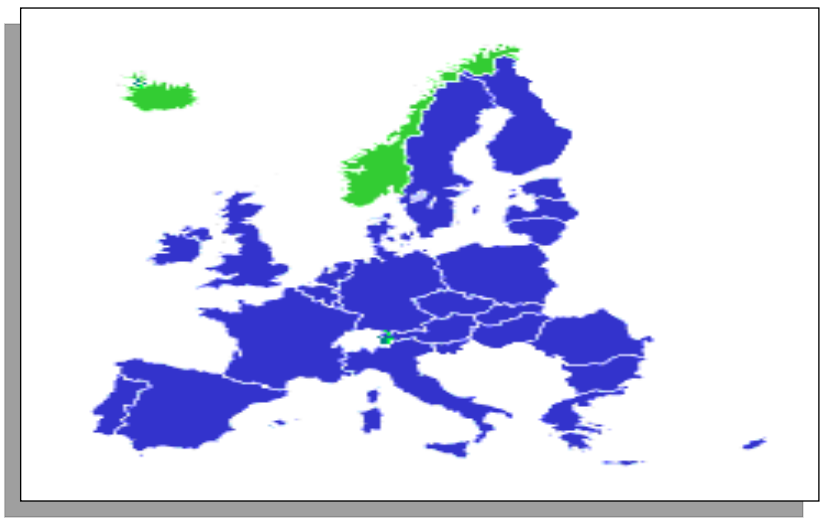
Réttarkerfi Evrópusambandsins og
Evrópska efnahagssvæðisins

Kennslubók fyrir byrjendur



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(2011)

Efnisyfirlit

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I

Stofnsáttmálar ESB og EES-samningurinn

1. Meginmál ESB-sáttmálans

The Treaty on European Union
PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, HER MAJESTY THE QUEEN OF DENMARK, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF IRELAND, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MAJESTY THE KING OF SPAIN, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE PORTUGUESE REPUBLIC, HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ([1]),

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency,

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([1]) The Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden have since become members of the European Union.

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,
HAVE DECIDED to establish a European Union and to this end have designated as their Plenipotentiaries:

(List of plenipotentiaries not reproduced)

WHO, having exchanged their full powers, found in good and due form, have agreed as follows:

TITLE I
COMMON PROVISIONS

Article 1
(ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the

European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3
(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5
(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 7
(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the

government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

TITLE II
PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions

shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article

49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

TITLE III
PROVISIONS ON THE INSTITUTIONS

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

— the European Parliament,

— the European Council,

— the Council,

— the European Commission (hereinafter referred to as 'the Commission'),

— the Court of Justice of the European Union,

— the European Central Bank,

— the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members.

Article 15

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.

8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union.

Article 17

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

3. The Commission's term of office shall be five years.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice- Presidents.

5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;

(b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

Article 18

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.

2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

3. The High Representative shall preside over the Foreign Affairs Council.

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties.

TITLE IV
PROVISIONS ON ENHANCED COOPERATION

Article 20
(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.

TITLE V
GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION AND SPECIFIC PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

CHAPTER 1
GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 21

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first

subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

safeguard its values, fundamental interests, security, independence and integrity;

consolidate and support democracy, the rule of law, human rights and the principles of international law;

preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

assist populations, countries and regions confronting natural or man-made disasters; and

promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Article 22

1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the

Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

CHAPTER 2
SPECIFIC PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

SECTION 1
COMMON PROVISIONS

Article 23

The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.

Article 24
(ex Article 11 TEU)

1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

2. Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence

of Member States' actions.

3. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.

Article 25
(ex Article 12 TEU)

The Union shall conduct the common foreign and security policy by:

(a) defining the general guidelines;

(b) adopting decisions defining:

  (i) actions to be undertaken by the Union;

  (ii) positions to be taken by the Union;

  (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);

  and by

(c) strengthening systematic cooperation between Member States in the conduct of policy.

Article 26
(ex Article 13 TEU)

1. The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.

If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments.

2. The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.

The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.

3. The common foreign and security policy shall be put into effect by the High Representative and by the Member States, using national and Union resources.

Article 27

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.

2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.

3. In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

Article 28

(ex Article 14 TEU)

1. Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.

2. Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.

3. Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.

4. In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures.

5. Should there be any major difficulties in implementing a decision as referred to in this Article, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the decision referred to in paragraph 1 or impair its effectiveness.

Article 29

(ex Article 15 TEU)

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.

Article 30

(ex Article 22 TEU)

1. Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it, respectively, initiatives or proposals.

2. In cases requiring a rapid decision, the High Representative, of his own motion, or at the request of a Member State, shall convene an extraordinary Council meeting within 48 hours or, in an emergency, within a shorter period.

Article 31

(ex Article 23 TEU)

1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.

2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:

— when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1),

— when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative,

— when adopting any decision implementing a decision defining a Union action or position,

— when appointing a special representative in accordance with Article 33.

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

3. The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2.

4. Paragraphs 2 and 3 shall not apply to decisions having military or defence implications.

5. For procedural questions, the Council shall act by a majority of its members.

Article 32
(ex Article 16 TEU)

Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council.

The diplomatic missions of the Member States and the Union delegations in third countries and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach.

Article 33
(ex Article 18 TEU)

The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative.

Article 34
(ex Article 19 TEU)

1. Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination.

In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.

2. In accordance with Article 24(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest.

Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.

Article 35
(ex Article 20 TEU)

The diplomatic and consular missions of the Member States and the Union delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that decisions defining Union positions and actions adopted pursuant to this Chapter are complied with and implemented.

They shall step up cooperation by exchanging information and carrying out joint assessments.

They shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in Article 20(2)(c) of the Treaty on the Functioning of the European Union and of the measures adopted pursuant to Article 23 of that Treaty.

Article 36
(ex Article 21 TEU)

The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

Article 37
(ex Article 24 TEU)

The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter.

Article 38
(ex Article 25 TEU)

Without prejudice to Article 240 of the Treaty on the Functioning of the European Union, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations referred to in Article 43.

The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.

Article 39

In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

Article 40
(ex Article 47 TEU)

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

Article 41
(ex Article 28 TEU)

1. Administrative expenditure to which the implementation of this Chapter gives rise for the institutions shall be charged to the Union budget.

2. Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise.

In cases where expenditure is not charged to the Union budget, it shall be charged to the Member States in accordance with the gross national product scale, unless the Council acting unanimously decides otherwise. As for expenditure arising from operations having military or defence implications, Member States whose representatives in the Council have made a formal declaration under Article 31(1), second subparagraph, shall not be obliged to contribute to the financing thereof.

3. The Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the common foreign and security policy, and in particular for preparatory activities for the tasks referred to in Article 42(1) and Article 43. It shall act after consulting the European Parliament.

Preparatory activities for the tasks referred to in Article 42(1) and Article 43 which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.

The Council shall adopt by a qualified majority, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, decisions establishing:

(a) the procedures for setting up and financing the start-up fund, in particular the amounts allocated to the fund;

(b) the procedures for administering the start-up fund;

(c) the financial control procedures.

