until it has been implemented into Norwegian law.

48. The principle that individuals and economic operators are not bound by obligations under international law until these have been implemented in Norwegian law follows from the dualistic system which is based on the Norwegian Constitution.

49. The Norwegian Government proposes to answer the above mentioned questions as follows:

> *The decision of the EEA Joint Committee No. 46/96 on the incorporation into the EEA Agreement of Commission Regulation 1475/95 applied from 1 October 1995. The individual EFTA States could however, for constitutional reasons, lay down transitional measures for the period between 1 July 1995 and the date of adoption of the decision, 19 July 1996. The individual EFTA states were thereby for constitutional reasons free to delay the implementation of the Regulation, or to lay down national adaptations to it, until 19 July 1996. Thus, it will be for the national court to interpret national legislation implementing the Regulation and, on this basis, decide whether the prohibition set out in Article 53, paragraph 1, of the EEA Agreement did exist in Norwegian law in September 1995.*

4. The EFTA Surveillance Authority

50. The *EFTA Surveillance Authority* states that it will be for the national court, based on the facts presented, to establish what content of the national law is applicable to the present case. Furthermore, it will be for the national court to decide when an agreement has been entered into and, if so, on what date.

51. According to the EFTA Surveillance Authority, an application for an individual exemption under Article 53 (3) was not made by the parties.

52. Concerning the question whether negotiations about an agreement or an agreement to enter into an agreement amount to an “agreement” within the meaning of Article 53(1) EEA, the EFTA Surveillance Authority refers to the

case law of the ECJ[12] and comes to the conclusion that unless a joint intention of the parties to conduct themselves in a specific way on the market is established, there is no agreement within the meaning of Article 53(1) EEA.

53. If the parties, without having entered into an agreement, have initiated activity which amounts to a “concerted practice”[13] within the meaning of Article 53(1), such activity could be contrary to Article 53(1). Since the parties only seem to have reached the stage of negotiations, no such co-ordination between the parties seems to have taken place.

54. Concerning the question whether a supplier could lay down conditions as to the structure of the ownership of the dealership company without violating Article 53(1) regardless of the aim or effects of the condition, the EFTA Surveillance Authority submits that the condition on a certain shareholder structure would by itself in most cases amount to a restriction of competition within the meaning of Article 53(1). In addition, the restrictive effect of such a condition seems to be strengthened due to the nature of the business in question. In many cases, the establishment of a dealership company would require a substantial amount of capital, which in turn, due to the condition of a shareholder structure, may restrict potential dealers from applying for dealerships. A dealership company will often not be able to finance the whole activity through loans, but will have to have a certain amount of equity capital in order to obtain loans and thus to commence business. Even if it were possible to start a new business without equity capital, national legislation in many EEA States requires that economic activities may only be carried out if certain requirements as to a minimum equity capital are fulfilled.

55. A condition on specific shareholder structure may also imply a restriction on the shareholder to sell his shares. If this condition implies that the owner or owners may only sell their shares to the other owners of the dealership company, or only with the prior consent of the supplier, such a condition may also imply certain foreclosure effects for new, potential dealers since it may be difficult to enter the market through the acquisition of shares in already-existing companies.

56. It seems that the requirement concerning a specific ownership structure is not a qualitative requirement in the meaning of the *Metro* judgment of the ECJ and would thus, in most cases, be a restriction within the meaning of Article 53(1).

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12 Case 41/69 ACF Chemiefarma NV v Commission of the European Communities [1970] ECR 661; Case T-7/89 S.A. Hercules Chemicals N.V. v Commission of the European Communities [1991] II ECR 1711; Case C-277/87 Sandoz prodotti farmaceutici SpA v Commission of the European Communities [1990] I ECR 45.

13 Case 48/69 Imperial Chemical Industries Ltd. v Commission of the European Communities [1972] ECR 619.

57. Referring to the case law of the ECJ[14], it is stated that the requirement "may affect trade" is satisfied in the present case. It is not necessary to establish that the agreement has in fact affected trade between Member States; it suffices to establish that the agreement is capable of having such an effect. Furthermore, an effect on inter-State trade will normally be presumed where the agreement directly relates to international transactions.

58. The EFTA Surveillance Authority is of the opinion that it will be for the national court to consider whether an agreement is unlikely either to affect trade or to restrict competition to any appreciable extent[15]. Therefore, the national court has to identify the relevant market, i.e. the product and geographical market in which the product competes[16].

59. Having established the relevant product and geographical market, the national court will have to consider whether the agreement affects trade and competition to any appreciable extent in this market.

60. When assessing whether an agreement in a selective distribution system has an appreciable effect on competition and trade, the national court will, firstly; have to consider whether the agreement in its own right has an appreciable effect. If it does not, but the agreement is a part of a network of similar agreements, the tests in *Delimitis*[17] will have to be applied.

61. The EFTA Surveillance Authority takes the view that the requirement of a specific ownership structure would, in most cases, regardless of the aim, be a restriction on competition within the meaning of Article 53(1) in September 1995 and would thus be contrary to that article if the agreement also appreciably affects trade and competition.

62. The requirement imposed on the owner and the General Manager not to own shares in other companies retailing cars or companies owning parts of such undertakings seems to be a restriction of competition within the meaning of Article 53(1) EEA because it restricts the owner and General Manager from starting competing businesses themselves, since their influence over another undertaking is limited if they are unable to be in a ownership position. Thus, it may be assumed that the interest for these persons in starting up a new business would be reduced. The condition on ownership in competing companies would also prevent other potential dealers from getting access to qualified persons who

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14 Case 42/84 Remia BV and Others v. Commission of the European Communities [1985] ECR 2545; Case 19/77 Miller International Schallplatten GmbH v Commission of the European Communities [1978] ECR 131; Case 172/80 Gerhard Züchner v Bayerische Vereinsbank AG [1981] ECR 2021.

15 Case 5/69 *Franz Völk* v *Établissements J. Vervaecke* [1969] ECR 295.

16 See footnote 11.

17 Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] I ECR 935.

could, in addition to providing capital, also bring valuable knowledge of the trade into other potential dealer companies.

63. A condition to the effect that the General Manager or owners of car dealer companies may not own parts in other competing companies is not a qualitative criterion within the meaning of *Metro*, but amounts, regardless of the aim of the condition, to a restriction of competition within the meaning of Article 53(1).

64. Referring to the *AEG*[18] judgment of the ECJ, the EFTA Surveillance Authority submits that the refusal to admit potential dealers to selective distribution systems which exclude certain qualified dealers is not a unilateral act, but falls to be examined under Article 53(1).

65. Reference is made to the *Hasselblad*[19] case in which the ECJ held that Article 85(1) applies if the system restricts the number of dealers admitted. Hence, in order for a selective distribution system not to fall within Article 53(1), all suitably qualified resellers must be admitted to the system. Therefore, Article 53(1) is infringed if Opel denies access to potential dealers which fulfil the qualitative criteria which Opel could lawfully set.

66. Following the case law of the ECJ[20], nullity as a civil law consequence of breaches of Article 85(1) EC only applies to those provisions or features in the agreement or practice which violate Article 85(1) EC and thus Article 53(1) EEA. The remaining provisions are unaffected by the nullity sanction, provided they are severable from the rest of the agreement. The question of severability is a matter to be decided by reference to the law applicable to the agreement or practice in question. Accordingly, it will be for the national court, in light of the national legislation, to decide on the question of severability.

67. The EFTA Surveillance Authority proposes answering the questions as follows:

> *Questions 1(a),(b) and (c):*
> *A requirement of a specific ownership structure in an agreement between a distributor and a dealer of motor vehicles entered into in September 1995, would, regardless of the aim, in most cases be a restriction on competition in the meaning of Article 53(1) and thus be contrary to this article if the agreement also appreciably affects trade and competition.*
>
> *Questions 2(a), (b) and (c):*
> *A clause in an agreement between a distributor and a dealer of motor vehicles entered into in September 1995 which forbids the owners and the managing*

[18] See footnote 9.

[19] Case 86/82 Hasselblad (GB) Limited v Commission of the European Communities [1984] ECR 883.

[20] See footnote 11.

director from owning shares in other car dealer companies, or companies which own such car dealer companies is, regardless of its aim, contrary to Article 53(1) provided the agreement appreciably affects competition and trade between the Contracting Parties.

Question 3:
According to Article 53(1) an importer of motor vehicles had in September 1995 an obligation to enter into a dealership agreement with all who wished to become dealers provided they met the qualitative criteria the importer lawfully could impose on such dealers.

Question 4:
Negotiations about an agreement or an agreement to enter into an agreement is not tantamount to an "agreement" in the meaning of Article 53(1).

Question 5:
A refusal to accept a dealer into a selective distribution system falls to be examined under Article 53(1) when that refusal can serve to enforce an anti-competitive policy or contractual practice between the other existing dealers.

Question 6:
Article 53(2) applies to those provisions or features in the agreement which violate Article 53(1) provided these parts of the agreement are severable from the rest of the agreement.

5. Commission of the European Communities

68. The *Commission of the European Communities* is of the opinion that a distinction has to be drawn between the ownership structure itself and the requirement that Jan and Kristian Jæger dissolve any links with the Jæger group of companies. A clause requiring the General Manager of a car dealership to hold 51% of the shares in the company holding the dealership does not in itself constitute a restriction of competition. Such a clause ensures that no others have control of the dealer chosen by the supplier.

69. The requirement to dissolve all links with the Jæger group prevents Jan and Kristian Jæger from continuing to have a role or even a financial interest in the business carried on by the group.

70. The Commission emphasizes that Article 53 EEA does not apply to the unilateral acts of undertakings. Only in the hypothesis of a dominant position may a refusal to deal be regarded *ipso facto* as an infringement of the competition rules. Such a refusal would only have an effect on trade between EEA Contracting Parties if such clauses were included in all Opel's dealership

agreements. The combined effect of such clauses in a host of contracts might amount to a significant restriction[21].

71. The Commission states that the case law of the ECJ[22] on selective distribution agreements is not of direct relevance to the present case. Opel does not operate a selective distribution system which is open to all dealers who want to join the system. It operates a system in which one dealer or a small number of dealers in each area are appointed.

72. Distribution agreements in the motor vehicle sector typically contain a number of restrictions of competition. Nevertheless such agreements may be considered beneficial on the ground that they contribute to efficient distribution of motor vehicles.

73. Referring to Regulation 123/85, Regulation 1475/95 and the Decision of the EEA Joint Committee No. 46/96, the Commission assumes that there was a period from 1 July to 30 September 1995 in which no block exemption for motor vehicle distribution agreements was in force in the EEA outside the European Community.

74. After the entry into force of Regulation 1475/95 in Norway, the transitional provision of Article 7 would have had the effect of exempting the clause in question until 30 September 1996.

75. Unlike Regulation 123/85, for contracts entered into after 1 October 1995, Regulation 1475/95 does not authorize the imposition of a single make rule. The new regulation provides for the possibility of multi-brand dealers, so long as different makes are sold in different premises under different management.

76. The Commission considers that the condition of a distinct legal entity does not justify a requirement that the shareholders of each legal entity must be different. A requirement to eliminate all connections with the Jæger group goes beyond what is necessary in order to establish a distinct legal entity. Such a clause is no longer exempted by Regulation 1475/95. It is for the national court to decide whether the remainder of the contract can stand by itself as a valid contract[23].

77. Concerning the question whether a contract may be found to have been concluded on 18 September 1995 and the question whether the defendant is under an obligation to enter into a contract with the plaintiff on the terms agreed

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21 Case 23/67 *S.A. Brasserie de Haecht* v *Wilkin and Wilkin* [1967] ECR 407; Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935; see also the third recital in the Preamble to Regulation 1475/95.

22 See footnote 5.

23 See footnote 11 and Case 319/82 *Société de vente de ciments* v *Kerpen & Kerpen* [1983] ECR 4173.

with the exception of the restrictive clause, the Commission states that Regulation 1475/95 does not establish a code of provisions applicable to motor vehicle distribution agreements[24].

78. Because of the possibility of exemption under Article 53(3) EEA, the Commission considers that at the time of conclusion of the contract it is not possible to know with certainty whether or not a restrictive clause will be considered capable of exemption. Therefore, a national rule of contract law following which the contract between the parties was concluded without the unlawful or void clause would not be applicable in the present case.

79. The Commission is of the view that the defendant is under an obligation to enter into a contract only if it occupies a dominant position on the market in question.

80. The Commission proposes answering the questions as follows:

Question 1:
A clause in a contract for the distribution of motor vehicles laying down requirements for the shareholder structure of the corporate entity which is to operate the dealership is not restrictive of competition where it serves merely to identify the individuals with whom the supplier has negotiated the dealership agreement and ensure that those person[s] have effective control of the corporate entity.

Question 2:
A clause in a contract for the distribution of motor vehicles which prevents shareholders in the corporate entity operating the dealership from holding ownership interests in other companies which deal in motor vehicles or hold in their turn ownership interests in such companies is restrictive of competition and is thus prohibited by Article 53(1) of the EEA Agreement.
The prohibition in Article 53(1) may be declared inapplicable to certain restrictions of competition by individual decision or by regulation.
Prior to 1 July 1995 an agreement containing a restrictive clause of the kind in question was exempted from the prohibition by virtue of Commission Regulation No. 123/85. No general (block) exemption for restrictive clauses in contracts for the distribution of motor vehicles existed in the EEA between 1 July and 30 September 1995. By virtue of Article 7 of Regulation 1475/95 an agreement containing a restrictive clause of the kind in question entered into on or before 30 September 1995 was exempted from the prohibition for the period from 1 October 1995 to 30 September 1996. There is no block exemption for such a clause in a contract entered into on or after 1 October 1995.
For the period from 1 July to 30 September 1995 and after 1 October 1996 it is open to the parties to a contract containing such a clause to apply for individual exemption.

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24 Case C-226/94 Grand Garage Albigeois SA and others v Garage Massol SARL [1996] ECR I-651.

Question 3:
Article 53(1) of the EEA Agreement imposes no obligation on an importer of motor vehicles to enter into a dealership agreement.

Question 4:
Article 53(1) is concerned with agreements; it lays down no rules for negotiations which do not culminate in agreements.

Question 5:
Article 53 of the EEA Agreement does not apply to the unilateral acts of undertakings. The fact that a restrictive clause in an agreement is similar to or reinforces restrictive elements in other agreements is relevant in determining whether the restriction is an appreciable one and whether it affects trade between Contracting Parties to the EEA Agreement, so as to fall within the prohibition laid down in Article 53(1).

Question 6:
In accordance with Article 6(2) of Regulation 1475/95, which has effect from 1 October 1995 onwards, the inclusion in a contract for the distribution of motor vehicles of a restrictive clause which is not expressly exempted by that regulation has the consequence that all the restrictive clauses in the contract are void. It is for the national court to determine whether those clauses are severable and whether there remains a contract capable of execution.

Carl Baudenbacher
Judge Rapporteur

ADVISORY OPINION OF THE COURT
14 March 1997*

(Council Directive 77/187/EEC – transfer of part of a business)

In Case E-3/96

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 Gulating lagmannsrett (Gulating Court of Appeal) for an advisory opinion in the case pending before it between

Tor Angeir Ask and Others

and

ABB Offshore Technology AS and Aker Offshore Partner AS

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,

THE COURT,

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

Registrar: Per Christiansen,

* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

– the appellants Tor Angeir Ask and Others, represented by Counsel Bent Endresen;

– the respondent ABB Offshore Technology AS (“ABB”), represented by Counsel Einar Østerdahl Poulsson;

– the respondent Aker Offshore Partner AS (“Aker”), represented by Counsel Kristine Schei;

– the Government of the Federal Republic of Germany, represented by Dr Ernst Röder and Sabine Maass, Officials in the Federal Ministry of Economics, acting as Agents;

– the Government of the United Kingdom, represented by John E. Collins, Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister;

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;

– the European Commission, represented by Hans Gerald Crossland and Maria Patakia, Members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing, revised in order to incorporate answers from the appellants and respondents, respectively, to questions put to them by the EFTA Court in a letter of 8 November 1996,

after hearing the oral observations of the appellants, Tor Angeir Ask and Others, the respondents, ABB Offshore Technology AS, represented by Counsel Merete Bårdsen, and Aker Offshore Partner AS, the Government of the Federal Republic of Germany, represented by Agent Bernd Kloke, the EFTA Surveillance Authority, represented by Agent Trygve Olavson Laake, and the EC Commission, represented by Agent Hans Gerald Crossland, at the hearing on 15 January 1997,

gives the following

Advisory Opinion

1 By an order dated 21 May 1996, registered at the Court on 28 May 1996, Gulating lagmannsrett (the Gulating Court of Appeal) in Norway made a request for an Advisory Opinion in a case brought before it by Mr Tor Angeir Ask, Mr Per Gerhard Hallem, Mr Rolf Hole, Mr Knut H. Kattetvedt, Mr Tore G. Knudsen, Mr Kjell Kristoffersen, Mr Jostein Laukeland, Mr Ove Rognø, Mr Ivar Utland and Mr Sverre Weibell (appellants) against the respondents, ABB and Aker.

2 The questions referred by the Norwegian court concern the interpretation of Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the Agreement on the European Economic Area ("EEA"). Thus, according to Article 2(a) of the Agreement, the Directive is to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it.

3 Article 1(1) of the Directive provides:

> "1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

4 Articles 3(1) and 3(2) of the Directive provides:

> "1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.
>
> 2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

> Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year."

5 Article 4(1) of the Directive provides:

> "1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.
>
> Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal."

Facts

6 In the autumn of 1994, the Norwegian company Statens Oljeselskap AS (Statoil) put out to tender certain maintenance and modification work on the Statfjord oil field in the North Sea. The respondent ABB had held a maintenance contract with Statoil for the Statfjord installations since 1988. After a pre-qualifying round, ABB was not considered qualified to take part in the tender competition. The respondent Aker was awarded the contract for the maintenance and modification work on the Statfjord field. Under the new contract the respondent Aker has an overall responsibility implying, *inter alia*, the responsibility to plan where, when and how inspections and tests are to be performed, to define the necessary works and inspections, to plan and carry out measures and reparations or alterations and to control and document the tasks. The company shall also perform tasks such as engineering, non-destructive testing and modification works. Payments are based on agreed annual goal-budgets, based on defined annual programmes, fixed net hourly rates, lease of machines, costs of materials, etc. Under the contract between ABB and Statoil, ABB performed only specific tasks as defined by Statoil, albeit with its own supervisors, and in principle received payment at fixed rates on an hourly basis.

7 Aker commenced its work on Statfjord in February 1995, when the contract between Statoil and ABB expired. However, ABB continued to work on the platforms for a few months, completing some of the maintenance work under its contract and, according to counsel for ABB, took on one specific work contract awarded by Statoil. It is agreed that Aker did not take over any tools or equipment from ABB, nor was there any agreement between the parties regarding a transfer of employees.

8 Maintenance workers on some of the Statoil oil platforms are employed by Statoil, while on other Statoil platforms the workers are primarily employees of a third company.

9 Both respondents describe their employment arrangements as being such that their employees are employed by the company but are not hired for a specific project, contract or platform. In 1995 ABB assigned about 220 person-years to the Statfjord field: approximately 200 on the installations offshore and approximately 20 onshore. In 1996 about 330 person-years were required to fulfil Aker's obligations under the new contract regarding Statfjord: approximately 245 on board the platforms and approximately 85 onshore. The total number of employees involved is higher than the number of person-years indicated above because of the organisation of the work in shifts.

10 ABB dismissed 74 employees when its contract with Statoil expired. Out of 60 employees hired by Aker in relation to the new Statfjord contract, only 10 had previously been employed with ABB.

11 Sixteen of the employees dismissed by ABB brought cases before Stavanger byrett (Stavanger City Court), petitioning for their dismissals by ABB to be ruled invalid. Stavanger byrett came to the conclusion that there had not been a transfer of an undertaking, business or part of a business under the Norwegian legislation implementing the Directive. Ten of the original sixteen plaintiffs, all of whom were scaffolding constructors, appealed the case to Gulating lagmannsrett, which decided to stay the proceedings and refer the case to the EFTA Court.