When the task planned in accordance with Article 42(1) and Article 43 cannot be charged to the Union budget, the Council shall authorise the High Representative to use the fund. The High Representative shall report to the Council on the implementation of this remit.

SECTION 2
PROVISIONS ON THE COMMON SECURITY AND DEFENCE POLICY

Article 42
(ex Article 17 TEU)

1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

2. The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

3. Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy.

Member States shall undertake progressively to improve their military capabilities. The Agency in the field of defence capabilities development, research, acquisition and armaments (hereinafter referred to as 'the European Defence Agency') shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

4. Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a

proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.

5. The Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests. The execution of such a task shall be governed by Article 44.

6. Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43.

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.
Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

Article 43

1. The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

2. The Council shall adopt decisions relating to the tasks referred to in paragraph 1, defining their objectives and scope and the general conditions for their implementation. The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks.

Article 44

1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.

2. Member States participating in the task shall keep the Council regularly informed of its progress on their own initiative or at the request of another Member State. Those States shall inform the Council immediately should the completion of the task entail major consequences or

require amendment of the objective, scope and conditions determined for the task in the decisions referred to in paragraph 1. In such cases, the Council shall adopt the necessary decisions.

Article 45

1. The European Defence Agency referred to in Article 42(3), subject to the authority of the Council, shall have as its task to:

(a) contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;

(b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods;

(c) propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;

(d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs;

(e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.

2. The European Defence Agency shall be open to all Member States wishing to be part of it. The Council, acting by a qualified majority, shall adopt a decision defining the Agency's statute, seat and operational rules. That decision should take account of the level of effective participation in the Agency's activities. Specific groups shall be set up within the Agency bringing together Member States engaged in joint projects. The Agency shall carry out its tasks in liaison with the Commission where necessary.

Article 46

1. Those Member States which wish to participate in the permanent structured cooperation referred to in Article 42(6), which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.

2. Within three months following the notification referred to in paragraph 1 the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative.

3. Any Member State which, at a later stage, wishes to participate in the permanent structured

cooperation shall notify its intention to the Council and to the High Representative.

The Council shall adopt a decision confirming the participation of the Member State concerned which fulfils the criteria and makes the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation. The Council shall act by a qualified majority after consulting the High Representative. Only members of the Council representing the participating Member States shall take part in the vote.

A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

4. If a participating Member State no longer fulfils the criteria or is no longer able to meet the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation, the Council may adopt a decision suspending the participation of the Member State concerned.

The Council shall act by a qualified majority. Only members of the Council representing the participating Member States, with the exception of the Member State in question, shall take part in the vote.

A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

5. Any participating Member State which wishes to withdraw from permanent structured cooperation shall notify its intention to the Council, which shall take note that the Member State in question has ceased to participate.

6. The decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only.

TITLE VI
FINAL PROVISIONS

Article 47

The Union shall have legal personality.

Article 48
(ex Article 48 TEU)

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences

conferred on the Union in the Treaties.

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Article 49

(ex Article 49 TEU)

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its

withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Article 51

The Protocols and Annexes to the Treaties shall form an integral part thereof.

Article 52

1. The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.

Article 53
(ex Article 51 TEU)

This Treaty is concluded for an unlimited period.

Article 54
(ex Article 52 TEU)

1. This Treaty shall be ratified by the High Contracting Parties in accordance with their

respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.

2. This Treaty shall enter into force on 1 January 1993, provided that all the Instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the Instrument of ratification by the last signatory State to take this step.

Article 55
(ex Article 53 TEU)

1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

2. This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council.

2. Meginmál Sáttmálans um framkvæmd ESB

The Treaty on the Functioning of the European Union

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS ([1]),

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,
and to this end HAVE DESIGNATED as their Plenipotentiaries:

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[1] The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland have since become members of the European Union.

(List of plenipotentiaries not reproduced)

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

PART ONE
PRINCIPLES

Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'.

TITLE I
CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;

(b) industry;

(c) culture;

(d) tourism;

(e) education, vocational training, youth and sport;

(f) civil protection;

(g) administrative cooperation.

TITLE II
PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8
(ex Article 3(2) TEC)

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 11
(ex Article 6 TEC)

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Article 12
(ex Article 153(2) TEC)

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 13

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Article 14
(ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 15
(ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16
(ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Article 17

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

PART TWO
NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18
(ex Article 12 TEC)

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

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19
(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20
(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. ,

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21
(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative

procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22
(ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23
(ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24
(ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25
(ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

PART THREE
UNION POLICIES AND INTERNAL ACTIONS

TITLE I
THE INTERNAL MARKET

Article 26
(ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 27
(ex Article 15 TEC)

When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

TITLE II
FREE MOVEMENT OF GOODS

Article 28
(ex Article 23 TEC)

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 30 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 29
(ex Article 24 TEC)

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

CHAPTER 1
THE CUSTOMS UNION

Article 30
(ex Article 25 TEC)

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 31
(ex Article 26 TEC)

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Article 32
(ex Article 27 TEC)

In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:

(a) the need to promote trade between Member States and third countries;

(b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;

(c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;

(d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.

CHAPTER 2
CUSTOMS COOPERATION

Article 33
(ex Article 135 TEC)

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

CHAPTER 3
PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 34
(ex Article 28 TEC)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35
(ex Article 29 TEC)

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36
(ex Article 30 TEC)

The provisions of Articles 34 and 35 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 Member States.

Article 37
(ex Article 31 TEC)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.EN 30.3.2010 Official Journal of the European Union C 83/61

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

TITLE III
AGRICULTURE AND FISHERIES

Article 38
(ex Article 32 TEC)

1. The Union shall define and implement a common agriculture and fisheries policy.

The internal market shall extend to agriculture, fisheries and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.

2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.

3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.

4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.

Article 39
(ex Article 33 TEC)

1. The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.

2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:

(a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;

(b) the need to effect the appropriate adjustments by degrees;

(c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

Article 40
(ex Article 34 TEC)

1. In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established.

This organisation shall take one of the following forms, depending on the product concerned:

(a) common rules on competition;

(b) compulsory coordination of the various national market organisations;

(c) a European market organisation.

2. The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Union.

Any common price policy shall be based on common criteria and uniform methods of calculation.

3. In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

Article 41
(ex Article 35 TEC)

To enable the objectives set out in Article 39 to be attained, provision may be made within the framework of the common agricultural policy for measures such as:

(a) an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge; this may include joint financing of projects or institutions;

(b) joint measures to promote consumption of certain products.

Article 42
(ex Article 36 TEC)

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council, on a proposal from the Commission, may authorise the granting of aid:

(a) for the protection of enterprises handicapped by structural or natural conditions;

(b) within the framework of economic development programmes.

Article 43
(ex Article 37 TEC)

1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title.

These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the

common fisheries policy.

3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:

(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;

(b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.

5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

Article 44
(ex Article 38 TEC)

Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export.

The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

TITLE IV
FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1
WORKERS

Article 45
(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and

other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46
(ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47
(ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 48
(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self- employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

CHAPTER 2
RIGHT OF ESTABLISHMENT

Article 49
(ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the

provisions of the Chapter relating to capital.

Article 50
(ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids

granted by Member States.