12 The following questions were referred to the EFTA Court:

> *"1. Does Article 1(1) of the Council Directive 77/187/EEC cover a situation where a time-limited contract regarding maintenance and modification expires, and the principal concludes new time-limited contracts covering the same or other maintenance work with one or more other contractors?*
>
> *2. Is it of any significance to the answer to question 1 that the contract falls under Council Directive 90/531/EEC and 93/38/EEC?*
>
> *3. Is it of any significance if employees and/or equipment are taken over or transferred between companies holding maintenance contracts with Statoil?"*

General remarks

13 The questions presented to the Court in the request for an advisory opinion concern the concept of transfer of an undertaking, business or part of business as a result of a legal transfer within the meaning of Article 1(1) of the Directive. The referring Court further asks whether it is of significance for the application of the Directive that the contract falls under directives regarding the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

14 The EFTA Court has dealt with the concept of transfer in Article 1 of the Directive, as well as with certain other questions on the interpretation of the Directive, in three previous decisions, namely in the *Eidesund* case (Case E-2/95, not yet reported, hereinafter "*Eidesund*") and the *Langeland* case (Case E-3/95, not yet reported), see Advisory Opinions delivered on 25 September 1996, and in the *Ulstein and Røiseng* case (Case E-2/96, not yet reported, hereinafter "*Ulstein*") in which an Advisory Opinion was given on 19 December 1996.

15 As pointed out by the EFTA Court in these three cases, the European Court of Justice (the ECJ) has previously dealt with the concept of transfer in Article 1 of the Directive in numerous cases. Although none of these cases have dealt directly with the situation where an independent service provider is succeeded by another, the general principles of interpretation of the Directive seem to be well established in ECJ case law and the decisions of the ECJ can give considerable guidance with respect to such situations. Furthermore, on 11 March 1997, the ECJ delivered its judgment in case C-13/95 *Ayse Süzen* v *Zehnacker Gebäudereinigung GmbH Krankenhausservice* (hereinafter "*Süzen*"), regarding the application of the Directive in a situation where a contract for cleaning services was terminated and subsequently a new service contract was entered into between the principal and a new service provider.

The first and the third question

16 By its first question, the referring court seeks to establish whether the Directive covers a situation where a time-limited contract regarding maintenance and modification work on an oil platform expires and the principal concludes a new time-limited contract covering the same as well as other maintenance work with another contractor. In its third question, the referring court asks whether it is of any significance in such a situation if employees or equipment, or both, are taken over by the new contractor. These questions should be examined together.

Transfer of part of a business

17 Whereas the *appellants* propose an affirmative answer to the first question and the *respondents*, supported by the *German Government*, submit that the first question should be answered in the negative, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* all propose a qualified answer to the first question, to the effect that a situation like the one in the case at hand may be covered by the Directive provided that the relevant criteria for a transfer of an undertaking are met, i.e., that an economic entity is transferred and retains its identity after the transfer.

18 Referring to the stated purpose of the Directive and the wide and flexible interpretation given to the concept of transfer in the case law of the ECJ, the Court has on earlier occasions held that the Directive may be applicable in situations where fixed-term contracts for the provision of certain services are, upon their expiry, succeeded by new fixed-term contracts concluded with other service providers for the same or similar services. See the Court's Advisory Opinions in *Eidesund* and *Ulstein*.

19 However, the Court has held in *Ulstein*, at paragraph 27, that a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business. The decisive criterion for establishing whether there has been a transfer of an undertaking, business or part of a business for the purposes of the Directive is whether the business in question is transferred as a going concern with its own identity, and whether it retains this identity after the transfer. The object of the transfer must constitute a stable economic entity, so that an activity limited to performing one specific works contract falls outside the scope of the Directive, see case C-48/94 *Rygaard* v *Strø Mølle Akustik* [1995] ECR I-2745. This view has also been expressed by the EFTA Court in *Ulstein* and in *Eidesund*.

20 In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period of suspension of those activities, if any. All of these circumstances are, however, only individual factors in the overall assessment to be made and cannot, therefore, be considered in isolation. The elements to be considered were set out in Case C-24/85 *Spijkers* v *Benedik* [1986]

ECR I-1119, at paragraph 13, and have consistently been invoked and referred to by the ECJ.

21 It is for the national court to assess the factual circumstances of the case and to take account of all the individual factors in the overall assessment. The core of the assessment is whether there is, in a particular case, a stable economic entity with its organisational structure and characteristics necessary for the operation of the entity that is transferred to another economic operator while retaining its characterising elements and continuing its activity. Further, as also pointed out in *Süzen*, in assessing the identity of the entity in question, it must be borne in mind that the activities carried on are not the only ones which characterise a business entity. Its organisation, workforce, managerial staff, organisation of the work, operating methods and, where appropriate, the operational resources available to it, are all factors contributing to the identity of a particular economic entity. It is important to note that individual factors carry different relevance in weight in relation to the business activity in question and its characteristics, see *Süzen*, at paragraphs 15 and 18.

22 In sum, for there to be a transfer of an undertaking, business or part of a business for the purposes of the Directive, a stable economic entity with its own identity must be transferred and it must retain its identity after the transfer. If there are no special circumstances which lead to the conclusion that an economic entity retaining its own identity has been transferred, the continuation of an activity by another undertaking is not by itself sufficient to constitute a transfer within the meaning of the Directive.

23 It seems to be uncontested that the entity in question in the case at hand would be the business unit working in ABB under the previous contract regarding the Statfjord field. As will be pointed out below, no assets were transferred from the first to the second service provider, nor were any tools or equipment taken over. Furthermore, only a very limited number of ABB's employees working under the Statfjord contract were re-engaged by Aker. No managerial staff was taken over, only scaffolding contructors, and even they were not taken over as an organisational group but engaged on an individual basis in competition with other applicants.

Assets and equipment

24 The *Government of the Federal Republic of Germany* submits that it is an indispensable condition for there to be a transfer of part of a business that a body of assets be transferred. The German Government further argues in this context that it is appropriate to apply the criterion of operating resources in the form of tangible or intangible assets. At the oral hearing, the agent of the *EC Commission*

stressed that there was nothing in the case law of the ECJ to support this contention; on the contrary, the case law shows that a number of factors must be taken into account, of which a transfer of a body of assets is one, but not a conclusive one.

25 As stated in *Eidesund*, at paragraph 39, the taking over of assets may constitute an important element in the overall assessment of the transaction. The taking over of tangible or intangible assets of a business or part of a business may be a strong indication that the business or the relevant part of the business has, in fact, been transferred. Depending on the circumstances, in particular the type of the business in question and its means of operation, this factor may be decisive in the overall assessment. However, as pointed out in *Ulstein*, at paragraph 33, the absence of this factor does not by itself render the Directive inapplicable. The importance of this factor in the overall assessment depends on the entity in question. Certain economic entities are thus less dependent on tangible and intangible assets for their operation than are other types of businesses, see judgment of the ECJ in *Süzen*, at paragraph 18.

26 Thus, where machinery or equipment needed for further production or operation has been taken over and used in the continued activity, it may underscore the notion that the business has been taken over as a going concern and that the identity and continuity of the business have been maintained. The Court notes, however, that in the present case no tools or equipment were taken over.

Employees

27 By its third question, the referring court seeks to establish whether it is of relevance in a case like the one at hand if employees are taken over by, or transferred from, the first to the second service provider.

28 As the Court has already stated, the re-engagement of the transferor's employees is one of various factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred. See *Ulstein*, at paragraph 35.

29 Further, as held by the Court in *Eidesund*, at paragraph 43, and *Ulstein*, at paragraph 36, in cases where a high percentage of the personnel taken over and

where the business of the first service provider is characterised by a high degree of expertise on the part of its personnel, the re-engagement of that same personnel by the second service provider may support a finding of identity and continuity of the business. This, however, depends on the entity in question and the importance of the personnel for that identity. Where a business activity is primarily characterised by a stable workforce carrying out the activity and where the new contractor chooses to re-engage the workforce for the continued operation of the business, this may suffice to constitute a transfer within the meaning of the Directive.

Conclusion

30 It follows from the foregoing that Article 1(1) of the Directive must be interpreted as meaning that it does not apply to a situation in which a principal enters into a new contract with a second contractor with a view to having similar maintenance and modification work carried out when there is no transfer of significant tangible or intangible assets, including essential equipment, nor the taking over or re-engagement of an essential part of the workforce, in terms of number and expertise, who were especially assigned by the predecessor to the performance of the contract.

The second question

31 In its second question, the referring court asks whether it is of significance to the answer to the first question that the contract falls under Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. These directives are referred to in point 4 of Annex XVI to the EEA Agreement, cf. an amendment by Decision of the EEA Joint Committee No 7/94 of 21 March 1994, see also Parliament and Council Directive 94/22/EC, referred to in point 12 of Annex IV to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 19/95 of 5 April 1995. Directive 93/38/EEC, which is to replace Directive 90/531/EEC, prescribes procedures for contracting entities when awarding supply, works or service contracts within the field of, *inter alia,* exploitation of a geographical area for the purpose of exploring for or extracting oil and gas.

32 The *Government of the Federal Republic of Germany*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* are all agreed that it is of no significance for the answer to the first question that the contract in question falls under the above-mentioned Council Directives. The

appellants and the respondents take the same view. However, both respondents submit that when these Directives apply, this supports or confirms the proposition that Council Directive 77/187/EEC is not applicable to such situations. The respondent Aker submits that Directive 93/38/EEC contains specific provisions aimed at fostering real competition, and thereby movement of goods and services. If the purpose of Directive 93/38/EEC is to be achieved, it is not possible to argue at the same time that a change of contractor is a transfer of a part of a business.

33 The Court notes that it addressed the same question in *Eidesund*. There the Court noted that the Directive, by its wording and purpose, is general in its application and held that the fact that a transaction is subject to public procurement directives does not by itself prevent the Directive from being applicable in a case such as the one then before the Court. The Court does not find any grounds to reach a different conclusion in the present case. The Court considers, however, that in most cases of public tenders, regardless of whether they are subject to EEA public procurement rules, the succession of service providers will not constitute a transfer within the meaning of the Directive.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Gulating lagmannsrett by order of 21 May 1996, hereby gives the following Advisory Opinion, taking the first and the third questions together:

1. **Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted as meaning that it may cover a situation where a time-limited contract regarding maintenance and modification work on an oil platform expires and the principal concludes a new time-limited contract with another contractor. However, the Article does not apply in a situation in which there is no transfer of significant tangible or intangible assets, including essential equipment, nor the taking over or re-engagement of an essential part of the workforce, in terms of number and expertise, who were especially assigned by the predecessor to the performance of its contract.**

2. **The fact that a transaction is subject to public procurement directives does not by itself prevent Council Directive 77/187/EEC from being applicable in a case such as the one at hand.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 14 March 1997.

Per Christiansen
Registrar

Bjørn Haug
President

REPORT FOR THE HEARING
in Case E-3/96

-- Revised --

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 Gulating lagmannsrett (Gulating Court of Appeal) for an advisory opinion in the case pending before it between

Tor Angeir Ask and Others

and

ABB Offshore Technology AS and Aker Offshore Partner AS

on the interpretation of Council Directive 77/187/EEC.

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I. Introduction

1. By an order dated 21 May 1996, registered at the Court on 28 May 1996, Gulating lagmannsrett, a Norwegian Court of Appeal, made a request for an advisory opinion in a case brought before it by Mr Ask, Mr Hallem, Mr Hole, Mr Kattetvedt, Mr Knudsen, Mr Kristoffersen, Mr Laukeland, Mr Rognø, Mr Utland and Mr Weibell (the appellants) against the respondents, ABB Offshore Technology AS (ABB) and Aker Offshore Partner AS (Aker).

II. Legal background

2. The questions submitted by the Norwegian court concern the interpretation of *Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.* This directive is referred to in Point 23 of Annex XVIII to the Agreement on the European Economic Area.

3. *Directive 77/187/EEC* states, *inter alia*:

[Section I / Scope and definitions]

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

...

[Section II / Safeguarding of employees' rights]

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1) , the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under the agreement .....

...

Article 4

1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

III. Facts

4. In 1988 ABB was awarded a maintenance contract with Statoil, a Norwegian oil company responsible for the operation of, *inter alia*, the Statfjord oil field in the North Sea. Following prolongation of the contract pursuant to its own terms, the contract expired in February 1995. In the autumn of 1994, Statoil put out to tender certain maintenance and modification work on the Statfjord field and, in addition to the area covered by the contract with ABB, the Gullfaks field. ABB did not submit a tender. Aker was awarded the contract for Statfjord for maintenance and modification work.

5. Additional information sent to the Court at its request on behalf of both the respondents includes *inter alia* the following statement:

> "Aker Offshore Partner AS´s tasks according to the current contract with Statoil are related to preventive maintenance work, corrective maintenance work and modification work. The borderlines between these works are necessarily fluid.
>
> Under the contract, Aker Offshore Partner AS has overall responsibility for tasks the company is to perform. This implies that Aker Offshore Partner AS is responsible for planning where, when and how inspections and tests shall be performed, define the necessary works, inspect, plan, work out solutions, carry out those measures and reparations or alterations which are current, and control and document the tasks. Aker Offshore Partner AS thus has a thoroughgoing responsibility.
>
> In the contract between ABB Offshore Technology AS and Statoil, ABB Offshore Technology AS was, with its own supervisors, to perform only specific tasks as defined by Statoil.

The extent of the contracts is different, e.g., in that Aker Offshore Partner AS performs tasks such as engineering, NDT services (non-destructive testing) and modification works.

The principal model for payment in Aker Offshore Partner AS´s contract with Statoil implies that annual goal-budgets based on defined annual programmes, fixed net hourly rates, lease of machines, costs of materials, etc., are drawn up and agreed upon. Aker Offshore Partner AS acts freely within these agreed frameworks. Any "profit" or "deficit" in relation to the annual budget in accordance with the annual programme is shared by the parties 50/50. Product development thus becomes an important element in the completion of the contract.

In the contract between ABB Offshore Technology AS and Statoil, ABB Offshore Technology AS was paid according to used hours based on fixed hourly rates."

6. According to the description of the requesting court, the employment arrangements for the workers on the platforms in the North Sea are organised in different ways, the decisions in most cases being based on considerations of what is most profitable for the business: either to provide services using the company's employees or to have the services provided by an outside company. At Statoil the catering service workers on some of the oil drilling platforms are employed by Statoil, while on other Statoil platforms the workers are employees of a professional catering company. The same is true of maintenance workers. According to the request, some Statoil employees were dismissed from their positions following the new maintenance contract with Aker. In her written observations, counsel for Aker has stated that if this is true, Aker was not aware of it.

7. Counsel for ABB states that the company is a part of ABB, a global group of industrial companies and enterprises operating in several countries and employing about 210 000 people. The head office is in Switzerland, while the head office for activities in oil, gas and petrochemicals is in Norway. The respondent in this case was established in 1993 through a merger of several companies in order to cover the Norwegian market. Today it employs about 1000 persons. They are not hired for a specific project, contract or platform. Counsel states that if the contracts fail to appear under circumstances indicating a permanent situation, or the company decides that it will no longer offer or provide a specific service, parts of the business will be wound up and the employees will be dismissed. When ABB was not awarded the new contract in 1995 and no similar contracts regarding extensions and professions were out for tender, the company dismissed the persons who were then left without work.

8. In 1987 ABB was awarded the maintenance contract for the Statfjord installations which Aker had held for three years. During the starting-up phase and the contract period, ABB employed workers of different professions to perform the work required under the contract. At the time of the expiry of ABB's maintenance contract regarding the Statfjord field (1995), approximately 220 persons were employed. Of these, 200 worked on the installation offshore, and approximately 20 onshore.

9. It is further stated in the written observations that there was no direct contact between ABB and Aker regarding a possible transfer of employees. Neither was there anything in the Statfjord contract that obliged Aker to give preference to former ABB employees.On behalf of the respondents it is stated that the tender request issued by Statoil was not based on European directives on public procurement. However, it is stated that the contract between Aker Offshore Partner AS and Statoil falls within the scope of Council Directive 93/38/EEC.

10. According to the written observations submitted by counsel for Aker, the company has been involved in most of the oil and gas activities on the continental shelf off Norway since the early 1970s. It has 1400 employees who have a permanent appointment which is not limited to a specific project or a specific platform. In October 1996 about 330 employees were working under the contract dealt with in this case, about 245 on board the platforms and about 85 on shore. The number will be somewhat higher during 1997. To take over the activities dealt with in this case, the company needed 60 new employees, in particular scaffolding constructors and insulation workers. Aker did not take over any equipment from ABB in connection with its new activities. Nor did it, according to its counsel, take over any of ABB's employees. The request from Gulating lagmannsrett states that the appointments of the 60 new employees were effected following ordinary advertisements and in accordance with the general terms of contracts concluded by the company. Of the 60 new employees, 10 had been working for ABB. There were 400 applications for the 60 positions.

11. ABB dismissed 74 employees when its contract with Statoil expired. The ten appellants, all scaffolding constructors, brought cases before Stavanger byrett, together with six others, petitioning for the dismissals to be ruled invalid and, as an interim measure, for Aker to be ordered to re-employ the appellants. The second claim was, however, not made by one of the appellants, Mr Hole. Stavanger byrett came to the conclusion that there had not been a transfer of an undertaking or a part of an undertaking under the Norwegian legislation. Ten of the original sixteen plaintiffs appealed the case to Gulating lagmannsrett, which decided to stay the proceedings and refer the case to the EFTA Court.

IV. Questions

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

"1. Does Article 1(1) of the Council Directive 77/187/EEC cover a situation where a time-limited contract regarding maintenance and modification expires, and the principal concludes new time-limited contracts covering the same or other maintenance work with one or more other contractors?

2. Is it of any significance to the answer to question 1 that the contract falls under Council Directive 90/531/EEC and 93/38/EEC?

3. Is it of any significance if employees and/or equipment are taken over or transferred between companies holding maintenance contracts with Statoil?"

V. Written observations

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

– The appellants, Tor Angeir Ask and others, represented by Counsel Bent Endresen;

– ABB Offshore Technology AS, represented by Counsel Einar ∅sterdahl Poulsson;

– Aker Offshore Partner AS, represented by Counsel Kristine Schei;

– The Government of the Federal Republic of Germany, represented by Dr Ernst Röder and Sabine Maass, Officials in the Federal Ministry of Economics, acting as Agents;

– The Government of the United Kingdom, represented by John E. Collins, Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister;

– The EFTA Surveillance Authority, represented by Håkon Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;

– The European Commission, represented by Hans Gerald Crossland and Maria Patakia, Members of its Legal Service, acting as Agents.

14. As the first and the third question of Gulating lagmannsrett both concern the material scope of the Directive, they will be dealt with together in the following summary.

A. The first and the third question

15. The appellants propose that the reply to the first question should be in the affirmative. The Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities all propose a qualified answer to the first question, to the effect that a situation like the one in the case at hand may be covered by the Directive provided that the relevant criteria are met. The respondents and the German Government propose that the first question should be answered in the negative.

16. The appellants and the respondents propose a negative answer to the third question, both respondents stating that it is of a hypothetical nature in the present case, as they claim neither equipment nor employees were transferred. The German Government is of the view that it is appropriate to distinguish between equipment and employees. The Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities all argue that these factors are relevant but not conclusive in determining whether there has been a transfer within the meaning of the Directive.

The appellants

17. Counsel for the *appellants* states that the oil platforms are different but that they all need continuous maintenance. The type of the work does not depend on the employer of the workers carrying it out. The appellants are scaffolding constructors. Their work is of a special kind as approved by Norwegian authorities, who organise and approve training in the field. It is carried out under the supervision of a foreman (supervisor). In this case the contract between Statoil and Aker covered all the tasks previously placed with ABB. Counsel for the appellants further states that, under the contract, Aker is obliged to establish a dedicated organisation for maintenance and modification, called V & M. According to him, this has been done and Aker has established a separate unit to service the V & M contract. Certain internal qualification requirements have to be fulfilled by the Aker personnel in this field. It is further stated that the scaffolding constructors employed by Aker on the Statfjord contract work permanently there.