Article 51
(ex Article 45 TEC)

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52
(ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Article 53
(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self- employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Article 54
(ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55
(ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

CHAPTER 3
SERVICES

Article 56
(ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57
(ex Article 50 TEC)

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 58
(ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.
2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59
(ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60
(ex Article 53 TEC)

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 61
(ex Article 54 TEC)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

Article 62
(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

CHAPTER 4
CAPITAL AND PAYMENTS

Article 63
(ex Article 56 TEC)

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments

between Member States and between Member States and third countries shall be prohibited.

Article 64
(ex Article 57 TEC)

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets.

3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Article 65
(ex Article 58 TEC)

1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Article 66
(ex Article 59 TEC)

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

TITLE V
AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1
GENERAL PROVISIONS

Article 67
(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71
(ex Article 36 TEU)

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

Article 72
(ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 73

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Article 74
(ex Article 66 TEC)

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76,

and after consulting the European Parliament.

Article 75
(ex Article 60 TEC)

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

(a) on a proposal from the Commission, or

(b) on the initiative of a quarter of the Member States.

CHAPTER 2
POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77
(ex Article 62 TEC)

1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78

(ex Articles 63, points 1 and 2, and 64(2) TEC)

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79

(ex Article 63, points 3 and 4, TEC)

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 80

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

CHAPTER 3
JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81
(ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

CHAPTER 4
JUDICIAL COOPERATION IN CRIMINAL MATTERS

Article 82
(ex Article 31 TEU)

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(b) prevent and settle conflicts of jurisdiction between Member States;

(c) support the training of the judiciary and judicial staff;

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(a) mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Article 83
(ex Article 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Article 84

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

Article 85
(ex Article 31 TEU)

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

(b) the coordination of investigations and prosecutions referred to in point (a);

(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

2. In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials.

Article 86

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

CHAPTER 5
POLICE COOPERATION

Article 87
(ex Article 30 TEU)

1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in

relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

(b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

(c) common investigative techniques in relation to the detection of serious forms of organised crime.

3. The Council, acting in accordance with a special legislative procedure, may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.

In case of the absence of unanimity in the Council, a group of at least nine Member States may request that the draft measures be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft measures concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The specific procedure provided for in the second and third subparagraphs shall not apply to acts which constitute a development of the Schengen *acquis*.

Article 88
(ex Article 30 TEU)

1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

2. The European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

(a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies;

(b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.

3. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.

Article 89
(ex Article 32 TEU)

The Council, acting in accordance with a special legislative procedure, shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 82 and 87 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.

TITLE VI
TRANSPORT

Article 90
(ex Article 70 TEC)

The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.

Article 91
(ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

Article 92
(ex Article 72 TEC)

Until the provisions referred to in Article 91(1) have been laid down, no Member State may, unless the Council has unanimously adopted a measure granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.

Article 93
(ex Article 73 TEC)

Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 94
(ex Article 74 TEC)

Any measures taken within the framework of the Treaties in respect of transport rates and conditions shall take account of the economic circumstances of carriers.

Article 95
(ex Article 75 TEC)

1. In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited.

2. Paragraph 1 shall not prevent the European Parliament and the Council from adopting other measures pursuant to Article 91(1).

3. The Council shall, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the provisions of paragraph 1.

The Council may in particular lay down the provisions needed to enable the institutions of the Union to secure compliance with the rule laid down in paragraph 1 and to ensure that users benefit from it to the full.

4. The Commission shall, acting on its own initiative or on application by a Member State, investigate any cases of discrimination falling within paragraph 1 and, after consulting any Member State concerned, shall take the necessary decisions within the framework of the rules

laid down in accordance with the provisions of paragraph 3.

Article 96
(ex Article 76 TEC)

1. The imposition by a Member State, in respect of transport operations carried out within the Union, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited, unless authorised by the Commission.

2. The Commission shall, acting on its own initiative or on application by a Member State, examine the rates and conditions referred to in paragraph 1, taking account in particular of the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other.

After consulting each Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition provided for in paragraph 1 shall not apply to tariffs fixed to meet competition.

Article 97
(ex Article 77 TEC)

Charges or dues in respect of the crossing of frontiers which are charged by a carrier in addition to the transport rates shall not exceed a reasonable level after taking the costs actually incurred thereby into account.

Member States shall endeavour to reduce these costs progressively.

The Commission may make recommendations to Member States for the application of this Article.

Article 98
(ex Article 78 TEC)

The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this Article.

Article 99
(ex Article 79 TEC)

An Advisory Committee consisting of experts designated by the governments of Member States shall be attached to the Commission. The Commission, whenever it considers it desirable, shall consult the Committee on transport matters.

Article 100
(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

TITLE VII
COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1
RULES ON COMPETITION

SECTION 1
RULES APPLYING TO UNDERTAKINGS

Article 101
(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, 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.

Article 102
(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making 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.

Article 103
(ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article

102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104
(ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105
(ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106
(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and

Articles 101 to 109.

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

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2
AIDS GRANTED BY STATES

Article 107
(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;,

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary

to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109
(ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

CHAPTER 2
TAX PROVISIONS

Article 110
(ex Article 90 TEC)

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 111
(ex Article 91 TEC)

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

Article 112
(ex Article 92 TEC)

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.

Article 113
(ex Article 93 TEC)

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

CHAPTER 3
APPROXIMATION OF LAWS

Article 114
(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.

Article 115
(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 116
(ex Article 96 TEC)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

Article 117
(ex Article 97 TEC)

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 116 shall not apply.

Article 118

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

TITLE VIII
ECONOMIC AND MONETARY POLICY

Article 119
(ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

CHAPTER 1
ECONOMIC POLICY

Article 120
(ex Article 98 TEC)

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

Article 121
(ex Article 99 TEC)

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

2. The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.

The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with

Article 238(3)(a).

5. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

6. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

Article 122
(ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

Article 123
(ex Article 101 TEC)

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

Article 124
(ex Article 102 TEC)

Any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public

authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

Article 125
(ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 126
(ex Article 104 TEC)

1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:

(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:

— either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,

— or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;

(b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.

3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position

of the Member State.

The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.

6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

— to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,

— to invite the European Investment Bank to reconsider its lending policy towards the Member

State concerned,

— to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,

— to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.

When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

CHAPTER 2
MONETARY POLICY

Article 127
(ex Article 105 TEC)

1. The primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCB’) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the

Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

— to define and implement the monetary policy of the Union,

— to conduct foreign-exchange operations consistent with the provisions of Article 219,

— to hold and manage the official foreign reserves of the Member States,

— to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

— on any proposed Union act in its fields of competence,

— by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

Article 128
(ex Article 106 TEC)

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

2. Member States may issue euro coins subject to approval by the European Central Bank of

the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

Article 129
(ex Article 107 TEC)

1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.

2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as 'the Statute of the ESCB and of the ECB') is laid down in a Protocol annexed to the Treaties.

3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.

4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

Article 130
(ex Article 108 TEC)

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

Article 131
(ex Article 109 TEC)

Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

Article 132
(ex Article 110 TEC)

1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:

— make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),

— take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,

— make recommendations and deliver opinions.

2. The European Central Bank may decide to publish its decisions, recommendations and opinions.

3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

Article 133

Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank.

CHAPTER 3
INSTITUTIONAL PROVISIONS

Article 134
(ex Article 114 TEC)

1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, an Economic and Financial Committee is hereby set up.

2. The Economic and Financial Committee shall have the following tasks:

— to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions,

— to keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions,

— without prejudice to Article 240, to contribute to the preparation of the work of the Council referred to in Articles 66, 75, 121(2), (3), (4) and (6), 122, 124, 125, 126, 127(6), 128(2), 129(3) and (4), 138, 140(2) and (3), 143, 144(2) and (3), and in Article 219, and to carry out other advisory and preparatory tasks assigned to it by the Council,

— to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of the Treaties and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.

The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.

3. The Council shall, on a proposal from the Commission and after consulting the European Central Bank and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.

4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Article 139, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

Article 135
(ex Article 115 TEC)

For matters within the scope of Articles 121(4), 126 with the exception of paragraph 14, 138, 140(1), 140(2), first subparagraph, 140(3) and 219, the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

CHAPTER 4
PROVISIONS SPECIFIC TO MEMBER STATES WHOSE CURRENCY IS THE EURO

Article 136

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.
A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

Article 137

Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group.

Article 138
(ex Article 111(4), TEC)

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

CHAPTER 5
TRANSITIONAL PROVISIONS

Article 139

1. Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as 'Member States with a derogation'.

2. The following provisions of the Treaties shall not apply to Member States with a derogation:

(a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(2));

(b) coercive means of remedying excessive deficits (Article 126(9) and (11));

(c) the objectives and tasks of the ESCB (Article 127(1) to (3) and (5));

(d) issue of the euro (Article 128);

(e) acts of the European Central Bank (Article 132);

(f) measures governing the use of the euro (Article 133);

(g) monetary agreements and other measures relating to exchange-rate policy (Article 219);

(h) appointment of members of the Executive Board of the European Central Bank (Article 283(2));

(i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article 138(1));

(j) measures to ensure unified representation within the international financial institutions and conferences (Article 138(2)).

In the Articles referred to in points (a) to (j), 'Member States' shall therefore mean Member States whose currency is the euro.

3. Under Chapter IX of the Statute of the ESCB and of the ECB, Member States with a derogation and their national central banks are excluded from rights and obligations within the ESCB.

4. The voting rights of members of the Council representing Member States with a derogation shall be suspended for the adoption by the Council of the measures referred to in the Articles listed in paragraph 2, and in the following instances:

(a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article 121(4));

(b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article 126(6), (7), (8), (12) and (13)).

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

Article 140

(ex Articles 121(1), 122(2), second sentence, and 123(5) TEC)

1. At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and

of the ECB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:

— the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability,

— the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6),

— the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro,

— the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.

The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to the Treaties. The reports of the Commission and the European Central Bank shall also take account of the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.

2. After consulting the European Parliament and after discussion in the European Council, the Council shall, on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1, and abrogate the derogations of the Member States concerned.

The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. These members shall act within six months of the Council receiving the Commission's proposal.

The qualified majority of the said members, as referred to in the second subparagraph, shall be defined in accordance with Article 238(3)(a).

3. If it is decided, in accordance with the procedure set out in paragraph 2, to abrogate a derogation, the Council shall, acting with the unanimity of the Member States whose currency is the euro and the Member State concerned, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the euro as the single currency in the Member State concerned.

Article 141

(ex Articles 123(3) and 117(2) first five indents, TEC)

1. If and as long as there are Member States with a derogation, and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank.

2. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States:

— strengthen cooperation between the national central banks,

— strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability,

— monitor the functioning of the exchange-rate mechanism,

— hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets,

— carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute.

Article 142
(ex Article 124(1) TEC)

Each Member State with a derogation shall treat its exchange-rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the exchange-rate mechanism.

Article 143
(ex Article 119 TEC)

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.
The Commission shall keep the Council regularly informed of the situation and of how it is

developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;

(b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

(c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.

Article 144
(ex Article 120 TEC)

1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 143(2) is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.

3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above.

TITLE IX
EMPLOYMENT

Article 145
(ex Article 125 TEC)

Member States and the Union shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and

adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

Article 146
(ex Article 126 TEC)

1. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Union adopted pursuant to Article 121(2).

2. Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148.

Article 147
(ex Article 127 TEC)

1. The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

Article 148
(ex Article 128 TEC)

1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.

2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 150, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 121(2).

3. Each Member State shall provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.

4. The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, on a recommendation from the Commission, may, if it considers

it appropriate in the light of that examination, make recommendations to Member States.

5. On the basis of the results of that examination, the Council and the Commission shall make a joint annual report to the European Council on the employment situation in the Union and on the implementation of the guidelines for employment.

Article 149
(ex Article 129 TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.

Those measures shall not include harmonisation of the laws and regulations of the Member States.

Article 150
(ex Article 130 TEC)

The Council, acting by a simple majority after consulting the European Parliament, shall establish an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies. The tasks of the Committee shall be:

— to monitor the employment situation and employment policies in the Member States and the Union,

— without prejudice to Article 240, to formulate opinions at the request of either the Council or the Commission or on its own initiative, and to contribute to the preparation of the Council proceedings referred to in Article 148.

In fulfilling its mandate, the Committee shall consult management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

TITLE X
SOCIAL POLICY

Article 151
(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989

Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Article 152

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Article 153
(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

— shall not affect the right of Member States to define the fundamental principles of their

social security systems and must not significantly affect the financial equilibrium thereof,

— shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 154
(ex Article 138 TEC)

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155
(ex Article 139 TEC)

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.
The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

Article 156
(ex Article 140 TEC)

With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this

Chapter, particularly in matters relating to:

— employment,

— labour law and working conditions,

— basic and advanced vocational training,

— social security,

— prevention of occupational accidents and diseases,

— occupational hygiene,

— the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

Article 157
(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for

equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 158
(ex Article 142 TEC)

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article 159
(ex Article 143 TEC)

The Commission shall draw up a report each year on progress in achieving the objectives of Article 151, including the demographic situation in the Union. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

Article 160
(ex Article 144 TEC)

The Council, acting by a simple majority after consulting the European Parliament, shall establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The tasks of the Committee shall be:

— to monitor the social situation and the development of social protection policies in the Member States and the Union,

— to promote exchanges of information, experience and good practice between Member States and with the Commission,

— without prejudice to Article 240, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.

In fulfilling its mandate, the Committee shall establish appropriate contacts with management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

Article 161
(ex Article 145 TEC)

The Commission shall include a separate chapter on social developments within the Union in

its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

TITLE XI
THE EUROPEAN SOCIAL FUND

Article 162
(ex Article 146 TEC)

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Article 163
(ex Article 147 TEC)

The Fund shall be administered by the Commission.

The Commission shall be assisted in this task by a Committee presided over by a Member of the Commission and composed of representatives of governments, trade unions and employers' organisations.

Article 164
(ex Article 148 TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt implementing regulations relating to the European Social Fund.