18. The appellants refer to the objective of the Directive, which is to safeguard employees' rights in the event of a transfer of undertaking. The necessity to protect employees does not lessen by there being several changes of owner or employer. Nor should employees' rights be dependent on how the employer organises the work. The appellants submit that the purpose of the Directive would be undermined if protection was afforded when parts of the business are contracted out (*Watson Rask and Christensen v ISS Kantineservice*[1], *Schmidt*[2]) but not when the principal transfers the work from one contractor to another. The appellants submit that case law from the ECJ also affords protection in the latter situation (*Redmond Stichting*[3], *Merckx and Neuhuys*[4]).

19. The fact that the transfer takes place in a triangle operation between Statoil and the respondents, ABB and Aker, does not preclude the application of the Directive. Nor can it be decisive for the employees' protection that the transaction is labelled as a "tender competition", rather than as representing another type of contractual transaction. Further, it cannot be decisive that the principal is also the receiver of the service.

20. The appellants maintain that the business ABB previously had which Aker has taken over at the Statfjord field was organised as an economic unit, carried out in a specific place, with a permanent crew, and constituted an identifiable income item in ABB's accounts. Specific maintenance work was and is carried out continuously. They maintain that the maintenance work fulfils the requirements laid down in the case law of the ECJ for an identifiable economic unit. It is the submission of the appellants that it is the maintenance work which is the core of the business.

21. The fact that not all of ABB's employees continued working for Aker is not decisive; nor is the fact that Aker has not taken over the activity's moveables in connection with the take-over of the business.

ABB Offshore Technology AS

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1 Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

2 Case C-392/92 *Schmidt* [1994] ECR I-1311.

3 Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189.

4 Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* v *Ford Motors Company Belgium SA* [1996] ECR I-1253.

22. *ABB* proposes that the first question should be answered in the negative, and that the third question if it is to be answered despite its hypothetical interest in the case, should also be answered in the negative.

23. ABB draws attention to the fact that this case concerns the interpretation of a Norwegian statute, the relevant sections of which were enacted as Norway's implementation of Council Directive 77/187/EEC. With respect to the question of what constitutes a transfer of an undertaking within the meaning of the Directive, ABB maintains that there is a clear distinction to be made between a transfer of an undertaking and a replacement of a contractor.

24. The replacement of a contractor (service provider) has a number of special features. First, it is based on a business contract, made for a fixed term, which does not itself affect the means of production. Second, unlike the transfer of an undertaking, the replacement of a contracting party is not final; it is normally understood to be of limited duration and thus open for re-evaluation. Third, when an undertaking is transferred, the transferor withdraws from the activity. Under a service contract, by contrast, the recipient of the service continues to be the same and retains certain rights of control and instruction as well as the possibility of terminating the contract. Determining that the replacement of a contractor comes under the provisions of the Directive would, in ABB's view, have a very restrictive effect on competition in bidding situations. The only party which has full knowledge of the rights of the employees that may continue with a new contractor is the party already holding a contract.

25. In his written observations, counsel for the respondent ABB analyses four judgments of the ECJ (*Watson Rask and Christensen*[5], *Schmidt*[6], *Rygaard* v *Strø Mølle Akustik*[7] and *Merckx and Neuhuys*[8]) which he states support his conclusions. He also refers to judgments delivered by courts in Denmark, Sweden and France as well as a reply given by ESA.

Aker Offshore Partner AS

26. According to the respondent *Aker*, the answer to the first question should be in the negative. The third question is said to have no bearing on the case. If it is to be answered, the answer must be in the negative. The main argument of Aker is that time-limited service contracts for maintenance and modification are not

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5 See footnote 1.

6 See footnote 2.

7 Case C-48/94 *Rygaard* v *Strø Mølle Akustik* [1995] ECR I-2745.

8 See footnote 4.

covered by the Directive. When they expire and the principal concludes a new contract with another contractor, even covering the same or partly the same work, this is a new contractual relationship unconnected with the former one from a labour law perspective. According to Aker, an analysis of the case law of the ECJ does not support the appellants' point of view. Nor can support be found in the wording of the Directive or its purpose. Counsel for the respondent Aker also sets out the conclusions of several judgments from France, Denmark and Sweden, which in her opinion support her conclusion. Aker's position on the third question is based on the assertion that neither equipment nor employees were taken over in the case at hand.

27. The consequences of accepting the arguments of the appellants are, in the respondent's view, that employees would have to be engaged each time a new contract was obtained, and lost at the expiry of the contract. Employers would have no incentive to take care of or develop their employees or allocate resources to education and development. Nor would there, in the respondent's view, be any true competition, as the company holding the earlier contract has completely different premises for technical solutions and price-setting than its competitors, which do not know the employees in question.

28. The respondent Aker emphasises that it is common business practice for a principal to conclude a contract for the supply of goods or services with a new provider upon expiry or termination of a contract. There exists a *bona fide* contractual relationship between the principal and the contractor as an independent business entity. It is, in Aker's view, very much a part of the activities of businesses in the industry to compete for contracts. The better a business, the more contracts it obtains and the more successful it is financially. A new contract does not mean, however, that a business takes over a part of another's business: the new contract is obtained on the strength of that business' own activities.

The Government of the Federal Republic of Germany

29 The *German Government* is of the opinion that the first question should be answered in the negative. It argues that the transfer of a part of a business can take place only when a body of assets endowed with operating resources is transferred. A mere activity cannot be considered a transferable part of a business. The fact that the same or similar activities are resumed, as stated in ECJ's judgment in *Schmidt*[9] is therefore not sufficient, in the opinion of the German Government, which submits that *Schmidt* merits review, in particular because of its potentially dangerous consequences for competition. The case at hand is distinguishable from Schmidt. Contracting-out of activities hitherto carried out by the company itself

[9] See footnote 2.

allows for the contractor to request information from the principal regarding organisational and staffing structures, whereas this type of exchange of information will not occur when a service provider is changed. The German Government outlines, in general, the decisive criterion for distinguishing between contracting-out of an activity and the transfer of a business. In the case of a contract, the contractor does not acquire anything from the principal and thus does not make any payment to the principal in return for the contract. The principal is obliged to render payment for the services.

30. The German Government refers to *Spijkers*[10], according to which the transfer of part of a business presupposes the existence of a corporate unit which is then transferred to a new owner whilst retaining its identity. The particular characteristics of a corporate unit are listed in paragraph 13 of the judgment. The German Government also refers to *Botzen*[11] regarding the necessity of an organisational connection of an employee to the relevant part of the business. In the view of the German Government, the performance of a maintenance contract entails no such organisational connection; otherwise a maintenance firm doing work for several clients would consist of several parts, the number of which would correspond to the number of its contracts. This would blur the concept of a "part of a business".

31. The German Government submits that the transfer of part of a business presupposes the transfer of a body of assets (*Rygaard*[12]). It further submits that this requirement is indispensable and that it is appropriate to apply the criterion of operating resources in the form of tangible or intangible assets. Whether the work is done on a permanent or a temporary basis is of no consequence for the definition of "part of a business" within the meaning of the Directive. The decisive point in *Rygaard* was whether a body of assets existed and not whether the work was on a temporary basis or was permanently repeated work.

32. The fact that a contract for maintenance and modification work does not imply the existence of a part of a business becomes clear through comparison with *Redmond Stichting*[13]. The contractual transfer in that case was based on a transferable unit. Such a unit does not exist when the termination or expiry of a maintenance contract removes the sole decisive asset of the "part of the business", i.e., the relationship with the client. The German Government further

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[10] Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119.

[11] Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519.

[12] See footnote 7.

[13] See footnote 3.

distinguishes *Merckx and Neuhuys* [14] from the present case, as that case involved a large number of client relationships for which a sum of money usually has to be paid.

33. As regards the third question, the German Government finds it necessary to differentiate between equipment and employees. It is inherent in the requirement that a corporate unit, i.e., a body of assets, must be transferred, that tangible or intangible operating resources be transferred. When, in the case of an organisational unit being transferred, the operating resources are of essential significance for the operations in question, the transfer of equipment will constitute the transfer of (part of) a business.

34. By contrast, the re-employment of employees with the new contractor cannot be used to substantiate the transfer. The German Government submits that if the re-employment of employees was a criterion of transfer, the new contractor could block the application of Council Directive 77/187/EEC by refusing to take the workers on. This would run counter to the aim of the Directive: to safeguard the rights of employees. In the view of the German Government, that aim can only be achieved if the existance of a transfer can be established on the basis of objective criteria which are not placed at the discretion of the company taking over the contract.

The Government of the United Kingdom

35. In light of consistent case law from the ECJ (*Watson Rask and Christensen*[15], *Spijkers*[16], *Redmond Stichting*[17]), the *Government of the United Kingdom* observes that the Directive may be applicable to a situation where a time-limited contract for services expires and a new contract is entered into with another undertaking provided that the services in question constitute a stable economic entity which retains its identity after the transfer.

36. A distinction must be drawn between situations where contracting out of services constitutes transfer of a part of a business and where it involves only a business opportunity for a contractor to provide services. The guidelines drawn up by the Government of the United Kingdom are: that there must be some combination of assets, premises or employees involved with some degree of separate organisational identity from the main undertaking, so that the activity can

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[14] See footnote 4.

[15] See footnote 1.

[16] See footnote 10.

[17] See footnote 3.

be said to constitute a stable economic entity capable of retaining its identity. Moreover, the Government of the United Kingdom addresses the question whether it is of relevance that the new contract is broader in scope than the previous contract with a different distribution of responsibility. It is pointed out that this question is a part of the first question submitted to the Court, even if Gulating lagmannsrett does not identify in detail the extent of the differences. It is submitted that the Norwegian Court should assess the facts of the case before it in order to decide whether there exists an entity that has retained its identity. One of the relevant factors is whether the operation "is actually continued or resumed by the new employer with the same or similar economic activities" (*Rygaard*[18]).

37. The Government of the United Kingdom submits the following answer to the first question:

> *"Article 1(1) of the Council Directive 77/187/EEC may cover a situation where a time-limited contract regarding maintenance and modification expires and the principal concludes new time-limited contracts provided that the services covered by the contact constitute a stable economic entity which retains its identity after the change in the person responsible for providing the services. In order to determine whether that is the case, the national court must consider whether the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities, and must consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."*

38. The individual elements singled out in the third question of Gulating lagmannsrett (equipment/ employees) are relevant factors in considering whether there was a transfer, although none of them is, by itself, decisive. It is for the national court to determine, on the facts of the case as a whole, whether the expiry of one contract and the entry into another does or does not constitute a transfer of an undertaking, business or part of a business.

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[18] See footnote 7.

The EFTA Surveillance Authority

39. The *EFTA Surveillance Authority* maintains that the ECJ has consistently emphasised the social objective of the Directive and systematically given a broad interpretation to the expression "legal transfer" in keeping with the Directive's objective (*Redmond Stichting*[19]). The transfer must take place in the context of contractual relations (*Bork*[20]) but it is not necessary that there be a direct contractual relationship between the transferor and the transferee. The emphasis has been on the final outcome of the transaction in question, whether a business comes into the hands of a transferee that continues to run it. The employment relationship has been seen to be essentially characterised by the link between the employee and the part of the undertaking or business to which he or she is assigned (*Botzen*[21]).

40. The EFTA Surveillance Authority submits that Article 1(1) of the Directive, as referred to in the EEA Agreement, is to be interpreted so as to mean that, where maintenance services for an undertaking have by a time-limited contract been entrusted to a company, the termination of that contract and the conclusion of a new time-limited contract for the same or similar services with another company do not as such fall within the scope of the Directive. However, where the subject matter of the transaction is arranged so as to form an organisational unit with its own identity, the transaction may come within the scope of the Directive, provided that the identity of the unit is retained.

41. According to the case law of ECJ, identity may be maintained, and hence there may be a transfer for the purpose of the Directive even if no assets are taken over by the transferee (*Schmidt*[22], *Merckx and Neuhuys*[23]). Furthermore, while the continuation of a business with the same staff after a transfer may be a strong indication of the identity being preserved, it is also clear from the ECJ case law that a transfer may well fall within the scope of the Directive, even if the majority of the employees engaged in the business before the transfer are not re-employed by the transferee (*Merckx and Neuhuys*).

42. When the question of identity is being considered, the subject-matter of the transaction must be seen as a whole. When considering the relative importance of

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[19] See footnote 3.

[20] Case 101/87 *Bork International* v *Foreningen af Arbeidsledere i Danmark* [1988] ECR 3057.

[21] See footnote 11.

[22] See footnote 2.

[23] See footnote 4.

the various elements, including employees, the organisational structure, the tangible and/or intangible assets, the EFTA Surveillance Authority emphasises the significance of these elements for the identity of the business which may or may not relate directly to an economic value. The re-employment of staff is one relevant factor in determining whether a transaction is a transfer for the purpose of the Directive. The more important the employees are for the identity of the business, the more decisive factor this becomes.

43. In the written observations, it is stated that the facts presented to this Court do not suffice for a final answer to the questions concerning identity. It will be for the Norwegian Court to establish the further facts needed.

The Commission of the European Communities

44. The Directive does not, according to the *Commission of the European Communities*, contain any express definition of transfer of an undertaking. The basis for the case law of the ECJ was put forth in its judgment in *Spijkers* v *Benedik*[24]. In the Commission's opinion, it follows from this judgment that two conditions must be met. First, the undertaking must constitute a business with its own identity, and second, that business and its identity must be preserved after the change of ownership. If either of these conditions is not met, there is no transfer within the meaning of the Directive.

45. In order to assess whether these conditions are met, the ECJ laid down further criteria as listed in paragraphs 13 and 14 in *Spijkers* v *Benedik*. The same approach, it is submitted, is followed in subsequent judgments.

46. Based on this case law, the Commission considers it helpful to distinguish between three categories or types of situations, differentiated by the degree to which the substance of what is transferred between undertakings is tangible. The first category consists of businesses with means of production, such as a company's locksmith's workshop. The second consists of businesses offering a service which involves principally the use of non-material assets, such as knowledge and experience. The third category consists of businesses providing services where no specific knowledge, experience or expertise is required, such as "cleaning services and the care of children".

47. According to the Commission, there is usually no difficulty in determining the existence of a business with its own identity in the first category. In the case of the second category, it is necessary to determine whether the knowledge or other assets can be delimited from an organisational point of view. What matters is

[24] See footnote 10.

whether the functions, within the same or similar activities, are carried out by the new legal person. If they are of a special nature, constituting an independent function, they may fall under the Directive. In the case of the third category, the Commission submits that the central element is the work force and the somewhat unskilled work they perform. If the staff is disposed of in its entirety together with the order book, goodwill, client relationship, organisational structure, etc., a business with its own identity can be said to exist, even if it is difficult to determine when this is so. The Commission carries its analysis further by contrasting *Watson Rask and Christensen*[25] against *Rygaard* v *Strø Mølle Akustik*[26]. In the former case there was a distinct permanent activity transferred from one company to another, whereas in the latter there was no distinct permanent activity carried out by an identifiable workforce but merely the assignment of a specific limited task, which had no identity as an economic entity.

48. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. It mentions, in connection with the first question, that the fact that a disposal is carried out in two stages does not prevent the Directive from being applied. The Directive may be applied if first one company and subsequently another provide a given service. A factor of relevance is the subject matter of the two contracts and the degree to which they are identical or differ. The greater their differences, the more there is an indication of a lack of identity.

49. Even if the subject-matter of the contracts is the same or similar, the continuation of the activities is merely one of many factors to be taken into account and is not conclusive. If the situation is merely that first one undertaking provides the services in question and subsequently another does so, it is difficult to see how there can be a transfer of the business within the meaning of the Directive, in the absence of a disposal from one to another of the organisational structure of the activity. Such a situation would merely be a case of succeeding companies executing a particular function. However, if equipment and/or staff are disposed of by one company to another, this is a factor indicating that the disposal is covered by the Directive.

50. Such an approach accords with the purpose of the Directive, which is to provide certain protection to employees. It is not, however, its purpose that when such a business changes hands by virtue of the fact that one provider of a service loses the contract to a competitor, that competitor acquires not only a new customer but also a new workforce.

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[25] See footnote 1.

[26] See footnote 7.

51. Finally, the Commission states that the Directive is to be applied regardless of the duration of the contracts.

52. In the light of this, the Commission proposes the following answer to the first question:

> *"Council Directive 77/187/EEC, properly construed, envisages the disposal of a business with its own identity and the retention of that identity after it has changed hands. In order to ascertain whether or not this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including the extent to which the tasks to be performed under the contract with the first provider of the services are the same or similar to those to be performed under the contract with the second provider of the services."*

53. The significance of the transfer of equipment and employees has been considered by the ECJ in *Spijkers*[27], paragraph 13. Both factors are significant but neither one conclusive. The Commission submits that, in *Merckx and Neuhuys*[28], the ECJ went further than in *Spijkers* by stating that the fact that the majority of the employees was dismissed when the transfer took place is not sufficient to preclude the application of the Directive.

B. The second question

54. In question 2, Gulating lagmannsrett seeks the opinion of this Court on whether it is of any significance to the answer to question 1 that the contract in question is covered by Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

The appellants

55. The *appellants* find no grounds in the texts of the Directives or in the case law to argue that Directive 77/187/EEC shall not apply in these circumstances. The appellants point out that, as much as the Directive applies to a purchase/sale of a company carrying on activities in the oil business in Norway, it must also be

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[27] See footnote 10.

[28] See footnote 4.

applicable in the case at hand, given that its conditions are otherwise fulfilled. Discrimination toward employees on those grounds is not justifiable.

ABB and Aker

56. The *respondents* both submit that it is not decisive for the answer to question 1 that the contracts in question are covered by Council Directives 90/531/EEC and 93/38/EEC. However, they both submit that when these Directives apply, this confirms that Council Directive 77/187/EEC is not applicable to such situations. The respondent *Aker* submits, that Directive 93/38/EEC contains specific provisions aimed at fostering real competition, and thereby movement of goods and services. The Directive applies to contracts such as in the case at hand, which means that competition for contracts of this type and scope is seen as a normal business activity. Aker concludes that if the purpose of Directive 93/38/EEC is to be achieved, it is not possible to argue at the same time that a change of contractor is a transfer of a part of a business.

The Governments of the Federal Republic of Germany and of the United Kingdom; The EFTA Surveillance Authority and the Commission of the European Communities

57. The *Government of the Federal Republic of Germany*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *Commission of the European Communities* all submit that it is of no significance to the answer to question 1 that the contract in question falls under Council Directive 93/38/EEC.[29]

58. The Government of the United Kingdom particularly points out that the Directives lay down criteria for advertising and awarding of contracts. They are therefore not relevant to the question of whether a transaction constitutes a transfer in the context of Directive 77/187/EEC, aimed at the protection of employees.

59. The EFTA Surveillance Authority submits that there is no direct conflict between the interests pursued by the two Directives which prevents them from being applied simultaneously. Excluding transfers from the scope of Directive 77/187/EEC because of the applicability of public procurement directives would, in the opinion of the EFTA Surveillance Authority, lead to disparity between similar contracts depending on their value and thereby affect employees in different ways depending on the value of the contract in question. There is no apparent justification for sacrificing the protection of employees altogether in

[29] As pointed out by the EFTA Surveillance Authority, Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors replaces Directive 90/531.

situations falling under the public procurement directives. Furthermore, such a conclusion would imply a deviation from the apparently broad interpretation given by the ECJ to the concept "legal transfer".

60. Similarly, the Commission of the European Communities submits that the purpose of the Directive is to make it possible for the worker to continue to work for the transferee under the same conditions as before the transfer of the undertaking or business. In order to provide the protection intended, these terms must be interpreted broadly and must not exclude public supplies contracts from its scope of application. Accordingly, the Commission submits that once the conditions for the application of Directive 77/187/EEC are met, it is irrelevant that the contract in question is also subject to the provisions of other directives.