TITLE XII
EDUCATION, VOCATIONAL TRAINING, YOUTH AND SPORT

Article 165
(ex Article 149 TEC)

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

— developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,

— encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

— promoting cooperation between educational establishments,

— developing exchanges of information and experience on issues common to the education systems of the Member States,

— encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,
— encouraging the development of distance education,

— developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.

4. In order to contribute to the achievement of the objectives referred to in this Article:

— the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

— the Council, on a proposal from the Commission, shall adopt recommendations.

Article 166
(ex Article 150 TEC)

1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

2. Union action shall aim to:

— facilitate adaptation to industrial changes, in particular through vocational training and retraining,

— improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,

— facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,

— stimulate cooperation on training between educational or training establishments and firms,

— develop exchanges of information and experience on issues common to the training systems of the Member States.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.

TITLE XIII
CULTURE

Article 167
(ex Article 151 TEC)

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

— improvement of the knowledge and dissemination of the culture and history of the European peoples,

— conservation and safeguarding of cultural heritage of European significance,

— non-commercial cultural exchanges,

— artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

— the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

— the Council, on a proposal from the Commission, shall adopt recommendations.

TITLE XIV
PUBLIC HEALTH

Article 168
(ex Article 152 TEC)

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary

legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

TITLE XV
CONSUMER PROTECTION

Article 169
(ex Article 153 TEC)

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

TITLE XVI
TRANS-EUROPEAN NETWORKS

Article 170
(ex Article 154 TEC)

1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union.

Article 171
(ex Article 155 TEC)

1. In order to achieve the objectives referred to in Article 170, the Union:

— shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,

— shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,

— may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific

projects in Member States in the area of transport infrastructure.

The Union's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

Article 172
(ex Article 156 TEC)

The guidelines and other measures referred to in Article 171(1) shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

TITLE XVII
INDUSTRY

Article 173
(ex Article 157 TEC)

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

— speeding up the adjustment of industry to structural changes,

— encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,

— encouraging an environment favourable to cooperation between undertakings,

— fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to

promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

TITLE XVIII
ECONOMIC, SOCIAL AND TERRITORIAL COHESION

Article 174
(ex Article 158 TEC)

In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross- border and mountain regions.

Article 175
(ex Article 159 TEC)

Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.

The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress

made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.

If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

Article 176
(ex Article 160 TEC)

The European Regional Development Fund is intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.

Article 177
(ex Article 161 TEC)

Without prejudice to Article 178, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, shall define the tasks, priority objectives and the organisation of the Structural Funds, which may involve grouping the Funds. The general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments shall also be defined by the same procedure.

A Cohesion Fund set up in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure.

Article 178
(ex Article 162 TEC)

Implementing regulations relating to the European Regional Development Fund shall be taken by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

With regard to the European Agricultural Guidance and Guarantee Fund, Guidance Section, and the European Social Fund, Articles 43 and 164 respectively shall continue to apply.

TITLE XIX
RESEARCH AND TECHNOLOGICAL DEVELOPMENT AND SPACE

Article 179
(ex Article 163 TEC)

1. The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.

2. For this purpose the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation.

3. All Union activities under the Treaties in the area of research and technological development, including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title.

Article 180
(ex Article 164 TEC)

In pursuing these objectives, the Union shall carry out the following activities, complementing the activities carried out in the Member States:

(a) implementation of research, technological development and demonstration programmes, by promoting cooperation with and between undertakings, research centres and universities;

(b) promotion of cooperation in the field of Union research, technological development and demonstration with third countries and international organisations;

(c) dissemination and optimisation of the results of activities in Union research, technological development and demonstration;

(d) stimulation of the training and mobility of researchers in the Union.

Article 181
(ex Article 165 TEC)

1. The Union and the Member States shall coordinate their research and technological development activities so as to ensure that national policies and Union policy are mutually consistent.

2. In close cooperation with the Member State, the Commission may take any useful initiative to promote the coordination referred to in paragraph 1, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and

the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Article 182
(ex Article 166 TEC)

1. A multiannual framework programme, setting out all the activities of the Union, shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee.

The framework programme shall:

— establish the scientific and technological objectives to be achieved by the activities provided for in Article 180 and fix the relevant priorities,

— indicate the broad lines of such activities,

— fix the maximum overall amount and the detailed rules for Union financial participation in the framework programme and the respective shares in each of the activities provided for.

2. The framework programme shall be adapted or supplemented as the situation changes.

3. The framework programme shall be implemented through specific programmes developed within each activity. Each specific programme shall define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary. The sum of the amounts deemed necessary, fixed in the specific programmes, may not exceed the overall maximum amount fixed for the framework programme and each activity.

4. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall adopt the specific programmes.

5. As a complement to the activities planned in the multiannual framework programme, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the measures necessary for the implementation of the European research area.

Article 183
(ex Article 167 TEC)

For the implementation of the multiannual framework programme the Union shall:
— determine the rules for the participation of undertakings, research centres and universities,
— lay down the rules governing the dissemination of research results.

Article 184
(ex Article 168 TEC)

In implementing the multiannual framework programme, supplementary programmes may be decided on involving the participation of certain Member States only, which shall finance them subject to possible Union participation.

The Union shall adopt the rules applicable to supplementary programmes, particularly as regards the dissemination of knowledge and access by other Member States.

Article 185
(ex Article 169 TEC)

In implementing the multiannual framework programme, the Union may make provision, in agreement with the Member States concerned, for participation in research and development programmes undertaken by several Member States, including participation in the structures created for the execution of those programmes.

Article 186
(ex Article 170 TEC)

In implementing the multiannual framework programme the Union may make provision for cooperation in Union research, technological development and demonstration with third countries or international organisations.

The detailed arrangements for such cooperation may be the subject of agreements between the Union and the third parties concerned.

Article 187
(ex Article 171 TEC)

The Union may set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes.

Article 188
(ex Article 172 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions referred to in Article 187.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the provisions referred to in Articles 183, 184 and 185. Adoption of the supplementary programmes shall require the agreement of the Member States concerned.

Article 189

1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.

2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space programme, excluding any harmonisation of the laws and regulations of the Member States.

3. The Union shall establish any appropriate relations with the European Space Agency.

4. This Article shall be without prejudice to the other provisions of this Title.

Article 190
(ex Article 173 TEC)

At the beginning of each year the Commission shall send a report to the European Parliament and to the Council. The report shall include information on research and technological development activities and the dissemination of results during the previous year, and the work programme for the current year.

TITLE XX
ENVIRONMENT

Article 191
(ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

— available scientific and technical data,

— environmental conditions in the various regions of the Union,

— the potential benefits and costs of action or lack of action,

— the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 192
(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first

subparagraph.

3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

— temporary derogations, and/or

— financial support from the Cohesion Fund set up pursuant to Article 177.

Article 193
(ex Article 176 TEC)

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

TITLE XXI
ENERGY

Article 194

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European

Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

TITLE XXII
TOURISM

Article 195

1. The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector.
To that end, Union action shall be aimed at:

(a) encouraging the creation of a favourable environment for the development of undertakings in this sector;

(b) promoting cooperation between the Member States, particularly by the exchange of good practice.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States to achieve the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.

TITLE XXIII
CIVIL PROTECTION

Article 196

1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters.

Union action shall aim to:

(a) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man- made disasters within the Union;

(b) promote swift, effective operational cooperation within the Union between national civil- protection services;

(c) promote consistency in international civil-protection work.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

TITLE XXIV
ADMINISTRATIVE COOPERATION

Article 197

1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.

PART FOUR
ASSOCIATION OF THE OVERSEAS COUNTRIES AND TERRITORIES

Article 198
(ex Article 182 TEC)

The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the ‘countries and territories’) are listed in Annex II.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and

territories in order to lead them to the economic, social and cultural development to which they aspire.

Article 199
(ex Article 183 TEC)

Association shall have the following objectives.

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.

2. Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which is has special relations.

3. The Member States shall contribute to the investments required for the progressive development of these countries and territories.

4. For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.

5. In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non- discriminatory basis, subject to any special provisions laid down pursuant to Article 203.

Article 200
(ex Article 184 TEC)

1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of the Treaties.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.

3. The countries and territories may, however, levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.

The duties referred to in the preceding subparagraph may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.

4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs

tariff.

5. The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.

Article 201
(ex Article 185 TEC)

If the level of the duties applicable to goods from a third country on entry into a country or territory is liable, when the provisions of Article 200(1) have been applied, to cause deflections of trade to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures needed to remedy the situation.

Article 202
(ex Article 186 TEC)

Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203.

Article 203
(ex Article 187 TEC)

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

Article 204
(ex Article 188 TEC)

The provisions of Articles 198 to 203 shall apply to Greenland, subject to the specific provisions for Greenland set out in the Protocol on special arrangements for Greenland, annexed to the Treaties.

PART FIVE
THE UNION'S EXTERNAL ACTION

TITLE I
GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 205

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

TITLE II
COMMON COMMERCIAL POLICY

Article 206
(ex Article 131 TEC)

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

Article 207
(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

TITLE III
COOPERATION WITH THIRD COUNTRIES AND HUMANITARIAN AID

CHAPTER 1
DEVELOPMENT COOPERATION

Article 208
(ex Article 177 TEC)

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

Article 209
(ex Article 179 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach.

2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

3. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1.

Article 210
(ex Article 180 TEC)

1. In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.

2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.

Article 211
(ex Article 181 TEC)

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.

CHAPTER 2
ECONOMIC, FINANCIAL AND TECHNICAL COOPERATION WITH THIRD COUNTRIES

Article 212
(ex Article 181*a* TEC)

1. Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of paragraph 1.

3. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The first subparagraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 213

When the situation in a third country requires urgent financial assistance from the Union, the Council shall adopt the necessary decisions on a proposal from the Commission.

CHAPTER 3
HUMANITARIAN AID

Article 214

1. The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.

2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for

the operation of the Corps.

6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures.

7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system.

TITLE IV
RESTRICTIVE MEASURES

Article 215
(ex Article 301 TEC)

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

TITLE V
INTERNATIONAL AGREEMENTS

Article 216

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Article 217
(ex Article 310 TEC)

The Union may conclude with one or more third countries or international organisations

agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Article 218
(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
The European Parliament and the Council may, in an urgent situation, agree upon a

time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Article 219

(ex Article 111(1) to (3) and (5) TEC)

1. By way of derogation from Article 218, the Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament and in accordance with the procedure provided for in paragraph 3.

The Council may, either on a recommendation from the European Central Bank or on a

recommendation from the Commission, and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the euro central rates.

2. In the absence of an exchange-rate system in relation to one or more currencies of third States as referred to in paragraph 1, the Council, either on a recommendation from the Commission and after consulting the European Central Bank or on a recommendation from the European Central Bank, may formulate general orientations for exchange-rate policy in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability.

3. By way of derogation from Article 218, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations, the Council, on a recommendation from the Commission and after consulting the European Central Bank, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Union expresses a single position. The Commission shall be fully associated with the negotiations.

4. Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

TITLE VI
THE UNION'S RELATIONS WITH INTERNATIONAL ORGANISATIONS AND THIRD COUNTRIES AND UNION DELEGATIONS

Article 220
(ex Articles 302 to 304 TEC)

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.

The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.

Article 221

1. Union delegations in third countries and at international organisations shall represent the Union.

2. Union delegations shall be placed under the authority of the High Representative of the

Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.

TITLE VII
SOLIDARITY CLAUSE

Article 222

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;

— protect democratic institutions and the civilian population from any terrorist attack;
— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

PART SIX
INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I
INSTITUTIONAL PROVISIONS

CHAPTER 1
THE INSTITUTIONS

SECTION 1
THE EUROPEAN PARLIAMENT

Article 223
(ex Article 190(4) and (5) TEC)

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

2. The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure after seeking an opinion from the Commission and with the consent of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.

Article 224
(ex Article 191, second subparagraph, TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at European level referred to in Article 10(4) of the Treaty on European Union and in particular the rules regarding their funding.

Article 225
(ex Article 192, second subparagraph, TEC)

The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.

Article 226
(ex Article 193 TEC)

In the course of its duties, the European Parliament may, at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the

alleged facts are being examined before a court and while the case is still subject to legal proceedings.

The temporary Committee of Inquiry shall cease to exist on the submission of its report.

The detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission.

Article 227
(ex Article 194 TEC)

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.

Article 228
(ex Article 195 TEC)

1. A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. The Ombudsman shall be elected after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any Government, institution, body, office or entity. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

4. The European Parliament acting by means of regulations on its own initiative in accordance with a special legislative procedure shall, after seeking an opinion from the Commission and with the consent of the Council, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

Article 229
(ex Article 196 TEC)

The European Parliament shall hold an annual session. It shall meet, without requiring to be convened, on the second Tuesday in March.

The European Parliament may meet in extraordinary part-session at the request of a majority of its component Members or at the request of the Council or of the Commission.

Article 230
(ex Article 197, second, third and fourth paragraph, TEC)

The Commission may attend all the meetings and shall, at its request, be heard.

The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members.

The European Council and the Council shall be heard by the European Parliament in accordance with the conditions laid down in the Rules of Procedure of the European Council and those of the Council.

Article 231
(ex Article 198 TEC)

Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast.

The Rules of Procedure shall determine the quorum.

Article 232
(ex Article 199 TEC)

The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members.

The proceedings of the European Parliament shall be published in the manner laid down in the Treaties and in its Rules of Procedure.

Article 233
(ex Article 200 TEC)

The European Parliament shall discuss in open session the annual general report submitted to it by the Commission.

Article 234
(ex Article 201 TEC)

If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from duties that he or she carries out in the Commission. They shall remain in office and continue to deal with current business until they are replaced in accordance with Article 17 of the Treaty on European Union. In this case, the term of office of the members of the Commission appointed to replace them shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired.

SECTION 2
THE EUROPEAN COUNCIL

Article 235

1. Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member.

Article 16(4) of the Treaty on European Union and Article 238(2) of this Treaty shall apply to the European Council when it is acting by a qualified majority. Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote.

Abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity.