Thór Vilhjálmsson
Judge-Rapporteur

ADVISORY OPINION OF THE COURT
19 December 1996[*]

(Council Directive 77/187/EEC – transfer of an undertaking)

In Case E-2/96

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 Inderøy herredsrett (the Inderøy County Court) for an advisory opinion in the case pending before it between

Jørn Ulstein and Per Otto Røiseng

and

Asbjørn Møller

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,

THE COURT,

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

Registrar: Per Christiansen,

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[*] Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

– Mr Jørn Ulstein and Mr Per Otto Røiseng, represented by Ms Gunvor Bryn Haavik, Advocate, the Norwegian Confederation of Municipal Employees (Kommunalansattes Fellesorganisasjon), Oslo;

– Mr Asbjørn Møller, represented by Mr Per Solem, Advocate, Levanger;

– The Government of the United Kingdom, represented by Mr John E. Collins, Treasury Solicitor's Department, acting as Agent, and Mr Clive Lewis, Barrister;

– The EFTA Surveillance Authority, represented by Mr Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Mr Trygve Olavson Laake, Officer of that Department;

– The Commission of the European Communities, represented by Mr Hans Gerald Crossland and Ms Maria Patakia, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Jørn Ulstein and Mr Per Otto Røiseng, Mr Asbjørn Møller, the EFTA Surveillance Authority and the EC Commission, represented by Mr Crossland, assisted by Mr De Las Hiras, Member of its Legal Service, at the hearing on 15 October 1996,

gives the following

Advisory Opinion

1 By an order dated 11 March 1996, registered at the Court on 29 March 1996, Inderøy herredsrett (the Inderøy County Court) in Norway made a request for an advisory opinion in a case brought before it by Mr Jørn Ulstein and Mr Per Otto Røiseng, plaintiffs, against Mr Asbjørn Møller, defendant.

2 The questions referred by the Norwegian court concern the interpretation of Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the Agreement on the

European Economic Area ("EEA"). The Directive is thus, according to Article 2(a) of the Agreement, to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it. According to Article 6 of the EEA Agreement and Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice the jurisprudence of the EC Court of Justice ("the ECJ") is therefore relevant when interpreting the provisions of the Directive.

3 The following questions were referred to the EFTA Court:

> *"1 Is Council Directive 77/187/EEC to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some kind of contract between the transferor and the transferee?*
>
> *2 Is the mentioned Council Directive to be interpreted in such a way that the expression quoted under point 1 above implies that the transferee must take over property or moveables from the transferor?*
>
> *3 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if some, but not all, employees of the transferor are employed by the transferee?*
>
> *4 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if an assignment is awarded according to the rules governing tender and the provision of the service is limited in time?"*

4 The first and second recital of the Directive's preamble reads:

> "Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;
>
> Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;"

5 Article 1(1) of the Directive provides:

> "1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

6 Articles 3(1) and 3(2) of the Directive provides:

> "1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.
>
> 2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
>
> Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year."

7 Article 4(1) of the Directive provides:

> "1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.
>
> Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal."

Facts

8 Nord-Trøndelag fylkeskommune (the Nord-Trøndelag County Municipality) (hereinafter "the County") operates two hospitals, one in the town of Levanger, the other in the town of Namsos. Earlier, the ambulance services were organised by a central governmental body. The county of Nord-Trøndelag was divided into 14 ambulance service districts, each serviced by independent enterprises performing the ambulance services under contracts with the central administration. The former employer of the plaintiffs, Hammer Syketransport, had such contracts for two districts, for the district of Levanger since 1971 and for the district of Steinkjer since 1968.

9 By an amendment of 1 March 1985 of the Norwegian Hospital Act of 19 June 1969, in force from 1 January 1986, the responsibility for the ambulance services was transferred to the county municipalities. According to a transitory provision, those who held contracts should have the right to continue for ten years, or until they reached the age of 67. Accordingly, Hammer Syketransport held contracts for ambulance services with the County until 31 December 1995 for the two districts mentioned.

10 The ambulance services were administered jointly from Mr Hammer's offices in Levanger. The Steinkjer branch had two ambulance vehicles and employed 10 persons, and the Levanger branch also had two ambulance vehicles and employed 9 persons besides the owner. Although Hammer Syketransport had its

office on the premises of Levanger hospital, the ambulance services were operated as an independent enterprise.

11 In the autumn of 1994 the County decided to invite tenders on all 14 ambulance service contracts as of 1 January 1996.

12 Hammer Syketransport participated in the tender procedure but did not obtain new contracts. One contract for the Levanger district was entered into with Mr Møller, the defendant before the national court, and the contract for the Steinkjer district went to a third person. As a consequence thereof, on 27 June 1995, Hammer Syketransport issued letters of termination to all its personnel, effective 31 December 1995, and the entire business terminated on that day.

13 Mr Møller did not enter into any agreement with Hammer Syketransport or take over any of its assets. Office space was no longer available on the hospital premises and had to be found elsewhere. He bought his ambulance vehicles elsewhere. He had previously been employed by Hammer Syketransport and later worked with other ambulance services. He did not advertise the vacancies, but invited some potential candidates to send in applications. He also posted an announcement in the ward room of Hammer Syketransport in Levanger. He received a total of 14 applications, including applications from the two plaintiffs in the case before the referring court. On the basis of these individual applications and further individual appraisals, a total of seven persons were employed, four of whom had been previously employed in the Levanger branch and one in the Steinkjer branch of Hammer Syketransport, while two were recruited from elsewhere. The other employees of Hammer Syketransport, including the two plaintiffs, were not offered employment.

14 The plaintiffs in the main proceedings claim that there has been a transfer of an undertaking within the meaning of the Directive and that the defendant is obliged, pursuant to Article 4(1) of the Directive, to employ them as ambulance personnel.

15 The facts of the case and the proceedings before Inderøy herredsrett are further described in the Report for the Hearing.

General remarks

16 The questions presented to the Court in the request for an advisory opinion all concern the concept of transfer of an undertaking, business or part of business as a result of a legal transfer within the meaning of Article 1(1) of the Directive.

17 As pointed out by the EFTA Court in the *Eidesund* case (Case E-2/95, not yet reported, hereinafter "*Eidesund*"), the ECJ has dealt with the concept of transfer in Article 1 of the Directive in numerous cases. Although none of these cases deal directly with the situation where an independent service provider is replaced

by another, the general principles of interpretation of the Directive seem to be well established through the ECJ case law, and the decisions of the ECJ can give considerable guidance with respect to the present case.

18 In particular, three aspects of this case law should be recalled:

19 First, the ECJ has consistently referred to the stated purpose of the Directive and given the concept of transfer a wider and more flexible interpretation than would usually be understood as the scope of the expressions "merger" and "transfer".

20 Secondly, the question whether or not a given transaction constitutes a transfer of an undertaking, business or part of a business must be determined based on an appraisal of all the facts characterising the transaction, in which all the relevant circumstances are merely individual factors in the overall assessment which must be made.

21 Thirdly, it is for the national court to make the necessary factual appraisal, in light of the criteria for interpretation specified by the ECJ, in order to establish whether or not there is a transfer in the above sense.

22 With reference to the case law of the ECJ, the EFTA Court has adopted the same general approach for interpreting Article 1(1) of the Directive: see the advisory opinion in *Eidesund*.

23 It will thus often be the case that an individual factor may generally be of considerable weight and importance in the overall assessment, but at the same time that the absence of that individual factor does not necessarily exclude the application of the Directive if an overall assessment of the circumstances leads to a finding that a transfer of an undertaking, business or part of a business within the meaning of the Directive has taken place.

The first question

24 By its first question the referring court seeks in essence to ascertain whether there has to be a direct contractual relationship between the transferor and the transferee for the Directive to be applicable, pursuant to its Article 1(1).

25 The *plaintiffs*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* submit that the absence of a direct contractual relationship between the first and the second service provider in a case such as the one at hand does not preclude the application of the Directive. The plaintiffs, the EFTA Surveillance Authority and the EC Commission further submit that the change of a service provider, such as in the case at hand, can be said to have taken place in the context of contractual relations and therefore may constitute a transfer for the purposes of the Directive. At the oral hearing, the representative of the Commission clarified his position by stating that he considered the

Commission's approach to be that in the absence of any special factors, the mere fact that the contractor service is awarded to a second person after the service contract has been terminated with the first person does not normally constitute a transfer of an undertaking. The *defendant* submits that it is a precondition for the application of the Directive that there has been some kind of contract between the transferor and the transferee.

26 The Court has, with reference to the stated purpose of the Directive and the wide and flexible interpretation given to the concept of transfer in the case law of the ECJ, on an earlier occasion held that the Directive may be applicable in a situation where one fixed-term contract for the provision of catering services, is upon its expiry, succeeded by another fixed-term contract concluded with another service provider on the basis of a tender award procedure: see the advisory opinion in *Eidesund*, where reference is made to relevant judgments of the ECJ. The Court held that a transfer can be effected in two stages and that there is no requirement that there is a direct contractual relationship between the first and the second employer.

27 However, although the absence of a direct contractual relationship between the transferor and the transferee does not exclude the application of the Directive, a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business. As pointed out by the Court in its advisory opinion in *Eidesund*, at paragraph 31, the decisive criterion for establishing whether there has been a transfer of an undertaking, business or part of a business for the purposes of the Directive is whether the business in question is transferred as a going concern, with its own identity, and whether it retains this identity after the transfer. This would be indicated, *inter alia*, by the fact that the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities; see, in particular, the judgment of the ECJ in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, at paragraphs 11 and 12. The case law of the ECJ also presupposes that the transfer relates to a stable economic entity. See the judgment in Case C-48/94 *Rygaard* v *Strø Mølle Akustik* [1995] ECR I-2745, where the ECJ held that an activity limited to performing one specific works contract falls outside the scope of the Directive.

28 In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, and the degree of similarity between the activities carried on before and after the transfer and the period of any suspension of those activities. All of these circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation. The elements to be considered were set out in *Spijkers* v *Benedik*, paragraph 13,

and have consistently been invoked and referred to by the ECJ. It is for the national court to perform this overall assessment with respect to the case before it.

29 As to the individual factors in the overall assessment to be made by the national court, some further remarks with regard to assets and employees will be made in reply to the second and the third question, see paragraph 31 et seq.

30 The answer to the first question must therefore be that Article 1(1) of the Directive is to be interpreted so that the absence of a direct contractual relationship between the transferor and the transferee does not exclude the applicability of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

The second question

31 In its second and third questions the referring court singles out some of the factors for assessing whether there has been a transfer of an undertaking, business or part of a business. The second question asks whether the Directive, properly construed, only applies in situations where property or moveables are taken over by the transferee.

32 It follows from the above that the taking-over of assets is one of the factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred. As stated by the Court in *Eidesund,* the taking-over of assets may, depending on the circumstances, be an important or even decisive factor in the assessment of whether an undertaking, business or part of a business has in fact been transferred.

33 Consequently, the answer to the second question must be that whether the transferee takes over property or moveables from the transferor is a factor which must be taken into account in the overall assessment referred to above, and which, depending on the circumstances, may be an important or even decisive factor. However, even in the absence of this factor, the applicability of the Directive is not excluded, provided that other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

The third question

34 By its third question, the referring court seeks to establish what relevance it has for the interpretation of the Directive that some, but not all, of the employees of the transferor are re-employed by the transferee.

35 It follows from the above that the employment of the transferor's employees is one of the various factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred.

36 As held by the Court in *Eidesund*, in cases where a high percentage of the personnel is taken over, and where the business of the first service provider is characterised by a high degree of expertise of its personnel, the employment of that same personnel by the second service provider may support a finding of identity and continuity of the business. If the work to be performed does not require any particular expertise or knowledge, the taking-over of personnel becomes less indicative of the identity of the undertaking.

37 It may also be a matter for consideration whether the taking-over of personnel is caused by a desire to carry on the same business as before, or merely represents a convenient way for the new service provider to fill its increased need for employees to service the new contract. It may be an indication of the former if the taking-over of employees is a condition for the transfer, while a filling of vacancies based on individual applications and free competition and on the new contractor’s terms may be an indication of the latter. For this reason, the procedures and the basis for the employment may be of significance for the total assessment to be made.

38 The answer to the third question must therefore be that whether the transferee employs some of the employees of the transferor is a factor that must be taken into account in the overall assessment of the situation to be made by the national court.

The fourth question

39 In the fourth question, the referring court essentially asks whether it affects the scope of the Directive if a contract is awarded after a tender procedure and if the provision of the service is limited in time.

40 The *defendant* submits that the Directive is not applicable when a contract is awarded in accordance with rules governing tender. The defendant points out that tender situations are not mentioned in the Directive and the preparatory work relating to the Directive, and additionally points out the inconvenient consequences this would have for competition-dependent industries.

41 The *plaintiffs* submit that both the wording and the objective of the Directive indicate that tender situations should also be covered by the Directive. The plaintiffs further submit that the application of the Directive in tender situations does not impede free competition any more than other statutory provisions concerning protection of worker's rights. The *EFTA Surveillance Authority* and the *EC Commission* emphasise the general applicability of the Directive,

according to its wording, as well as the purposive interpretation of the Directive by the ECJ, in support of the conclusion that rules governing tenders have no effect on the applicability of the Directive.

42 As pointed out by the EFTA Surveillance Authority, it is not clear from the request whether the question in the case at hand concerns tender procedures in general or whether it relates specifically to situations where such procedures are required under EEA rules concerning public procurement. At the oral hearing counsel for both of the parties to the case before the requesting court confirmed that the tender award procedure in the present case was not instituted in order to comply with any national legislation implementing EEA rules concerning public procurement. Therefore, the Court does not find it necessary to express its views on the situation where the tender procedures are following from EEA rules. However, in a situation where tender procedures are chosen for other reasons the application of the Directive cannot be seen as being limited.

43 The Court accepts the submissions of the EFTA Surveillance Authority and the EC Commission to the effect that the fact that a service contract is awarded for a limited period of time, as in the case at hand, does not as such exclude the application of the Directive. As the EC Commission points out, fixed-term contracts have been held by the ECJ not to fall outside the scope of the Directive, provided that a stable economic entity passes from one employer to another and retains its identity (judgment in Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465 and *Rygaard* v *Strø Mølle Akustik* (cited above)). The same view was expressed by the EFTA Court in its advisory opinion in *Eidesund.*

44 The answer to the fourth question must therefore be that the fact that a contract for the provision of services is awarded under tender procedures which do not follow from EEA rules does not exclude the applicability of the Directive. Nor is it decisive for the application of the Directive that the provision of the service is limited in time.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Inderøy herredsrett by an order of 11 March 1996, hereby gives the following advisory opinion:

1. **Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so that the absence of a direct contractual relationship between the transferor and the transferee does not exclude the application of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.**

2. **Whether the transferee takes over property or moveable assets from the transferor is a factor which must be taken into account in the overall assessment of the situation to be made by the national court. The fact that no property or moveables are transferred, does not as such exclude the applicability of the Directive, provided that other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.**

3. **Whether the transferee employs some of the employees of the transferor is a factor that must be taken into account in the overall assessment of the situation to be made by the national court.**

4. **The fact that a contract for the provision of services is awarded under tender procedures which do not follow from EEA rules does not exclude the applicability of the Directive. Nor is it decisive for the application of the Directive that the provision of the service is limited in time.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 19 December 1996.

Per Christiansen	Bjørn Haug
Registrar	President

REPORT FOR THE HEARING
in Case E-2/96

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 the Inderøy herredsrett (the Inderøy County Court) for an Advisory Opinion in the case pending before it between

Jørn Ulstein and Per Otto Røiseng

and

Asbjørn Møller

on the interpretation of Council Directive 77/187/EEC.

I. Introduction

1. By a request dated 11 March 1996, registered at the Court on 29 March 1996, the Inderøy herredsrett (the Inderøy County Court) in Norway requested an Advisory Opinion in a case brought before it by Mr. Jørn Ulstein and Mr. Per Otto Røiseng, the plaintiffs, against Mr. Asbjørn Møller, the defendant.

II. Legal background

2. The questions presented by the Norwegian court concern the interpretation of *Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses* (hereafter, the directive). The directive is referred to in Point 23 of Annex XVIII to the Agreement on the European Economic Area.

3. The case before the Norwegian court concerns a dispute between the plaintiffs and the defendant as to whether there has been a transfer of an undertaking, business or part of a business to another employer within the meaning of Article 1(1) of the directive. The background of the dispute is that the plaintiffs' former employer Hammer Syketransport held a contract with the Nord-Trøndelag County Municipality to provide ambulance services until 31 December 1995. In the autumn of 1994 the municipality issued an invitation to tender which led to the defendant entering into a contract with the municipality for the provision of ambulance services for a five year period commencing 1 January 1996. After obtaining this contract, the defendant employed

some of Hammer Syketransport's employees but not the plaintiffs. The plaintiffs claim, *inter alia*, that the defendant is obliged to employ them as ambulance personnel with the ambulance service.

4. *The directive* states *inter alia*:

Preamble / first and second recital

"...Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

...

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement....

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.

...

Article 4 (1)

1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce."

III. Questions

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

“1 Is Council Directive 77/187/EEC to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations were there is some form of contract between the transferor and the transferee?

2 Is the mentioned Council Directive to be interpreted in such a way that the expression quoted under point 1 above implies that the transferee must take over property or moveables from the transferor?

3 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if some, but not all employees of the transferor are employed by the transferee?

4 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if an assignment is awarded according to the rules governing tender and the provision of the service is limited in time?”

IV. Facts

6. The Inderøy herredsrett describes the facts of the case as follows:

"Until 1 January 1996 a company, Hammer Syketransport, had a contract with Nord-Trøndelag County Municipality ("Nord-Trøndelag fylkeskommune") for ambulance service, *inter alia* in the municipalities Verdal, Frosta and Levanger in Nord-Trøndelag. The company had a similar contract for the operation of the ambulance service in the region of Steinkjer. The company had no other activities. Hammer Syketransport held the ambulance service contract for the period from 1 January 1990 to 31 December 1995, when the contract terminated pursuant to its own paragraph 3.3.

Nord-Trøndelag County Municipality owns and manages Innherred Hospital ("Innherred sykehus") in Levanger, which provides service to the above-mentioned municipalities, and has a responsibility to provide the ambulance service, pursuant to Section 2 of the Hospital Act ("sykehusloven") of 19 June 1969 No. 57.

Hammer Syketransport operated the ambulance service for an agreed amount, *inter alia* in the above-mentioned municipalities. The company maintained a fleet of equipped ambulance vehicles and paid the drivers and other personnel. There are certain requirements as to how the ambulances shall be equipped and arranged. Furthermore, there are requirements regarding the education and qualifications of the personnel.

Both plaintiffs were employed with Hammer Syketransport: Per Otto Røiseng since 6 June 1976, and Jørn Ulstein since 1 March 1991.

Nord-Trøndelag County Municipality issued an invitation to tender for ambulance service in the autumn of 1994. The reason why the County Municipality instituted a tender competition is not

stated in the case. Hammer Syketransport lost the contract following the tender process. Hammer Syketransport ceased to exist from 1 January 1996. On 2 June 1995 Nord-Trøndelag County Municipality concluded an agreement with the defendant under which he would provide the ambulance services in the three municipalities, starting 1 January 1996 for a five-year period, with an obligation to have two 24-hour stand-by ambulance vehicles, of which one vehicle would be ready for turn-out within a maximum of 5 minutes, and one vehicle would be ready for turn-out within 15 minutes. The vehicles would be stationed in Levanger. The amount of the tender is not stated.

The defendant has not taken over any assets from Hammer Syketransport. Some of the employees, but not the two plaintiffs, have become employees of the defendant.

The defendant runs the ambulance service himself. He also plans to provide training in first aid for companies interested in such assistance.

The plaintiffs were both dismissed from Hammer Syketransport on 27 June 1995, effective 31 December 1995, with a reference to the 'termination of the ambulance service'.

The defendant made an offer to some, but not all, of the employees of Hammer Syketransport, to continue as ambulance personnel with the defendant, instead of with Hammer Syketransport. The defendant also posted information in the ward office of Hammer Syketransport about the ambulance service after 1 January 1996. On 4 August 1995, both plaintiffs applied for positions as ambulance employees after 1 January 1996.