2. The President of the European Parliament may be invited to be heard by the European Council.

3. The European Council shall act by a simple majority for procedural questions and for the adoption of its Rules of Procedure.

4. The European Council shall be assisted by the General Secretariat of the Council.

Article 236

The European Council shall adopt by a qualified majority:

(a) a decision establishing the list of Council configurations, other than those of the General Affairs Council and of the Foreign Affairs Council, in accordance with Article 16(6) of the Treaty on European Union;

(b) a decision on the Presidency of Council configurations, other than that of Foreign Affairs, in accordance with Article 16(9) of the Treaty on European Union.

SECTION 3
THE COUNCIL

Article 237
(ex Article 204 TEC)

The Council shall meet when convened by its President on his own initiative or at the request of one of its Members or of the Commission.

Article 238
(ex Article 205(1) and (2), TEC)

1. Where it is required to act by a simple majority, the Council shall act by a majority of its component members.

2. By way of derogation from Article 16(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.

3. As from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, in cases where, under the Treaties, not all the members of the Council participate in voting, a qualified majority shall be defined as follows:

(a) A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

A blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained;

(b) By way of derogation from point (a), where the Council does not act on a proposal from

the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

4. Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

Article 239
(ex Article 206 TEC)

Where a vote is taken, any Member of the Council may also act on behalf of not more than one other member.

Article 240
(ex Article 207 TEC)

1. A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council's Rules of Procedure.

2. The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary- General appointed by the Council.

The Council shall decide on the organisation of the General Secretariat by a simple majority.

3. The Council shall act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure.

Article 241
(ex Article 208 TEC)

The Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons.

Article 242
(ex Article 209 TEC)

The Council, acting by a simple majority shall, after consulting the Commission, determine the rules governing the committees provided for in the Treaties.

Article 243
(ex Article 210 TEC)

The Council shall determine the salaries, allowances and pensions of the President of the

European Council, the President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, the Members of the Commission, the Presidents, Members and Registrars of the Court of Justice of the European Union, and the Secretary-General of the Council. It shall also determine any payment to be made instead of remuneration.

SECTION 4
THE COMMISSION

Article 244

In accordance with Article 17(5) of the Treaty on European Union, the Members of the Commission shall be chosen on the basis of a system of rotation established unanimously by the European Council and on the basis of the following principles:

(a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;

(b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States.

Article 245
(ex Article 213 TEC)

The Members of the Commission shall refrain from any action incompatible with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks.

The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits in its stead.

Article 246
(ex Article 215 TEC)

Apart from normal replacement, or death, the duties of a Member of the Commission shall end when he resigns or is compulsorily retired.

A vacancy caused by resignation, compulsory retirement or death shall be filled for the remainder of the Member’s term of office by a new Member of the same nationality appointed

by the Council, by common accord with the President of the Commission, after consulting the European Parliament and in accordance with the criteria set out in the second subparagraph of Article 17(3) of the Treaty on European Union.

The Council may, acting unanimously on a proposal from the President of the Commission, decide that such a vacancy need not be filled, in particular when the remainder of the Member's term of office is short.

In the event of resignation, compulsory retirement or death, the President shall be replaced for the remainder of his term of office. The procedure laid down in the first subparagraph of Article 17(7) of the Treaty on European Union shall be applicable for the replacement of the President.

In the event of resignation, compulsory retirement or death, the High Representative of the Union for Foreign Affairs and Security Policy shall be replaced, for the remainder of his or her term of office, in accordance with Article 18(1) of the Treaty on European Union.

In the case of the resignation of all the Members of the Commission, they shall remain in office and continue to deal with current business until they have been replaced, for the remainder of their term of office, in accordance with Article 17 of the Treaty on European Union.

Article 247
(ex Article 216 TEC)

If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, compulsorily retire him.

Article 248
(ex Article 217(2) TEC)

Without prejudice to Article 18(4) of the Treaty on European Union, the responsibilities incumbent upon the Commission shall be structured and allocated among its members by its President, in accordance with Article 17(6) of that Treaty. The President may reshuffle the allocation of those responsibilities during the Commission's term of office. The Members of the Commission shall carry out the duties devolved upon them by the President under his authority.

Article 249
(ex Articles 218(2) and 212 TEC)

1. The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these Rules are published.

2. The Commission shall publish annually, not later than one month before the opening of the session of the European Parliament, a general report on the activities of the Union.

Article 250
(ex Article 219 TEC)

The Commission shall act by a majority of its Members.

Its Rules of Procedure shall determine the quorum.

SECTION 5
THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251
(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.
When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252
(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.
It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253
(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 254
(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates- General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Article 255

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Article 256
(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 257
(ex Article 225*a* TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Article 258
(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260
(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may

impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 261
(ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

Article 262
(ex Article 229*a* TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Article 263
(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264
(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265
(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266
(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268
(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270
(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271
(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272
(ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Article 273
(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which

relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274
(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 276

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277
(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278
(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279
(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Article 280
(ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Article 281
(ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

SECTION 6

THE EUROPEAN CENTRAL BANK

Article 282

1. The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.

2. The ESCB shall be governed by the decision-making bodies of the European Central Bank. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives.

3. The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.

4. The European Central Bank shall adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133, with Article 138, and with the conditions laid down in the Statute of the ESCB and of the ECB. In accordance with these same Articles, those

Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters.

5. Within the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.

Article 283
(ex Article 112 TEC)

1. The Governing Council of the European Central Bank shall comprise the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the Member States whose currency is the euro.

2. The Executive Board shall comprise the President, the Vice-President and four other members.

The President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank.

Their term of office shall be eight years and shall not be renewable.

Only nationals of Member States may be members of the Executive Board.

Article 284
(ex Article 113 TEC)

1. The President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the Governing Council of the European Central Bank. The President of the Council may submit a motion for deliberation to the Governing Council of the European Central Bank.

2. The President of the European Central Bank shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB.

3. The European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis.

The President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the

competent committees of the European Parliament.

SECTION 7
THE COURT OF AUDITORS

Article 285
(ex Article 246 TEC)

The Court of Auditors shall carry out the Union's audit.

It shall consist of one national of each Member State. Its Members shall be completely independent in the performance of their duties, in the Union's general interest.

Article 286
(ex Article 247 TEC)

1. The Members of the Court of Auditors shall be chosen from among persons who belong or have belonged in their respective States to external audit bodies or who are especially qualified for this office. Their independence must be beyond doubt.

2. The Members of the Court of Auditors shall be appointed for a term of six years. The Council, after consulting the European Parliament, shall adopt the list of Members drawn up in accordance with the proposals made by each Member State. The term of office of the Members of the Court of Auditors shall be renewable.

They shall elect the President of the Court of Auditors from among their number for a term of three years. The President may be re-elected.

3. In the performance of these duties, the Members of the Court of Auditors shall neither seek nor take instructions from any government or from any other body. The Members of the Court of Auditors shall refrain from any action incompatible with their duties.

4. The Members of the Court of Auditors may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

5. Apart from normal replacement, or death, the duties of a Member of the Court of Auditors shall end when he resigns, or is compulsorily retired by a ruling of the Court of Justice pursuant to paragraph 6.