On 14 August 1995, the defendant informed the two plaintiffs that he had no position for them. No reasons were given other than that there was no need for more employees.

The defendant has hired a total of seven men, all after individual applications, including two not connected with Hammer Syketransport. In addition, he takes some shifts himself. All of the others who were hired are former employees of Hammer Syketransport. The number of employees with Hammer Syketransport is not stated in the case. The employees are remunerated under a collective wage agreement."

V. Written observations

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

Mr. Jørn Ulstein and Mr. Per Otto Røiseng, represented by Counsel Ms. Gunvor Bryn Haavik, lawyer for the Norwegian Confederation of Municipal Employees (Kommunalansattes Fellesorganisasjon);

- Mr. Asbjørn Møller, represented by Counsel Mr. Per Solem;
- The Government of the United Kingdom, represented by Mr. John E. Collins, Treasury Solicitor's Department, acting as Agent, and Mr. Clive Lewis, Barrister;
- The EFTA Surveillance Authority, represented by Mr. Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Mr. Trygve Olavson Laake, Officer of that Department;

- The Commission of the European Communities, represented by Mr. Hans Gerald Crossland and Ms. Maria Patakia, Members of its Legal Service, acting as Agents.

8. All the questions in the Request for an Advisory Opinion deal with the concept of "transfer of undertaking" under Article 1 of Council Directive 77/187/EEC.

Mr. Jørn Ulstein and Mr. Per Otto Røiseng

First question

9. The plaintiffs state, that according to the case law of the EC Court of Justice, the directive is applicable even if there is no direct contractual relationship between the old and the new owner of the enterprise (*Tellerup* v *Daddy's Dance Hall*).[1] It is pointed out that the triangle relationship which is dealt with in that case has many parallels to a tender situation. The plaintiffs submit that, given the *Tellerup* v *Daddy's Dance Hall* case, the requirement that a transfer takes place in the context of a contractual relationship in *Berg* v *Besselsen* and *Bork International* v *Foreningen af Arbjedsledere i Danmark*[2], does *not* mean that there must be a *direct* contractual relationship between the previous and the new employer.

10. The plaintiffs stress that in the case at hand, the expiration of a fixed-term contract with the Nord-Trøndelag County Municipality led to the termination of the activities of Hammer Syketransport, and that it is a contract between Asbjørn Møller and the municipality that is the basis for Møller's activities. The transfer may therefore be said to have taken place in the context of a contractual relationship.

11. As regards to what transfer situations are covered by the directive, reference is made to *Redmond Stichting*[3]. It is pointed out by the plaintiffs that in the *Redmond Stichting* case the transfer was not based on any direct contract between the former and the new employer.

12. The plaintiffs propose the following answer to the first question:

“Council Directive 77/187/EEC is not to be interpreted in such a way that the expression "transfer of an undertaking, business or part of business" in Article 1(1) only covers situations where there is some form of contract between the transferor and the transferee.”

Second question

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1 Case C-324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739.

2 Joined cases 144 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559 and Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057.

3 Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189. See also Joined Cases 171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys* v *Ford Motors Company Belgium SA* (paragraph 30) in this context. (Judgment from 7 March 1996, not yet reported in the ECR).

13. The plaintiffs point out that according to *Spijkers* v *Benedik*[4] the decisive criterion is whether the economic entity in question retains its identity after the transfer. In order to determine whether the identity is retained one must consider all the criteria listed in paragraph 13 of that judgment. The list is not exhaustive and none of the individual factors mentioned are decisive one way or the other. Each of these factors is to be treated as a single factor in the overall assessment and therefore cannot be considered in isolation.

14. Furthermore, it appears from the operative part of the judgment that the economic entity in question must be considered to have retained its identity, if the new employer actually continues or resumes the operation with the same or similar activities *(Spijkers* v *Benedik*, *Schmidt*[5] and *Redmond Stichting).*

15. According to the case law of the EC Court of Justice a transfer of assets is not necessary for a transaction to fall within the scope of the directive (*Schmidt*, *Merckx*[6] and *Redmond Stichting*). It is also pointed out that avoiding the transfer of assets could, in certain cases, be used in an attempt to prevent the application of the directive.

16. The answer to the second question should therefore, according to the plaintiffs, be the following:

“The expression "transfer of an undertaking, business or part of a business" in Council Directive 77/187/EEC is not to be interpreted in such a way that the expression implies that the transferee must take over property or moveables from the transferor.”

Third question

17. The plaintiffs refer to *Spijkers* v *Benedik* and state that the majority of the employees being taken over by the transferee is one of the relevant factors in deciding whether or not the identity is retained. However, this specific factor is not decisive. If it were decisive, the transferee could attempt to bypass the directive by not taking over a majority of the employees of the transferee.

18. One relevant criterion in determining whether the identity has been retained is whether the new employer needs employees with the same background as the employees of the former employer. For example, when the new owner, like the former owner, is in need of ambulance personnel, this is one factor that indicates identity has been retained.

19. If the employees are not all offered employment with the transferee, this may be due to economic, technical or organisational reasons entailing changes in the workforce. It follows from Article 4(1) of the directive that the transfer of an undertaking does not prevent dismissals for such reasons.

20. The plaintiffs propose that the answer to the third question should therefore be**:**

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[4] Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119.

[5] Case C-392/92 *Schmidt* [1994] ECR I-1311

[6] Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* v *Ford Motors Company Belgium SA*, see footnote 3.

“The fact that some but not all of the employees of the transferor are taken over by the transferee is not decisive in determining whether a transfer within the meaning of the directive has taken place.”

Fourth question

21. The plaintiffs assume that *Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts* does not require the provision of ambulance services to be put out for tender. The answer to the fourth question must be the same regardless of whether there is an obligation to invite tenders or not. The wording of Council Directive 77/187/EEC does not indicate that the directive should not be applicable in a tender situation.

22. The objective of the directive argues against letting the actual form of the transfer prevent it from being considered as a transfer of an undertaking within the meaning of the directive. In those cases where there is an obligation to invite tenders, the obligation is linked to the value of the contract. To exclude tender situations from the scope of the directive in cases where invitations to tender are obligatory would make the employees' rights dependent on the value of the contract. This cannot have been the intended objective of the directive.

23. Allowing the directive to apply in a tender situation does not impede free competition any more than any other statutory provision on the protection of workers' rights.

24. The fact that the contract is time-limited cannot be decisive for the application of the directive, especially when the tasks which are to be carried out are of a permanent nature. For example, the tasks that are carried out in providing ambulance services.

25. The plaintiffs are accordingly of the opinion that the answer to the fourth question should be:

“The fact that an assignment is awarded in accordance with the rules governing tender is not decisive for the interpretation of Council Directive 77/187/EEC. It is insignificant in this connection that the assignment is limited in time, as long as the tasks which are to be carried out are of a permanent nature.”

Mr. Asbjørn Møller

26. The defendant refers to the preparatory work relating to the implementation of the directive into Norwegian national law and points out that the situation relating to a tender competition was not explicitly considered. The tender situation is also not discussed in the preparatory work on the directive. He concludes that if the directive was meant to cover tender situations, this would have been discussed in the preparatory work. Should the provisions regarding the transfer of undertakings be applicable to tendering, this will have major consequences for industries that are dependent upon competition. The tendering system could easily disappear for the simple reason that it will be impossible to submit a tender. If the tenderer risks being obliged to take over one or more of the employees of his or her competitor, there will be an element of uncertainty which will make it impossible to submit a tender. Such applicability would also come into conflict with the aim of the EEA Agreement on equal conditions of

competition based upon the principles of free movement of goods, persons, services and capital. Such rules would also be contrary to the regulations regarding public procurement, where the purpose is to prevent lengthy contracts that lead to a limited number of suppliers monopolising a business.

27. The defendant refers to the case law of the EC Court of Justice and submits that certain factors have emerged from the case-law that are important for the overall assessment which has to be made. In *Spijkers* v *Benedik*[7] the EC Court of Justice stated that there must be "an economic entity which has retained its identity". Further, in *Berg* v *Besselsen*[8] the Court stated that the transfer must occur on "the basis of an existing" contract. Finally, the defendant refers to *Bork International* v *Foreningen af Arbjedsledere i Danmark*[9] where the Court stated that the transfer must take place in "the context of an existing" contract.

28. The defendant submits that *Rygaard* v *Strø Mølle Akustik*[10] is one of the few judgments of the EC Court of Justice which may have relevance to the case at hand. He is of the opinion that the approach in *Rygaard* should be adapted by the EFTA Court.

29. The defendant further refers to case law in Norway and Sweden in support of his views, including two Norwegian cases with advisory opinions of the EFTA Court pending.[11]

30. The defendant points out that the plaintiffs have presented a number of judgments from the EC Court of Justice in support of their view. In his opinion none of these are relevant since the factual circumstances are different from the case at hand. It is noted that the defendant did not take over any vehicles, moveable property, buildings or other assets from the previous provider of the ambulance services.

31. In the view of the defendant the Court should base its assessment upon the following facts: (A) The previous provider of the ambulance services, Hammer Syketransport, had a time-limited contract and no claim to continue the business at the expiration of the contract; (B) It was only parts of the assignments that Hammer Syketransport had previously carried out that were put out for tender; (C) Hammer Syketransport still existed after the defendant was awarded the contract and the winding up of this business at a later date, due to a lack of work, has no relevance; (D) The five former employees of Hammer Syketransport who were hired by the defendant were hired on the basis of individual, independent applications and not by automatic transfer from the previous employer; (E) There has never been any contractual relationship between the defendant and Hammer Syketransport; (F) No assets of Hammer Syketransport were taken over by the defendant and in no way can what has taken place be compared to a change of owner; (G) The defendant's business is a new project which focuses as much on prevention and safety as it does on pure transport of injured and sick persons and as such is clearly distinct from the business of Hammer Syketransport; and (H) The defendant has concluded a time-limited

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7 See footnote 4.

8 See footnote 2.

9 See footnote 2.

10 Case C-48/94 *Rygaard* v *Strø Mølle Akustik AS* [1995] ECR I-2745.

11 Case E-2/95 *Eidesund* v *Stavanger Catering A/S* and Case E-3/95 *Langeland* v *Norske Fabricom A/S*.

contract with the Nord-Trøndelag County Municipality for five years commencing 1 January 1996, with no right of extension.

32. If the term transfer of an undertaking is to be applied in the manner claimed by the plaintiffs, this must follow from new legislation and not from interpretation. There is no support in existing legal theory or practice for such an interpretation.

33. With reference to the statements above the defendant requests the EFTA Court to give the following answers to the questions referred:

"1. It is a precondition for the application of EC Council Directive 77/187 that there has been some form of contract between the transferor and the transferee.

2. It is not a precondition for the application of the Council Directive that the transferee has to take over property or movables from the transferor, but if such a take-over has taken place, this factor must be included in an assessment of whether the directive is applicable.

3. If employees are transferred without applying for a new position with the transferee, this clearly indicates that the transfer of an undertaking has taken place.

4. The Council Directive is not applicable when an assignment is awarded in accordance with the rules governing tender and the provision of the service is limited in time."

The Government of the United Kingdom

34. The Government of the United Kingdom submits that the questions deal with two issues: (1) whether the directive is to be interpreted in a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some form of contract between the transferor and the transferee, and (2) what is the relevance of certain specified factors (the transfer of property or moveables, the transfer of some but not all employees, the fact that the services are assigned under a tendering process and for a limited period) in assessing whether there has been a transfer of an undertaking within the meaning of the directive.

35. Concerning the first issue the Government of the United Kingdom submits that it is settled case law of the EC Court of Justice that for the directive to be applicable "it is not necessary for there to be a direct contractual relationship between the transferor and the transferee" (*Merckx*[12], *Tellerup* v *Daddy's Dance Hall*[13], *Redmond Stichting*[14] *and Bork*[15]). The Government of the United Kingdom therefore suggests that the first question can be answered by stating that in circumstances where services are provided under contract between a municipality and a company, and that contract ceases, and the municipality then enters into another contract with a second company, the absence of a direct contractual relationship between the first and a

[12] See footnote 3.

[13] See footnote 1.

[14] See footnote 3.

[15] See footnote 2.

second company does not preclude the application of the directive, provided that there is a transfer of a stable economic entity which retains its identity.

36. Concerning the second issue, the Government of the United Kingdom, *inter alia*, refers to the formula established in *Spijkers* v *Benedik*[16]. It is submitted that the existing case law of the EC Court of Justice provides a clear indication that the individual elements identified by the requesting court are relevant factors in considering whether a transfer has taken place, but no single element by itself is a decisive factor. On the basis of this conclusion the Government of the United Kingdom submits that the requesting court should be invited to apply the detailed criteria formulated by the EC Court of Justice in *Spijkers* v *Benedik* to the facts of this case and determine whether there has been a transfer within the meaning of the directive.

[16] See footnote 4 (paragraph 13).

37. The Government of the United Kingdom proposes the following answer:

"As regards question 1, Council Directive 77/187/EEC is not to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some form of contract between the transferor and the transferee.

As regards question 2,3 and 4, the decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Council Directive 77/187/EEC is whether the business in question retains its identity as an economic entity. In order to determine whether that is the case, the national court must consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."

The EFTA Surveillance Authority

38. The EFTA Surveillance Authority emphasises the prime objective of the directive by referring to its preamble. Even if the preamble, where the social objective is emphasised in general terms, states that the directive was prompted by changes in the structure of undertakings caused by economic trends, a corresponding limitation of the directive's potential is not reflected in the operative text or in the judgments delivered by the EC Court of Justice.

39. The EFTA Surveillance Authority maintains that the EC Court of Justice has systematically given a broad interpretation to the expression "legal transfer" (*Redmond Stichting*[17], *Schmidt*[18] *and Botzen*[19]). It is noted in particular that the concept of legal transfer does not presuppose that ownership is transferred; furthermore, a transfer may come within the scope of the directive even if it does not take place directly between the previous employer and a new one as long as it takes place in the context of contractual relations.

40. As to the type of activities that fall under the directive, the EFTA Surveillance Authority states, referring to its summary of the case law of the EC Court of Justice, that the subject matter of the transfer must be a business constituting an organisational unit with its own identity. It is pointed out that the EC Court of Justice has found activities such as canteen services and cleaning services capable of coming within the scope of the directive (*Watson Rask and Christensen*[20]).

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[17] See footnote 3.

[18] See footnote 5.

[19] Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519.

[20] Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

41. The EFTA Surveillance Authority also notes that the EC Court of Justice has identified a number of factors that may be taken into account when determining whether a legal transfer has resulted in a "transfer of an undertaking, business or part of a business to another employer". In general terms, the EC Court of Justice has found this to be the case where the economic unit in question retains its "identity". When making this determination, the Court repeatedly refers to the following characteristics: the type of undertaking or business concerned, whether or not tangible assets are transferred, the value of the intangible assets, whether or not the majority of the employees is taken over, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which the activities were suspended (*Spijkers* v *Benedik*[21] and *Bork International* v *Foreningen af Arbjedsledere i Danmark*[22]).

42. With regard to the over-all assessment that must be made in order to determine whether a transferred business has retained its identity, the EFTA Surveillance Authority notes that the EC Court of Justice has recognised that identity may be maintained, and hence there may be a transfer for the purpose of the directive, even if no assets are taken over by the transferee. Furthermore while the continuation of a business with the same staff after a transfer may be a strong indication of the identity being preserved, it is also clear from the EC Court of Justice case law, that a transfer may well fall within the scope of the directive, even if the majority of the employees engaged in the business before the transfer are not re-employed by the transferee.

43. In considering the question of identity, the subject matter of the transaction must be seen as a whole, comprising of the employees, the organisational structure and the assets used for carrying out the activities. The relative importance of these elements is bound to vary. A transaction in which an undertaking entrusts a service to a provider does not in itself lead to the conclusion that it falls under the terms of the directive. Nevertheless, it may be so in some circumstances.

44. The EFTA Surveillance Authority recognises that it must be for the national court to establish the facts of the case. It notes, however, that in this case the ambulance service seems to have been continued without interruption, that some of the employees of the previous service provider were re-employed by the new one and that the change of service provider was brought about in the context of contractual relations. While these circumstances are obviously relevant, and could also be taken to indicate that the transaction may be such as to come within the scope of the directive, the EFTA Surveillance Authority notes that there are also facts that could be seen as indications to the contrary (e.g. the fact that no assets were taken over). Above all, there are a number of other important facts that need to be established before a conclusion as to retention of identity can be reached. Findings of fact such as the manner in which the services were in fact organised before and after the change of service provider and the extent to which, if any, equipment and/or personnel were used for other activities than the ambulance services concerned, in the EFTA Surveillance Authority's opinion, would clearly be of relevance to the issue of identity.

45. The EFTA Surveillance Authority then proceeds with analysing separately each of the questions put forward by the requesting court. On the basis of the case law of the EC Court of Justice the EFTA Surveillance Authority proposes an answer in the following terms:

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[21] See footnote 4.

[22] See footnote 2.

"1. Article 1(1) of the Act referred to in point 23 of Annex XVIII to the Agreement on the European Economic Area (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees´ rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so as to mean that a transfer may come within the scope of the Act even if it does not take place directly between the previous employer and the new one, but through a third person, without there being any contractual relations between the two employers;

2. Article 1(1) of the Act is to be interpreted so as to mean that, although the taking over or not of assets is relevant in determining whether or not a transaction constitutes a transfer for the purpose of the Act, the fact that no assets are taken over does not in itself preclude the Act from applying;

3. Article 1(1) of the Act is to be interpreted so as to mean that the significance for the application of the Act in any given case of employees of the transferor being re-employed by the transferee is to be assessed in the light of all circumstances characterizing the transaction in question and that the fact that only some of the former employees are in fact re-employed does not preclude the Act from applying;

4. Article 1(1) of the Act is to be interpreted so as to mean that, in the case of the transfer of a contract for the provision of services, the facts that the transfer is preceded by a tender procedure and that the contract is for a limited period of time do not preclude the transfer from coming within the scope of the Act."

The Commission of the European Communities

46. The directive does not, according to the Commission of the European Communities, contain any express definition of transfer of an undertaking. The basis for the case law of the EC Court of Justice was put forth in its judgement in *Spijkers* v *Benedik*[23]. In the Commission's opinion, it follows from this judgement that two conditions must be met. First, the undertaking must constitute a business with its own identity, and second, that business and its identity must be preserved after the change of ownership. If either of these conditions is not met, there is no transfer within the meaning of the directive.

47. In order to assess whether these conditions are met, the EC Court of Justice laid down further criteria as listed in paragraphs 13 and 14 in *Spijkers* v *Benedik*. The same approach, it is submitted, is followed in subsequent judgments. The Commission then proceeds to analyse this case law. The criteria expressed by the EC Court of Justice in *Spijkers* v *Benedik* is examined in each individual case to determine if there has been a transfer within the meaning of the directive. The Commission refers to the following cases: *Watson Rask and Christensen*[24]*, Redmond Stichting*[25] and *Rygaard* v *Strø Mølle Akustik*[26].

[23] See footnote 4.

[24] See footnote 20.

[25] See footnote 3.

[26] See footnote 10.

48. Based on this case law, the Commission considers it helpful to distinguish between three categories or types of situations, differentiated by the degree to which the substance of what is transferred between undertakings is tangible. The first category consists of businesses with means of production, such as a company's locksmith's workshop. The second consists of businesses offering a service which involves principally the use of non-material assets, such as knowledge and experience. The third category consists of businesses providing services where no specific knowledge, experience or expertise is required, such as "cleaning services and the care of children".

49. According to the Commission, there is usually no difficulty in determining the existence of a business with its own identity in the first category. In the case of the second category, it is necessary to determine whether the knowledge or other assets can be delimited from an organisational point of view. What matters is whether the functions, within the same or similar activities, are carried out by the new legal person. If they are of a special nature, constituting an independent function, they may fall under the directive. In the case of the third category, the Commission submits that the central element is the work force and the somewhat unskilled work they perform. If the staff is disposed of in its entirety together with the order book, goodwill, client relationship, organisational structure etc., a business with its own identity can be said to exist, even if it is difficult to determine when this is so. The Commission carries its analysis further by contrasting *Watson Rask and Christensen* against *Rygaard* v *Strø Mølle Akustik*. The conclusion of this analysis is that if services are continually provided by the same members of the staff, the group to which they belong may be regarded as a distinct business which falls under the terms of the directive.

50. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. The Commission mentions, in connection with the first question, that if the situation is merely that the first company provides the service in question and subsequently another does so, there cannot be a transfer of the business in the absence of a disposal from one to another of the structure of the activity or in the absence of equipment or staff being taken over. The existence of a contract between the companies is a factor to be taken into account in determining whether or not there is a business with its own identity which has been transferred to the new company whilst retaining its identity. The existence of such a contract is not, however, conclusive, and must be considered in the light of the business arrangement as a whole. With regard to the second question, the Commission submits that neither taking over property nor taking over moveables, nor the fact that property and/or moveables are not taken over, is conclusive by itself. With regard to the third question, the Commission states that Article 4(1) of the directive provides that the transfer of an undertaking, business or part of a business does not itself constitute grounds for dismissal. Nevertheless, that provision is not to stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. The dismissal of staff may therefore be in compliance with the directive, and even if it is not, non-compliance cannot affect the existence of a transfer for the purposes of the directive. In response to the fourth question, the Commission concludes that the fact that a contract is awarded in accordance with the rules governing tenders can have no bearing on the applicability or interpretation of the directive. The text of the directive gives no room for believing that a particular type of contract falls outside its applicability. The purpose of the directive leads to the same conclusion. The fact that the contract for provision of services is limited in time has no bearing on the applicability or interpretation of the directive. The Commission points out that fixed-term contracts such as leases have been held to fall within the

scope of the directive (*Ny Mølle Kro*)[27], and that in *Rygaard* the situation was held not to be a transfer, not because of the limited duration of the task, but because no economic entity with its own identity passed from one employer to another. The Commission concludes that the factors relevant in determining whether or not there is a transfer within the meaning of the directive do not include the formal length of one or more of the contracts involved.

51. The Commission proposes the following answers to the questions:

"1. The expression "transfer of an undertaking, business or part of a business" in Directive 77/187/EEC is not restricted to situations where there is a direct contractual relationship between the transferor and the transferee.

2. The expression referred to in point 1 is similarly not restricted to situations where the transferee takes over property and/or moveables from the transferor. The taking over of property and/or moveables, is one of the factors to be taken into account in determining whether or not there is a transfer within the meaning of the Directive, but it is not a conclusive factor.

3. The fact that some but not all employees of the transferor are employed by the transferee is also one of the factors to be taken into account in determining whether or not there is a transfer within the meaning of the Directive. Once again it is not a conclusive factor.

4. The fact that a contract is awarded in accordance with the rules governing tenders and the fact that a contract for the provision of services is of limited duration have no bearing on the interpretation of the Directive."

Thór Vilhjálmsson
Judge-Rapporteur

[27] *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465.

ADVISORY OPINION OF THE COURT
25 September 1996*

(Council Directive 77/187/EEC – transfer of part of a business – transfer of rights to pension benefits)

In Case E-2/95,

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 Gulating lagmannsrett (the Gulating Court of Appeals), Norway, for an Advisory Opinion in the case pending before it between

Eilert Eidesund

and

Stavanger Catering A/S

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,

THE COURT,

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

Registrar: Per Christiansen,

after considering the written observations submitted on behalf of:

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* Language of the request for an advisory opinion: Norwegian.

– Eilert Eidesund, represented by Bent Endresen, Advocate, Stavanger;

– Stavanger Catering A/S, represented by Einar Østerdahl Poulsson, Advocate, Oslo;

– the Government of Sweden, represented by Erik Brattgård, Assistant Under-Secretary, Ministry for Foreign Affairs, Trade Department, acting as Agent;

– the Government of the United Kingdom, represented by John Collins, Treasury Solicitor's Department, acting as Agent, assisted by Eleanor Sharpston, Barrister;

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director of its Legal & Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;

– the EC Commission, represented by Hans Gerald Crossland and Maria Patakia, both Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eidesund, Stavanger Catering A/S, the Government of Sweden, the Government of the United Kingdom, the EFTA Surveillance Authority and the EC Commission at the hearing on 7 May 1996,

gives the following

Advisory Opinion

Facts, legal background and the questions referred to the Court

1 By an order dated 27 November 1995, registered at the Court on 29 November 1995, Gulating lagmannsrett (the Gulating Court of Appeals) in Norway made a request for an Advisory Opinion in a case brought before it by Mr Eilert Eidesund (hereinafter "Eidesund"), appellant, against Stavanger Catering A/S ("Stavanger Catering"), a Norwegian company, respondent.

2 The questions referred by the Norwegian court concern the interpretation of Council Directive 77/187/EEC on the approximation of the laws of the Member

States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the EEA Agreement. The Directive is thus, according to Article 2(a) of the Agreement, to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it. According to Article 6 of the EEA Agreement and Article 3(2) of the Surveillance and Court Agreement the jurisprudence of the EC Court of Justice ("the ECJ") is therefore relevant when interpreting the provisions of the Directive.

3 The following questions were referred to the EFTA Court:

"5.1 Does the termination of a catering contract with one company and the signing of a new catering contract with another company fall under Council Directive 77/187 No 1, when no condition is made in the contract that equipment and/or employees are also to be taken over?

5.2 Will it make any difference to the answer to question 5.1 if the new catering company takes over the employees and the stocks?

5.3 Will it make any difference to the answer to question 5.1 if the contract falls under Council Directive 77/62, 80/767 and 88/295 on the award of public supplies contracts?

5.4 Do rights under Article 3 paragraph 1 and 2 also include the right to uphold insurance schemes, including pension schemes, with the new employer that the employee had with the employer who lost the contract?

5.5 Will the answer to question 5.1 be different in cases where:

a) employees of the original catering company apply the normal way for and after competing are employed in positions in the new catering company, and

b) there is an agreement between the new catering company and the old catering company, or between the principal and the new catering company, to the effect that the employees are also to be taken over?"

4 By orders of 5 October and 27 November 1995, received at the Court Registry on 1 December 1995, Stavanger byrett (the Stavanger City Court) in Norway made a request to the EFTA Court for an Advisory Opinion in a case brought before it by Mr Torgeir Langeland against Norske Fabricom A/S. This request was registered at the Court as Case E-3/95 and concerns the interpretation of the same Directive. Although the two cases were not joined for the purposes of the hearing or the Court's opinions, oral hearings in the two cases were held consecutively on 7 May

1996, with the common understanding that arguments made in one case may also be considered in the other without the need for repetition. The advisory opinions in the two cases are delivered simultaneously. For the sake of convenience the Court's findings are included in full in both opinions.

5 The case before Gulating lagmannsrett concerns a claim of Eidesund to the effect that his present employer Stavanger Catering shall pay certain pension insurance premiums. Eidesund's former employer, Scandinavian Service Partner ("SSP"), had paid these premiums into an insurance scheme, apparently on the basis of a local collective agreement with its employees.

6 SSP provided catering and cleaning services to a number of customers, including the operator of an oil drilling platform in the North Sea. A total of 19 persons were employed by SSP to perform the services on the platform. Following a tender procedure, Stavanger Catering obtained a contract to provide the same services on the platform that had previously been provided by SSP. After obtaining this contract, Stavanger Catering offered 14 of the 19 employees, including Eidesund, continued work on the platform, but refused to pay the pension insurance premiums.

7 The primary legal questions before the Court are whether the replacement of a service provider following a tender procedure constitutes a transfer of an enterprise, business or part of a business within the meaning of the Directive, and, if so, whether the transferee is under a legal obligation to pay the premiums for a supplementary pension scheme which was provided by the previous employer, but which is outside the mandatory State social security system.

8 The facts of the case and the procedure before Gulating lagmannsrett are further described in the Report for the Hearing.

9 The first and second recital of the Directive's preamble reads:

> "Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;
>
> Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;"

10 Article 1(1) of the Directive provides:

> "1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

11 Article 3 of the Directive provides:

"1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

12 Article 4 of the Directive provides:

"1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship."

General remarks

13 The relevance of national legislation and decisions by national courts of law has been the subject of discussion, both in the written observations and at the oral hearings.

14 In the case of advisory opinions, as opposed to direct actions before the Court, the sole task of this Court is to interpret provisions of EEA law. It is not the role of this Court in such cases to interpret provisions of national law or to ascertain to what extent provisions of EEA law have been transposed into national law. Nor is this Court in any way bound by findings or decisions by national courts of law.

15 However, in the interpretation of EEA law, it may be a factor of some interest to ascertain how the different Member States have demonstrated, through their implementation into national law of EEA legal provisions, how they perceived and interpreted those EEA legal provisions which the Member States have adopted and which the Court is called upon to interpret. In connection herewith, the interpretation and application by national courts of implementing national legislation may cast light on the contents given to that legislation by the state's legislators. Obviously, how much reliance is to be placed on a national court decision will depend on whether the decision stands out as representative, as does, for instance, an authoritative interpretation given by the highest court of appeals in the country in question.

Whether there is a transfer of undertaking, business or part of a business.

16 Questions 5.1, 5.2 and 5.5 in the request for an Advisory Opinion all concern the concept of transfer of an undertaking, business or part of business within the meaning of Article 1(1) of the Directive.

17 In the present case the alleged transfer of an undertaking or business followed a tender procedure where Stavanger Catering obtained a five-year, time-limited contract to provide certain catering and cleaning services on board the Eko Alpha platform ("the platform") in the North Sea which had previously been provided by SSP under a similar, time-limited contract. Eidesund, who had worked on the platform since 1985, was dismissed by SSP on 16 February 1996 but was at the same time offered, and accepted, employment with the new contractor.

18 *Eidesund* underlines that catering services form a necessary part of the activity on an oil platform and submits that when an ongoing service activity is transferred from one employer to another, it cannot be decisive for the rights of the employees that a transfer takes the form of a change of contractor for the supply of services. The employees' need for protection of their interests is the same. Eidesund

emphasises that it is a well established practice that workers on North Sea platforms are given the opportunity to continue in the service of the new employer.

19 At the oral hearing Eidesund further stated that the work on the platform requires special skills because of the conditions at sea. He also underlined that a majority of the workers continued their work, without interruption, as employees of a new service provider, although for the same platform operator. According to Eidesund, an overall assessment based on the relevant case law of the ECJ results in the conclusion that there was, under the specific circumstances of the case, a transfer within the meaning of the Directive.

20 *Stavanger Catering* maintains that the replacement of a contracting party in this way has a number of special features which make it fundamentally different from a transfer of an undertaking within the meaning of the Directive. Its further arguments on this point are set out in the Report for the Hearing.

21 The Report also summarises Stavanger Catering's remarks on what it sees as disadvantages of considering these transactions as a transfer within the meaning of the Directive, in particular the impediment to competition and the adverse effect on long-term personnel policy. At the oral hearing Stavanger Catering developed its arguments in the case at hand which, according to it, is not one where an economic and organisational entity was transferred and continued to carry out work under the second contractor. It emphasised that not all the employees were engaged by the new employer, who, in its opinion, was not under an obligation to take over any of them.

22 *The Government of the United Kingdom*, *the EFTA Surveillance Authority* and *the Commission of the European Communities* do not propose a definite answer to the question of whether there has been a transfer within the meaning of Article 1 of the Directive in the present case. Instead they suggest that the Court lay down the criteria for assessment of the question, based on the case law of the ECJ, and leave it to the requesting court to make the final factual appraisal based on those criteria.

23 The ECJ has dealt with the concept of transfer in Article 1 of the Directive in numerous cases, in particular, Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519, Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465; Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739 and Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057. Of cases decided after 2 May 1992, the date of signing of the EEA Agreement: Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189, Case C-392/92 *Schmidt* [1994] ECR I-1311, Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, Case C-48/94 *Rygaard*

v *Strø Mølle Akustik* [1995] ECR I-2745, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* v *Ford Motors Company Belgium*, judgment of 7 March 1996, not yet published in the ECR.

24 Although none of these cases deal directly with the situation now before the EFTA Court, the general principles of interpretation of the Directive seem to be well established, and the decisions of the ECJ can give considerable guidance with respect to the present case.

25 As stated in the second recital of its preamble the aim of the Directive is, *inter alia*, to "provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." To that end Article 3(1) of the Directive provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee. According to Article 3(2), the transferee shall, following the transfer, continue to observe the terms and conditions agreed in any collective agreement. Furthermore, Article 4(1) provides for the protection for the employees concerned against dismissal by the transferor or the transferee on account of the transfer only.

26 It follows from the preamble and from those provisions that the objective of the Directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer as a result of a merger or a transfer of an undertaking, a business or part of a business, by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor.

27 The ECJ has consistently referred to the stated purpose of the Directive and given the concept of transfer of an undertaking a wider and more flexible interpretation than would usually be understood as the scope of the expressions "mergers" and "transfers". Thus, the ECJ has held that the Directive applies, or is not excluded from being applicable, in a case where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee (see judgment in *Ny Mølle Kro*, cited above); where a non-transferable lease of a restaurant is terminated and the owner leases it to a new lessee who carries on the business without interruption and with the same staff (see judgment in *Daddy's Dance Hall*, cited above); where the owner of an undertaking, after giving notice bringing the lease to an end or upon termination thereof, retakes possession of the undertaking and thereafter sells it to a third party who, shortly afterwards, brings it back into operation (see judgment in *Bork International*, cited above); where a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim (see judgment in *Redmond*

Stichting, cited above). In *Merckx and Neuhuys* v *Ford Motors Company Belgium* (cited above), an undertaking holding a motor vehicle dealership for a particular territory discontinued its activities and the dealership was then transferred to another undertaking which took over part of the staff and was recommended to customers.

28 Some decisions concern service functions comparable to the present case: see in particular the judgment in *Schmidt* (cited above), where a bank had entrusted by contract a cleaning company the responsibility for carrying out cleaning operations which it previously performed itself; and the judgment in *Watson Rask and Christensen* (cited above), concerning a similar arrangement for the running of a canteen.

29 From the former group of decisions it must be seen as established that the transfer can be effected in two stages and that there is no requirement that there is a direct contractual relationship between the first and the second employer. The latter group of decisions shows that where a businessman entrusts some of his business-related activity to an outside contractor, this may also constitute a transfer. Considering the wide scope of the transfer concept established through the ECJ jurisprudence, it may be concluded that a succession of two independent service contracts does not *as such* fall outside the scope of the Directive**.**

30 The fact that the new service contract was awarded as the result of a tender procedure underscores that the alleged transfer was not based on a direct contractual relationship between the former and the new service provider. However, as pointed out above, the absence of a direct contractual relationship does not exclude the applicability of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

31 As pointed out in the judgment in *Rygaard* v *Strø Mølle Akustik* (cited above), at paragraphs 15 and 16, it is clear from the scheme of the Directive and from the terms of Article 1(1) thereof that the Directive is intended to ensure continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows from the ECJ case law that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question is transferred as an ongoing concern and retains its identity, see, in particular, the judgment in *Spijkers* v *Benedik* (cited above), at paragraphs 11 and 12. According to that judgment, in order to ascertain whether that criterion is satisfied, it is necessary to consider whether the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities. The case law of ECJ also presupposes that the

transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract.

32 It is further well established that it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, and the degree of similarity between the activities carried on before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation. The elements to be considered were set out in *Spijkers* v *Benedik*, paragraph 13, and have consistently been invoked and referred to by the ECJ. It has also been consistently held that it is for the national court to perform this overall assessment in respect of the case before it.

33 The situation where an alleged transfer consists of a succession of two independent service providers calls for some general observations.

34 First, the business or part of business to be considered must be the business activity carried out by the service provider. Where the services have been carried out by an independent supplier and not by the recipient itself, there would not seem to be a basis for considering a part of the recipient's business as being transferred.

35 In the present case, although the supply of continuous canteen and cleaning services is an important and necessary ancillary function for the operation of the oil platform, the performance of these functions was not part of the operator's own business operation, and workers were not employed by the platform operator to perform these functions. The case at hand is therefore distinguishable from several of the cases decided by the ECJ, where certain functions or activities had been carried out by the business operator itself, but later had been entrusted to an independent outside supplier.

36 Secondly, for a service provider's business activity to be considered a separate economic entity it must be distinguishable from his other service activities, and normally have employees mostly assigned to that unit. The supply of services, or goods, to one among several customers would normally not qualify as a distinct part of the supplier's business within the meaning of the Directive. Correspondingly, the loss of one customer to a competing company would normally not qualify as a transfer of a business within the meaning of the Directive.

37 Thirdly, for a supply of services, or goods, to be considered a separate business there must be a certain minimum of activity and continuity. A few deliveries, or non-continuous deliveries, would hardly qualify, even if one or several employees were selected to serve a particular customer. Seen from that perspective, the present case concerns the supply of services on a continuous, round-the-clock basis for a period of several years, and the nature of the services being such that it is found convenient to train and attach a specific group of employees for the tasks to be performed.

38 Similarly, with reference to questions 5.1, 5.2 and 5.5 posed by the Norwegian court, the absence of contract conditions providing that equipment, employees and/or stocks are to be taken over does not in itself preclude the applicability of the Directive. As established by the ECJ, decisive for the conclusions will be an overall assessment of all aspects of the transaction. The taking-over of assets, employees and/or stocks may, depending on the circumstances, be important or even decisive factors in such an assessment, but the outcome of the assessment may well be that a transfer within the meaning of the Directive is found to have taken place even if one or more of the circumstances mentioned are missing.

39 The taking-over of assets may constitute an important element in the overall assessment of the transaction. Where machinery or equipment needed for the further production is taken over and used in the continued activity, it may underscore that the business is taken over as a going concern and that the identity and continuity of the business are maintained.

40 In the case at hand the services were carried out on the platform operator's premises and presumably with the main part of the equipment on the platform owned by the operator. The operator's machinery and other assets were not transferred, but the fact that the continued services were rendered on the same premises and with the same equipment as before would support a finding that the same business activity was continuing.

41 On the other hand, all linen and tableware was owned by SSP and carried SSP's logo. These were not taken over. Stavanger Catering supplied their own material, with their own logo, even small flags with the new logo placed on the canteen tables to demonstrate that the service provider had changed.

42 In connection with the new catering contract a special agreement was concluded between SSP and Stavanger Catering to the effect that the latter would take over stocks owned by SSP (food and cleaning agents) remaining on the platform. This taking-over of remaining stores of food and cleaning agents appears to be of little significance in the overall assessment. Presumably there is a continuous supply of such material which makes the taking-over of remaining stores a matter of

convenience, not important or necessary for the continuation of the service activity. But it is a matter for the national court to ascertain the facts of the case and assess its influence on the total picture.

43 Where a high percentage of the personnel is taken over, and where the previous business is characterised by a high degree of expertise of its personnel the continued activities of the personnel may support a finding of identity and continuity of the business. If the work to be performed does not require any particular expertise or knowledge, the taking-over of personnel becomes less indicative of the identity of the undertaking. The perspective here is whether the qualifications required of the personnel is of relevance for the assessment of whether a transfer has taken place. Another matter is that all categories of personnel are entitled to employment protection in the event of a transfer.

44 It may also be a matter for consideration whether the taking-over of personnel is caused by a desire to carry on the same business as before, or merely represents a convenient way for the new service provider to fill his increased need for employees to service the new contract. In that connection it may be an indication of the former if the taking-over of employees is a condition for the transfer, while an advertisement of vacancies under free competition and on the new contractor's terms may be an indication of the latter. For this reason, the procedures and basis for the taking-over of employees may be of significance for the total assessment to be made.

45 In the present case, as mentioned above, a total of 19 persons had been especially assigned by SSP to carry out the services on board the platform. Of these, 14 persons were offered, and accepted, to continue with the new contractor. However, none of the management personnel was taken over.

46 Based on the foregoing, the answer to questions 5.1, 5.2 and 5.5 is that the termination of a catering contract with one company and the signing of a new contract with another company does not as such fall outside the scope of the Directive. Nor does the absence of contract provisions to the effect that equipment and employees are to be taken over exclude the application of the Directive. However, all aspects of the matter must be taken into consideration in the overall assessment to be made. An assessment of whether the Directive applies must be made in the light of the criteria laid down in paragraphs 25 to 45 above. It is for the national court to make the necessary factual appraisal, in order to finally establish whether or not there has been a transfer within the meaning of the Directive.

Contract subject to public procurement

47 In question 5.3, Gulating lagmannsrett seeks to ascertain whether the fact that a contract falls under Council Directives 77/62/EEC, 80/767/EEC and 88/295/EEC on the award of public supplies contracts makes any difference as to the application of Council Directive 77/187/EEC in the circumstances of this case.

48 The written observations on this question are summarised in the Report for the Hearing. In brief, *the Government of the United Kingdom*, *the EFTA Surveillance Authority* and *the Commission of the European Communities* note that there is nothing in the Directive, neither in its main text nor the preamble, indicating that its scope of application should be limited by the aforementioned directives on public procurement. Furthermore, there is nothing in those directives preventing them form being simultaneously applied.

49 The Court notes that the above-mentioned directives have been replaced by Council Directive 93/36/EEC. Furthermore, the respondent before the national court points out that reference should rather be to Council Directive 90/531/EEC, replaced by Council Directive 93/38/EEC, referred to in point 4 of Annex XVI to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 7/94 of 21 March 1994, see also Parliament and Council Directive 94/22/EC, referred to in point 12 of Annex IV to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 19/95 of 5 April 1995.

50 It is not clear from the facts presented to the Court whether the above-mentioned public procurement directives apply to the present situation. However, the Court notes that the Directive by its wording and purpose is general in its application. There is nothing in the case at hand which would justify a restriction in its application.

Interpretation of Article 3(3) of the Directive

51 It will be recalled that question 5.4 is formulated as follows:

"Do rights under Article 3 paragraph 1 and 2 also include the right to uphold insurance schemes, including pension schemes, with the new employer that the employee had with the employer who lost the contract?"

52 As a starting point there would seem to be little doubt that the expression "The transferor's rights and obligations arising from a contract of employment or from an employment relationship" in Article 3(1) includes rights and obligations in respect of insurance schemes vis-à-vis its employees. Some questions of application and adaptation may arise as a result of the transfer itself, for instance, where an insurance scheme is limited to employees of a certain company or group of companies and cannot be extended to an employee no longer in the service of that company or group of companies. However, the question relates in essence to the interpretation of Article 3(3), first subparagraph. It will be recalled that this provision reads as follows:

"Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States."

53 More specifically, the question is whether this provision excludes from automatic transfer to the transferee an obligation to pay premiums to a supplementary pension scheme which the transferor was under an obligation to pay by virtue of its employment relationship to the employee.

54 The arguments put forward in the written comments to the Court are summarised in the Report for the Hearing. At the oral hearing held on 7 May 1996 these arguments were developed further and will be set out below to the extent necessary.

55 *Eidesund* is of the opinion that the exception contained in Article 3(3) of the Directive does not apply to payments of insurance premiums to supplementary pension schemes. *The Government of Norway* and *the Government of Sweden* are of the same opinion and so is *the EFTA Surveillance Authority*. *The Government of the United Kingdom*, on the other hand, concludes that this clause, by necessary implication, exempts the transferee from paying premiums of this type. This view is shared by *Stavanger Catering* whose further arguments are set out in the Report for the Hearing. *The Commission of the European Communities* proposes to construe Article 3(3) in accordance with the general purpose of the Directive which is to protect the rights of employees as far as possible in the event of a

transfer. Any limits to or exceptions from this protection should therefore be interpreted in a restrictive way. The Commission points out, however, that as much as Article 3(3), first subparagraph, excludes certain rights from automatic transfer, employees are not necessarily deprived of all protection. The second subparagraph of Article 3(3) instead imposes an obligation on the Member States to protect the interests of employees regarding certain of these rights.

56 The Court notes that no decision of the ECJ directly concerns the scope of the exception clause in Article 3(3). The interpretation must be made on the basis of recognised methods of interpretation, bearing in mind that the ECJ, in its construction of the Directive, has consistently referred to the aim of the Directive to "ensure, as far as possible, that the employment relationship continues unchanged with the transferee" after the transfer, see, for instance, Case 19/83 *Wendelboe* v *L.J. Music* [1985] ECR 457, paragraph 15, and that the same conditions as those agreed with the transferor should continue with the transferee after a transfer, see Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventor* [1985] ECR 2639.

57 The wording "employees' rights to old-age, invalidity or survivors benefits" in Article 3(3), first subparagraph, is not clear.

58 Even a narrow interpretation would seem to cover current payments to the beneficiary when or if payments become due under the supplementary pension scheme. Such payment obligations are clearly not transferred to the transferee, whether or not such payments under the pension scheme were to be made by some insurance company or by the employer directly.

59 A wider and more natural understanding of "rights to ... benefits" would, in the view of the Court, include the employee's right to enjoy the continued accrual of pension rights during the whole term of his employment. It is not unusual for a pension scheme to stipulate that the pension amounts eventually due to the beneficiary increase with the number of years the employee is in service and premiums are paid in. A finding that the expression "rights to ... benefits" covers the right to further accrual of pension rights after the date of the transfer would mean that the right to claim such further accrual is excluded.

60 In the Court's view, the wording of Article 3(3) first and second subparagraphs, read in conjunction with the general principle in Article 3(1), points to the conclusion that all rights and obligations pertaining to old-age, invalidity and survivors' benefits have been excluded from the general transfer of rights and obligations to the transferee.

61 Although preparatory work relating to the Directive is not of direct help in defining the scope of Article 3(3), first subparagraph, Commission documents relating to the Directive elucidate the complications envisaged if the transferee were to be obliged to take over obligations of the transferor in the area of supplementary pension schemes. In view of the preparatory work and in view of the inclusion of the exception clause (Article 3(3)) in the final directive text, the Court finds support for interpreting the provision as exempting the transferee from all involvement in this specific area.

62 This does not mean, as also pointed out by the EC Commission, that the employees were left without any protective measures. As an alternative measure, the provision was introduced in Article 3(3), second subparagraph, stating that the Member States shall be under obligation to adopt the measures necessary to protect the interests of present and previous employees in respect of rights conferring on them immediate or prospective entitlements to old-age benefits, including survivors' benefits (but not invalidity benefits).

63 There is a principle of interpretation expressed by the ECJ that exemption clauses reducing rights granted to employees must be interpreted narrowly. The same principle was relied on by the EFTA Court in Case E-1/95 *Samuelsson* [1994-95] EFTA Report 145 paragraph 22 *et seq*. This principle of interpretation cannot, however, lead to a situation in which the exemption clause becomes deprived of any reasonable content or is virtually abolished.

64 On a proper interpretation of Article 3(3) it must be assumed that the transferee is not obliged to provide for further accruals of rights to old-age, invalidity or survivors' benefits, after the date of the transfer.

65 With that finding as a basis it becomes untenable to hold that the transferee is under an obligation to continue payment of pension premiums in accordance with the supplementary pension scheme established by the transferor.

66 As pointed out by the Government of the United Kingdom the accrual of pension benefits and the payment of pension premiums are inseparable. In any insurance scheme each element presupposes the other. It would be without any economic sense requiring premium payments to be made when no further pension benefits are to accrue. The sole purpose of paying premiums into an insurance scheme must be the creation of further insurance coverage.

67 From this it must follow that the transferor's obligation to pay premiums for old-age, invalidity and survivors' benefits is excluded. At the oral hearing various opinions were expressed with regard to the amount of the premium payments to be made by the transferee, if ruled applicable. Some were of the opinion that the same

amount should be paid as had been paid by the transferor, regardless of whether the employee was able to continue as member of the company or inter-company scheme. Others suggested that the transferee should be under an obligation to pay whatever amount, normally higher than before, that would be required to establish the same future coverage and accrual as the employee had enjoyed before. In the view of the Court, the uncertainty and unreasonableness of these alternatives illustrate the lack of logic in maintaining a payment obligation without a corresponding obligation to uphold a previous pension scheme.

68 The conclusion must therefore be that no obligation to continue payment of premium amounts relating to old-age, invalidity and survivors' benefits is transferred to the transferee.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Gulating lagmannsrett, by an order of 27 November 1995, hereby gives the following Advisory Opinion:

1. Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so as to mean that, where catering services for an undertaking have by contract been entrusted to a company, the termination of that contract and the conclusion of a new contract for the same services with another company does not exclude the Directive from being applicable. For there to be a transfer of an undertaking, business or

part of a business within the meaning of the Directive, an economic entity with its own identity must be transferred and this identity must be retained. In order to ascertain whether these conditions are fulfilled in a case such as that which is the subject of the main proceedings, it is necessary to have regard to all facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible or intangible assets are transferred, the value and the nature of such assets, whether or not a majority of the employees, or employees with a special expertise or experience are taken over, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which the activities were suspended.

2. **Whether the new catering company is to take over employees and stock must be taken into account in the overall assessment referred to in 1 above.**

3. **The fact that a transaction is subject to public procurement directives does not as such prevent Council Directive 77/187/EEC from being applicable in a case such as the one at hand.**

4. **According to Article 3(3) of Council Directive 77/187/EEC the employer's obligation to pay premiums to supplementary pension schemes for an employee is not transferred.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 25 September 1996

Per Christiansen
Registrar

Bjørn Haug
President

REPORT FOR THE HEARING
in Case E-2/95

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Gulating lagmannsrett (the Gulating Appeal Court) for an Advisory Opinion in the case pending before it between

Eilert Eidesund

and

Stavanger Catering A/S

on the interpretation of Council Directive 77/187/EEC.

I. Introduction

1. By an order dated 27 November 1995, registered at the Court on 29 November, the Gulating lagmannsrett (the Gulating Appeal Court) in Norway made a request for an Advisory Opinion in a case brought before it by Mr. Eilert Eidesund, appellant, against Stavanger Catering A/S, a Norwegian company, respondent.

II. Legal background

2. The questions presented by the Norwegian court concern the interpretation of *Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses*. This directive is referred to in Point 23 of Annex XVIII to the Agreement on the European Economic Area.

3. The case before the Norwegian court concerns the appellant's claim to have certain insurance premiums paid by the respondent. The appellant's former employer had paid these premiums. Following a tender procedure, the respondent obtained a contract to provide certain catering and cleaning services which had been provided by the appellant's former employer. After obtaining this contract, the respondent company employed the appellant but refused to pay the insurance premiums. The primary legal questions before the Court are whether the replacement of a party to a service contract following a tender procedure constitutes a transfer of an enterprise, business or part of a business within the meaning of the directive, and if so, whether the transferee is under a legal obligation to pay the premiums of an employee pension scheme which was provided by the previous employer, but which is outside the obligatory state social system.

4. *Directive 77/187/EEC* states *inter alia*:

[Preamble/first and second recital]

"...Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;

[Section I/Scope and definitions]

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

...

[Section II/Safeguarding of employees' rights]

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement....

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

III. Questions

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

"5.1 Does the termination of a catering contract with one company and the signing of a new catering contract with another company fall under Council directive 77/187 No 1, when no condition is made in the contract that equipment and/or employees are also to be taken over?

5.2 Will it make any difference to the answer to question 5.1 if the new catering company takes over the employees and the stocks?

5.3 Will it make any difference to the answer to question 5.1 if the contract falls under Council directive 77/62, 80/767 and 88/295 on the award of public supplies contracts?

5.4 Do rights under Article 3 paragraph 1 and 2 also include the right to uphold insurance schemes, including pension schemes, with the new employer that the employee had with the employer who lost the contract?

5.5 Will the answer to question 5.1 be different in cases where:

a) employees of the original catering company apply the normal way for and after competing are employed in positions in the new catering company, and

b) there is an agreement between the new catering company and the old catering company, or between the principal and the new catering company, to the effect that the employees are also to be taken over?"

IV. Facts

6. The Gulating lagmannsrett describes the procedure before the Norwegian courts as follows:

"Since no agreement was reached between the employer and the employees on the transfer of the pension scheme to the new employer, Eilert Eidesund brought a suit against Stavanger Catering A/S by a writ of summons dated 17 March 1994. The Stavanger byrett [the Stavanger City Court] delivered its judgment in the case on 29 May 1995 [and rejected the claim made by Mr. Eidesund]. On 30 May 1995 Eilert Eidesund brought an appeal against the judgment before the Gulating lagmannsrett. On 4 July 1995 the Gulating lagmannsrett decided that the question of interpretation should be referred to the EFTA Court for an Advisory Opinion."

7. The parties based their submissions before the Gulating lagmannsrett on Chapter XII A of the Norwegian Act relating to Worker Protection and Working Environment (arbeidsmiljøloven). This chapter was added to the act in 1992 as part of Norway's implementation of Directive 77/187/EEC.

8. The facts of the case are summarised in the request of Gulating lagmannsrett as follows:

"... Since the late 1970s he [Mr. Eidesund] has been working as a service worker in the field of catering offshore. Over the years he has been employed by several employers and has worked on

Ekofisk field where Phillips Petroleum Norway (PPCoN) is operator. PPCoN does not itself carry out the catering service on the platform.
...

Until 21 February 1994 Scandinavian Service Partner A/S had a contract with PPCoN regarding the supply of boarding services on the Eko Alpha platform in the Ekofisk field. Well before the expiry of the contract PPCoN prepared an invitation for tenders. Stavanger Catering A/S won the tender competition with the consequence that Stavanger Catering A/S took over the boarding services as from 21 February 1994. In accordance with established practice within catering activities offshore, those who had been employed as service workers by Scandinavian Service Partner A/S were offered corresponding positions by Stavanger Catering A/S as from the time Stavanger Catering A/S took over the catering service. The normal manning of the catering service at Ekofisk Alpha is 19 persons. Senior personnel were not offered positions by Stavanger Catering A/S. 14 persons got and accepted positions with Stavanger Catering A/S.

Eilert Eidesund was one of the service workers who accepted the offer of a position with Stavanger Catering A/S. He was dismissed from Scandinavian Service Partner A/S on 16 February 1994. On the same day he received the offer of a position with Stavanger Catering A/S. The following is quoted from the letter containing the offer for employment:

"In connection with the taking over of the catering contract at Eko Alpha by Stavanger Catering as from 21.2.1994 at 00.00 hrs we hereby ask if you are interested in becoming an employee of Stavanger Catering A/S or if you will remain with S.S.P.

Since there is only a very short time until the taking over we must receive your answer as soon as possible and from those who are going out on 21.02 we must have the answer not later than 12.00 hrs on Friday 18.02.

The employment with Stavanger Catering A/S will be in accordance with the practice and the local agreements that exist in the company."

After having received the offer a letter was sent on 21 February 1994 by the company branch of the Oljearbeidernes Fellessammenslutning (OFS-klubben) (the Federation of Oil Workers Trade Union) at Scandinavian Service Partner A/S to Stavanger Catering A/S. The following is quoted from the letter:

"On 20 February 1994 at 24.00 hrs the catering services onboard the "Ekofisk Alpha" were transferred from SCANDINAVIAN SERVICE PARTNER OIC A/S to Stavanger Catering. In that connection we wish to submit the following:

The offer from Stavanger Catering of employment in that company (enclosure 1) is contrary to Section 73 B of the Act relating to Worker Protection and Working Environment. A new employer is bound by those rights the employees had concerning salary and other working conditions, *inter alia* the obligation to maintain those insurance schemes including pension insurance, that the employees were entitled to before the transfer of this part of the activities took place.

It is therefore incorrect of Stavanger Catering to claim that the "employment" is in accordance with practice and local agreements in the company.

On behalf of our members: ...

we hereby demand that all rightful work and employment conditions are applied after the formal transfer of the mentioned part of SSP's activities."

With the reservation that appears from the above quotation Eilert Eidesund accepted the offer of employment with Stavanger Catering A/S and took up his duties.

The pension insurance referred to in the letter quoted above is a pension insurance scheme that covered all employees of Scandinavian Service Partner A/S. The insurance consists of an old age pension part. The premiums are paid partly by contributions from the employer and partly by the employees themselves. The employer's obligations under the pension insurance agreement cease when the employment ends. Insurance premiums are paid by the employer only as long as the employment relationship exists.

In connection with the taking over of the catering contract an agreement was also concluded between Scandinavian Service Partner A/S and Stavanger Catering A/S that the latter would take over the stocks (food and cleaning agents) on the platform, but not table linen and bed linen with company logos. These items were replaced in connection with the change of contractor. ..."

9. In his written observations, counsel for Mr. Eidesund states that he is in agreement with the description of facts as set out by the Gulating lagmannsrett. He adds that Scandinavian Service Partner A/S now owns Stavanger Catering A/S. Counsel for the respondent also states that he is in agreement with the description of facts as set out by the lagmannsrett. He adds that most of those who are at present employed by Stavanger Catering A/S do not have a pension scheme.

V. Written observations

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

- Mr. Eilert Eidesund
- Stavanger Catering A/S
- The Government of the United Kingdom
- The Government of Sweden
- The EFTA Surveillance Authority
- The Commission of the European Communities

The written observations from the Government of Sweden deal exclusively with question 5.4.

11. In the following summary of the written observations the questions from Gulating lagmannsrett will be dealt with in three parts:

A. Transfer of undertakings (questions 5.1, 5.2 and 5.5);
B. Contracts subject to public procurements (question 5.3); and
C. Transferred rights (question 5.4).

A. Transfer of undertakings

Mr. Eilert Eidesund

12. In his written observations Mr. Eidesund refers to the following judgments of the EC Court of Justice: *Rygaard* v *Strø Mølle Akustik*,[1] *Schmidt*,[2] *Watson Rask and Christensen*,[3] *Tellerup* v *Daddy's Dance Hall*[4] and *Redmond Stichting.*[5]

13. Mr. Eidesund refers to the objective of the directive, which he submits is to safeguard employees' rights in the event of a transfer of undertaking. He also submits that from the judgments referred to above, it can be concluded that the directive covers the particular change of contractor at issue.

14. The appellant claims that a catering service, even though it may be organised in different ways, forms a necessary part of activity on a platform. By its very nature, this service is easily distinguishable from other activities that take place on board. It will remain necessary for as long as continuous oil operations are carried out at sea. Even if it is carried out under a fixed-term contract, the nature of the specific activity is the same. Mr. Eidesund adds that this continuity is further strengthened by the fact that, by tradition, workers are transferred to a new contractor who takes over operations on a North Sea platform.

15. The appellant maintains that when an ongoing activity is transferred from one employer to another, it cannot be decisive for the rights of the employee that a transfer is labelled "change of supplier" or "change of contractor". The employee's need for protection of his interests are the same.

16. Mr. Eidesund maintains that judgments of national courts are of limited value for the interpretation of the directive and that it is the EC Court of Justice which provides the relevant precedents.

17. Mr. Eidesund proposes the following answer to questions 5.1, 5.2, 5.3 and 5.5.

"The transfer of the catering service on the Eko Alpha platform from SSP to Stavanger Catering AS is covered by Council Directive 77/187."

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1 Case C-48/94 *Rygaard* v *Strø Mølle Akustik* [1995] ECR I-2745.

2 Case C-392/92 *Schmidt* [1994] ECR I-1311.

3 Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

4 Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739.

5 Case 29/91 *Redmond Stichting* [1992] ECR I-3189.

Stavanger Catering A/S

18. Stavanger Catering A/S draws attention to the fact that this case concerns the interpretation of a Norwegian statute, the relevant sections of which were enacted as Norway's implementation of Directive No. 77/187/EEC.

19. As to the question of what constitutes a transfer of an undertaking within the meaning of the directive, Stavanger Catering A/S maintains that there is a clear distinction to be made between a transfer of an undertaking and a replacement of a contractor. By comparing the wording of the Norwegian translation of the term "undertaking" ("foretak" in the directive and "virksomhet" in the implementing directive) to translations of other Member States and by tracing the background of the Norwegian translation, he comes to the conclusion that the Norwegian word "virksomhet" must mean the same as "foretak". The Norwegian word "foretak", however, does not include replacement of a contractor.

20. The respondent maintains that the replacement of a contracting party is fundamentally different from the transfer of an undertaking. The replacement of a contracting party (supplier, contractor) has a number of special features that distinguish it from the transfer of an undertaking:

1) It is a business contract, made for a fixed term, which does not itself affect the means of production.

2) Unlike the transfer of an undertaking, the replacement of a contracting party is not final; it is normally understood to be of limited duration and thus open for re-evaluation.

3) When an undertaking is transferred the transferor withdraws from the activity. Under a service contract, on the other hand, the recipient of the service continues to be the same and he retains certain rights of control and instruction as well as the possibility of terminating the contract.

21. The respondent continues by setting out what he submits are the disadvantages of determining that the replacement of a contractor on a North Sea platform falls under the directive. It would, he says, have a very restrictive effect on competition in bidding situations. The only party which has full knowledge of the rights of the employees that may continue with a new contractor is the party already holding a contract. The respondent further submits that long-term personnel policy would also be adversely affected for a number of reasons, including an employer's inability to maintain his employees.

22. The respondent refers mainly to three judgments of the EC Court of Justice: *Watson Rask and Christensen*,[6] *Schmidt*[7] and *Rygaard* v *Strø Mølle Akustik.*[8] The third is the only case where the EC Court of Justice considered the directive in relation to a situation where a contractor lost a contract to another contractor. The question was whether the employees of the losing contractor could demand work with the new one. The Court came to the conclusion that such a situation did not fall within the scope of the directive.

23. The respondent then cites case law from Denmark, Sweden and France. He also refers to an exchange of letters between the Norwegian Shipping and Offshore Federation and the EFTA-Surveillance Authority. Stavanger Catering A/S interprets a letter from the Authority dated 9 January 1995, as saying that in the sense of the directive, the replacement of a catering company is a change of supplier and not a transfer.

24. With regard to questions 5.1 - 5.3 and 5.5 in the request for Advisory Opinion, Stavanger Catering A/S comes to the following conclusions:

"The situation whereby Scandinavian Service Partner A/S loses its catering contract with Phillips on Eco Alfa and Stavanger Catering A/S is awarded the new contract is not a situation that falls under Council Directive No 77/187. The EFTA Court's answer to Questions 5.1, 5.2, 5.3 and 5.5 must be no."

The Government of the United Kingdom

25. In its observations, the UK states that the case law of the EC Court of Justice clearly indicates that the individual elements signalled by the Gulating lagmannsrett are not, by themselves, conclusive factors one way or the other (*Bork International* v *Foreningen af Arbejdsledere i Danmark,*[9] *Tellerup* v *Daddy's Dance Hall*;[10] *Watson Rask and Christensen*[11] and *Botzen* v *Rotterdamsche Droogdok Maatschappij*[12]). Nevertheless, all of these elements are relevant.

26. The UK then refers to and quotes extensively from *Spijkers* v *Benedik.*[13] In the understanding of the UK, the essence of this judgment is that the directive is only applicable if an economic entity is transferred.

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6 See footnote 3.

7 See footnote 2.

8 See footnote 1.

9 Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057.

10 See footnote 4.

11 See footnote 3.

12 Case 186/83 *Botzen and Others* v *Rotterdamsche Droogdok Maatschappi*j *BV* [1985] ECR 519.

13 Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119 (mainly paragraphs 11 -14).

27. The observations emphasize that later judgments of the EC Court of Justice apply the same formula (*Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro*,[14] *Redmond Stichting*[15] and *Schmidt*[16]). The UK understands the EC Court of Justice, in Schmidt, to have singled out a particular factor (continuation or resumption of the same or similar activities) amongst the various relevant factors and, on the basis of an order for reference that enabled it to focus on that factor specifically, indicated the conclusion to be drawn from finding that the activities were indeed the same or similar. The UK further draws attention to *Rygaard* v *Strø Mølle Akustik*[17] and points out that the duration of the works in question could be of relevance.

28. The UK proposes that questions 5.1, 5.2 and 5.5(a) and (b) should be answered in the following terms:

"The decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Council Directive 77/187/EEC is whether the business in question retains its identity as an economic entity.

To determine whether that is the case, the national court must consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended."

The EFTA Surveillance Authority

29. The EFTA Surveillance Authority emphasizes the prime objective of the directive by referring to the preamble. Even if the preamble, where the social objective is emphasized in general terms, states that the directive was prompted by changes in the structure of undertakings caused by economic trends, a corresponding limitation of the directive's potential is not reflected in the operative text or in the judgments delivered by the EC Court of Justice.

30. The EFTA Surveillance Authority maintains that the EC Court of Justice has systematically given a broad interpretation to the expression "legal transfer" (*Stitching* v *Bartol*; *Schmidt; Botzen* v *Rotterdamsche Droogdok Maatschappij*[18]). It is noted in particular that the concept of legal transfer does not presuppose that ownership is transferred; furthermore, a transfer may come within the scope of the directive even if it does not take place directly between the previous employer and a new one.

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[14] Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR II-5465.

[15] See footnote 5.

[16] See footnote 2.

[17] See footnote 1.

[18] *Redmond Stichting* (see footnote 5); *Schmidt* (see footnote 2) and *Botzen* v *Rotterdamsche Droodok Maatschappij* (see footnote 12).

31. As to the type of activities that fall under the directive, the EFTA Surveillance Authority states, referring to its summary of the case law of the EC Court of Justice, that the subject matter of the transfer must be a business constituting an organizational unit with its own identity. It is pointed out that the EC Court of Justice has found activities such as canteen services and cleaning services capable of coming within the scope of the directive.[19]

32. The EFTA Surveillance Authority also notes that the EC Court of Justice has identified a number of factors that may be taken into account when determining whether a legal transfer has taken place. In general terms, a legal transfer has been found when the economic unit in question retains its own "identity". When making this determination, the court repeatedly refers to the following characteristics: the type of undertaking or business concerned, whether or not tangible assets are transferred, the value of the intangible assets, whether or not the majority of the employees is taken over, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which the activities were suspended.[20]

33. In considering the question of identity, the subject matter of the transaction must be seen as a whole, comprising of the employees, the organizational structure and the assets used for carrying out the activities. The relative importance of these elements is bound to vary. A transaction in which an undertaking entrusts a service to a provider does not in itself lead to the conclusion that it falls under the terms of the directive. Nevertheless, it may be so in some circumstances.

34. The EFTA Surveillance Authority recognizes that it must be for the national court to establish the facts of the case. It notes, however, that in this case the catering service appears to have been continued without interruption and that a considerable number of the employees were taken over by the transferee. While these circumstances are obviously relevant to the question of identity, in the opinion of the EFTA Surveillance Authority, there are a number of other important facts that need to be established before a conclusion can be reached as to whether this is just a matter of the platform operator changing from one service provider to another, in which case the directive would not apply, or, whether the subject matter of the transaction was in fact arranged so as to constitute an organizational unit with its own identity and whether that identity was in fact retained, in which case the directive would apply.

35. The EFTA Surveillance Authority proposes that questions 5.1 - 5.3 and 5.5. should be answered in the following terms:

"Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees´ rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so as to mean that, where catering services for an undertaking have by contract been entrusted to a company, the termination of that contract and the conclusion of a new contract for the same services with another company do not as such fall within the scope of the Directive. However, where the subject matter of the transaction is arranged so as to form an organizational unit with its own identity, the transaction may come within the scope of the Directive, provided that the identity of the unit is retained. In order to

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[19] *Watson Rask and Christensen* (see footnote 3); *Schmidt* (see footnote 2).

[20] *Spijkers* v *Benedik* (paragraph 13) (see footnote 13); *Bork International* v *Foreningen af Arbejdsledere i Danmark* (paragraph 14) (see footnote 9).

ascertain whether these conditions are fulfilled, it is necessary to have regard to all facts characterizing the services and the transaction in question, such as the type of undertaking or business concerned, whether or not tangible assets are transferred, the value of intangible assets, whether or not the majority of the employees is taken over, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which the activities were suspended."

The Commission of the European Communities

36. The directive does not, according to the Commission of the European Communities, contain any express definition of transfer of an undertaking. The basis for the case law of the EC Court of Justice was put forth in its judgment in *Spijkers* v *Benedik*.[21] In the Commission's opinion, it follows from this judgment that two conditions must be met. First, the undertaking being disposed of must constitute a business with its own identity, and second, that business and its identity must be preserved after the change of ownership. If either of these conditions is not met there is no transfer within the meaning of the directive.

37. In order to assess whether these conditions are met, the EC Court of Justice laid down further criteria as listed in paragraphs 13 and 14 in *Spijkers* v *Benedik*. The same approach, it is submitted, is followed in subsequent judgments. The Commission then proceeds to analyse this case law. The criteria expressed by the EC Court of Justice in *Spijkers* v *Benedik* is examined in each individual case to determine it there has been a transfer within the meaning of the directive. The Commission refers to the following cases: *Watson Rask and Christensen*,[22] *Redmond Stichting*[23] and *Rygaard* v *Strø Mølle Akustik.*[24]

38. Based on this case law, the Commission considers it helpful to distinguish between three categories or types of situations, differentiated by the degree to which the substance of what is transferred between undertakings is tangible. The first category consists of businesses with means of production, such as a company's locksmith's workshop. The second consists of businesses offering a service which involves principally the use of non-material assets, such as knowledge and experience. The third category consists of businesses providing services where no specific knowledge, experience or expertise is required, such as cleaning services and the care of children.

39. According to the Commission, there is usually no difficulty in determining the existence of a business with its own identity when a situation comes within the first category. In the case of the second category, it is necessary to determine whether the knowledge or other assets can be delimited from an organizational point of view. What matters is whether the functions, within the same or similar activities, are carried out by the new legal person. If they are of a special nature, constituting an independent function, they may fall under the directive. In the case of the third category, the Commission submits that the central element is the work force and the somewhat unskilled work they perform. If the staff is disposed of in its entirety together with the order book, goodwill, client relationship, organizational structure etc., a business with its own identity can be

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[21] See footnote 13.

[22] See footnote 3.

[23] See footnote 5.

[24] See footnote 1.

said to exist, even if it is difficult to determine when this is so. The Commission carries its analysis further by contrasting *Watson Rask and Christensen*[25] against *Rygaard* v *Strø Mølle Akustik*.[26] The conclusion of this analysis is that if services are continually provided by the same members of the staff, the group to which they belong may be regarded as a distinct business which falls under the terms of the directive. The Commission further states that the complexity of the present rules has prompted the Commission to make proposals for modifying the directive.

40. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. It mentions, in connection with the first question, that the fact that a disposal is carried out in two stages does not prevent the directive from being applied. The directive may be applied if first one company and subsequently another provide a given service. A factor indicating that the transaction is covered by the directive is a large amount of staff and equipment transferring from the first to the second company; it is not necessary that the second company is under an obligation to take over staff and equipment. Such an approach is in accord with the purpose of the directive, as it is the facts of the actual transfer which are of overriding importance. The points raised in the second question and second part of the fifth questions are also of relevance. As regards the first part of the fifth question (whether it matters if the employees of the old company apply in the normal way for work with the new one), the Commission remarks that such a situation does not necessarily indicate that a business with its own identity has been transferred by one company to another.

41. The Commission proposes the following answers to questions 5.1, 5.2 and 5.5:

"Council Directive 77/187/EEC, properly construed, envisages the disposal of a business with its own identity and the retention of that identity after it has changed hands. In order to ascertain whether this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including, where appropriate, whether or not the agreement to dispose of the business to the transferee includes a provision for equipment and / or employees to be taken over, whether or not the transaction in fact involves the taking-over by the transferee of employees and stocks, and whether or not the employees of the transferor apply to the transferee for employment in the normal way and are indeed appointed to a position by the transferee. The presence or absence of one or more of these facts is, of itself, not conclusive in ensuring or precluding the applicability of the Directive."

B. Contract subject to public procurement

42. In a separate question, 5.3, the Norwegian court seeks the opinion of this Court on whether the applicability of Directive 77/187/EEC is affected by the contract falling under three specified council directives on public procurement: a) *Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts*; b) *Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC*; and c) *Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the co-ordination of procedures for the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC*.

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[25] See footnote 3.

[26] See footnote 1.

43. Neither of the two parties before the Norwegian Court address this question separately in their written observations, apart from counsel for Stavanger Catering A/S noting that reference should be made to Directives 90/531/EEC and 93/38/EEC.

The Government of the United Kingdom

44. In the written observations of the UK, question 5.3 is dealt with under the sub-heading "Issue 2". It is stated that there seems no reason to exclude a contract from the scope of the directive by the fact that it also comes under the scope of some other directive. The texts of the three directives cited as a possible basis for such an exclusion contain no reference to the directive on transfers. The terms of the directive on transfers indicate that it shall be applied even if the contract in question is in the field of public procurement. The EC Court of Justice has focused on the "economic entity" test in interpreting the directive, not on the particular features of a given transfer. Accordingly, the UK proposes the following response to question 5.3:

"The answer to Issue 1 is unaffected by whether or not the provisions of Directives 77/62 and/or 80/767 and/or 88/295 are applicable to the contract in question."

The EFTA Surveillance Authority

45. The EFTA Surveillance Authority submits, in its written observations, that the fact that a contract by which a transfer is effected falls under a directive on public supplies contracts does not in itself exclude the transfer from coming within the scope of the directive on transfers. There is nothing, according to the EFTA Surveillance Authority, in the preamble or the text of the directive to indicate that this was intended to be otherwise, even if the public supplies directive was already in force when it was enacted. Further, there is no conflict between the interests pursued by the two directives such that they could not be simultaneously applied. If the applicability of the directive on transfers was limited by the other directive, it would nevertheless be applicable to public procurements of a value under the threshold stated in the public supply directive. This fact makes it unlikely that the directive on public supplies limits the applicability of the directive on transfers. Such a limitation is also unlikely given the EC Court of Justice's broad interpretation of Directive 77/187/EEC. The EFTA Surveillance Authority continues these arguments in its answer to questions 5.1, 5.2 and 5.5.

The Commission of the European Communities

46. The Commission submits that the purpose of the directive is to make it possible for the worker to continue to work for the transferee under the same conditions as before the transfer of the undertaking or business. In order to provide the protection intended, these terms must be interpreted broadly and not exclude public supplies contracts from its scope of application. Accordingly, the Commission submits that the question under scrutiny here should be answered as follows:

"Once the conditions for the application of Directive 77/187/EEC are met, it is irrelevant that the transaction in question is also subject to the provisions of other directives."

C. Transferred rights

Mr. Eilert Eidesund

47. The appellant submits that the new employer is obliged to maintain the pension insurance scheme which was provided by the previous employer. The scheme requires the employer to pay a premium to an insurance company which is responsible towards the employee for subsequent payments from the scheme. He proposes the following answer to question 5.4:

"The rights of the employees under Council Directive 77/187 also include pension insurance schemes."

Stavanger Catering A/S

48. Stavanger Catering A/S refers to Article 3(3) of the directive and compares the English and the Danish versions. Stavanger Catering maintains that it is obvious that the directive does not mean that the new employer is obliged to provide pension schemes for employees who are following along with a business or part of a business. Article 3(3) provides that Member States are obliged to ensure that pension rights accrued at the previous employer are protected. He draws attention to the fact that Stavanger Catering A/S has about 260 employees senior to the appellant. It would be morally wrong and practically impossible to set up a special insurance scheme for newer employees without providing employees with a longer service record a similar scheme. The cost would be so high that it would not be financially justifiable given Stavanger Catering A/S' revenues.

49. Stavanger Catering A/S further states that the claim for payment of pension premiums illustrates the uncertainties that will arise in competitive situations if the replacement of a contracting party/contractor falls under the directive. Collective wage agreements do not contain provisions on pension rights and it will be difficult for a competitor in a tender situation to assess the real costs involved.

50. As to question 5.4. in the request for Advisory Opinion, Stavanger Catering comes to the following conclusion:

"Stavanger Catering A/S is not obliged to set up a pension scheme for Eidesund. The EFTA Court's answer to question 5.4 must be no."

The Government of the United Kingdom

51. The UK states that even if Article 3(3) of the directive must be interpreted narrowly, the derogation set out therein is one of substance. It expressly covers the right to payment of pension benefits. Therefore, by necessary implication, this derogation covers the right to payment of the contributions required to generate such benefits. This conclusion is supported by the provision in the same sub-paragraph which provides that Member States shall adopt measures to protect the interests of employees. The conclusion proposed by the UK follows:

"The substance of the derogation contained in Article 3(3), first indent, ARD [Acquired Rights Directive], covers rights to payments of contribution to, and benefits from, the supplementary schemes there referred to. It is for the Member State to make the appropriate arrangements to discharge the duty imposed upon them by Article 3(3), second indent, ARD in respect of accrued rights."

The Government of Sweden

52. In its written observations, the Swedish Government only refers to question 5.4. It submits that the exception in Article 3(3) shall not cover the responsibility to pay contributions (insurance premiums) to pension schemes flowing from a contract of employment. According to the Swedish government, it would be unreasonable for Member States to be required to take measures to protect the payment of future insurance premiums. That obligation must be a part of the contract safeguarded by Article 3(1) and 3(2).

53. The Government of Sweden proposes an answer to the question in the following terms:

"The exception clause contained in Article 3(3) of the Council Directive 77/187/EEC does not cover the right of an employee to coverage of insurance premiums to pension schemes. That right must therefore be a part of the contract safeguarded for in Article 3(1) and 3(2)."

The EFTA Surveillance Authority

54. The EFTA Surveillance Authority is of the opinion that Articles 3(1) and 3(2) of the directive must include an obligation of an employer to maintain and pay premiums for an insurance or pension scheme for the benefit of an employee. This interpretation is also consistent with the purpose of the directive and finds general support in the case law of the EC Court of Justice *(Wendelboe* v *L.J. Music; Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar)*.[27]

55. Article 3(3) excludes from the scope of Articles 3(1) and 3(2) rights to old age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. This provision is an exception from the main principles and must be interpreted narrowly.

56. What is exempted are rights to benefits. The ordinary meaning of the words in the provision, as well as practice in the field of insurance indicate that the meaning is to exclude the benefits provided for in particular schemes, for example, the payment of pension benefits. The payment of premiums is, by contrast, normally not a benefit of the pension scheme itself. The right to payment of the premiums is a corollary to the obligations undertaken by the employer.

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[27] Case 19/83, *Wendelboe* v *L.J. Music,* [1985] ECR 457; Case 105/84, *Foreningen af Arbejdsledere i Danmark* v *AS Danmols Inventar*, [1985] ECR 2639.

57. The EFTA Surveillance Authority proposes an answer to the fourth question in the following terms:

"Article 3 of the Act is to be interpreted so as to mean that, in the case of a transfer within the meaning of Article 1(1), an obligation of the transferor to maintain and pay the premiums for an insurance scheme for the benefit of an employee, such as a pension scheme, is automatically transferred to the transferee."

The Commission of the European Communities

58. The Commission states that while Article 3(3) of the directive excludes certain rights from the scope of the directive, it does not deprive the employees having those rights of all protection. The directive's thrust is that protection is to be provided, but not in the form set out in Article 3(1) of the directive. It is therefore clear that the protection of the directive in the case of a transfer does not extend to the rights and obligations of the transferor in respect of employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes. It is, however, not clear whether the exemption covers the benefit derived by an employee from an employer paying all or part of the premiums of a pension insurance scheme. In light of the primary objective of the directive, any limitations to or exceptions from the protection it is supposed to provide must be interpreted in a restrictive manner. It must also be borne in mind that the Member States are under an obligation to protect the interests of employees in respect of rights conferring on them pension benefits; the domestic law of a given Member State may provide extremely comprehensive and effective protection.

59. Based on the these considerations the Commission proposes the following answer to question 5.4:

"Article 3 of Directive 77/187/EEC must be interpreted as meaning that the Directive transfers to the transferee all rights and obligations vis-à-vis employees arising from an employment relationship with the transferor existing on the date of transfer with the exception of employees' rights to old-age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States, Member States being required to adopt the measures necessary to protect the interests of employees and former employees of the transferor in respect of rights conferring on them entitlement to old-age benefits under such supplementary schemes."

Thór Vilhjálmsson
Judge-Rapporteur