The vacancy thus caused shall be filled for the remainder of the Member's term of office.
Save in the case of compulsory retirement, Members of the Court of Auditors shall remain in office until they have been replaced.

6. A Member of the Court of Auditors may be deprived of his office or of his right to a pension

or other benefits in its stead only if the Court of Justice, at the request of the Court of Auditors, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.

7. The Council shall determine the conditions of employment of the President and the Members of the Court of Auditors and in particular their salaries, allowances and pensions. It shall also determine any payment to be made instead of remuneration.

8. The provisions of the Protocol on the privileges and immunities of the European Union applicable to the Judges of the Court of Justice of the European Union shall also apply to the Members of the Court of Auditors.

Article 287
(ex Article 248 TEC)

1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union. It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination.

The Court of Auditors shall provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions which shall be published in the Official Journal of the European Union. This statement may be supplemented by specific assessments for each major area of Union activity.

2. The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases of irregularity.

The audit of revenue shall be carried out on the basis both of the amounts established as due and the amounts actually paid to the Union.

The audit of expenditure shall be carried out on the basis both of commitments undertaken and payments made.

These audits may be carried out before the closure of accounts for the financial year in question.

3. The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Union, on the premises of any body, office or agency which manages revenue or expenditure on behalf of the Union and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget. In the Member States the audit shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence. These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit.

The other institutions of the Union, any bodies, offices or agencies managing revenue or expenditure on behalf of the Union, any natural or legal person in receipt of payments from the budget, and the national audit bodies or, if these do not have the necessary powers, the competent national departments, shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task.

In respect of the European Investment Bank's activity in managing Union expenditure and revenue, the Court's rights of access to information held by the Bank shall be governed by an agreement between the Court, the Bank and the Commission. In the absence of an agreement, the Court shall nevertheless have access to information necessary for the audit of Union expenditure and revenue managed by the Bank.

4. The Court of Auditors shall draw up an annual report after the close of each financial year. It shall be forwarded to the other institutions of the Union and shall be published, together with the replies of these institutions to the observations of the Court of Auditors, in the Official Journal of the European Union.

The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union.

It shall adopt its annual reports, special reports or opinions by a majority of its Members. However, it may establish internal chambers in order to adopt certain categories of reports or opinions under the conditions laid down by its Rules of Procedure.

It shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

The Court of Auditors shall draw up its Rules of Procedure. Those rules shall require the approval of the Council.

CHAPTER 2
LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1
THE LEGAL ACTS OF THE UNION

Article 288
(ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Article 289

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word 'implementing' shall be inserted in the title of implementing acts.

Article 292

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

SECTION 2
PROCEDURES FOR THE ADOPTION OF ACTS AND OTHER PROVISIONS

Article 293
(ex Article 250 TEC)

1. Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in paragraphs 10 and 13 of Article 294, in Articles 310, 312 and 314 and in the second paragraph of Article 315.

2. As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act.

Article 294
(ex Article 251 TEC)

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.

4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:

(a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;

(b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;

(c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement

with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

Article 295

The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.

Article 296
(ex Article 253 TEC)

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

Article 297
(ex Article 254 TEC)

1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.

Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.

Legislative acts shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

2. Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

Other directives, and decisions which specify to whom they are addressed, shall be notified

to those to whom they are addressed and shall take effect upon such notification.

Article 298

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

Article 299

(ex Article 256 TEC)

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

CHAPTER 3
THE UNION'S ADVISORY BODIES

Article 300

1. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions, exercising advisory functions.

2. The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio- economic, civic, professional and cultural areas.

3. The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.

4. The members of the Economic and Social Committee and of the Committee of the Regions shall not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Union's general interest.

5. The rules referred to in paragraphs 2 and 3 governing the nature of the composition of the Committees shall be reviewed at regular intervals by the Council to take account of economic, social and demographic developments within the Union. The Council, on a proposal from the Commission, shall adopt decisions to that end.

SECTION 1
THE ECONOMIC AND SOCIAL COMMITTEE

Article 301
(ex Article 258 TEC)

The number of members of the Economic and Social Committee shall not exceed 350.

The Council, acting unanimously on a proposal from the Commission, shall adopt a decision determining the Committee's composition.

The Council shall determine the allowances of members of the Committee.

Article 302
(ex Article 259 TEC)

1. The members of the Committee shall be appointed for five years The Council shall adopt the list of members drawn up in accordance with the proposals made by each Member State. The term of office of the members of the Committee shall be renewable.

2. The Council shall act after consulting the Commission. It may obtain the opinion of European bodies which are representative of the various economic and social sectors and of civil society to which the Union's activities are of concern.

Article 303
(ex Article 260 TEC)

The Committee shall elect its chairman and officers from among its members for a term of two and a half years.

It shall adopt its Rules of Procedure.

The Committee shall be convened by its chairman at the request of the European Parliament, the Council or of the Commission. It may also meet on its own initiative.

Article 304
(ex Article 262 TEC)

The Committee shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide. The Committee may be consulted by these institutions in all cases in which they consider it appropriate. It may issue an opinion on its own initiative in cases in which it considers such action appropriate.

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time limit which may not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time limit, the absence of an opinion shall not prevent further action.

The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.

SECTION 2
THE COMMITTEE OF THE REGIONS

Article 305
(ex Article 263, second, third and fourth paragraphs, TEC)

The number of members of the Committee of the Regions shall not exceed 350.

The Council, acting unanimously on a proposal from the Commission, shall adopt a decision determining the Committee's composition.

The members of the Committee and an equal number of alternate members shall be appointed for five years. Their term of office shall be renewable. The Council shall adopt the list of members and alternate members drawn up in accordance with the proposals made by each Member State. When the mandate referred to in Article 300(3) on the basis of which they were proposed comes to an end, the term of office of members of the Committee shall terminate automatically and they shall then be replaced for the remainder of the said term of office in accordance with the same procedure. No member of the Committee shall at the same time be a Member of the European Parliament.

Article 306
(ex Article 264 TEC)

The Committee of the Regions shall elect its chairman and officers from among its members for a term of two and a half years.

It shall adopt its Rules of Procedure.

The Committee shall be convened by its chairman at the request of the European Parliament, the Council or of the Commission. It may also meet on its own initiative.

Article 307
(ex Article 265 TEC)

The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time limit which may not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time limit, the absence of an opinion shall not prevent further action.

Where the Economic and Social Committee is consulted pursuant to Article 304, the Committee of the Regions shall be informed by the European Parliament, the Council or the Commission of the request for an opinion. Where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter.

It may issue an opinion on its own initiative in cases in which it considers such action appropriate.

The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.

CHAPTER 4
THE EUROPEAN INVESTMENT BANK

Article 308
(ex Article 266 TEC)

The European Investment Bank shall have legal personality.

The members of the European Investment Bank shall be the Member States.

The Statute of the European Investment Bank is laid down in a Protocol annexed to the Treaties. The Council acting unanimously in accordance with a special legislative procedure, at the request of the European Investment Bank and after consulting the European Parliament and the Commission, or on a proposal from the Commission and after consulting the European Parliament and the European Investment Bank, may amend the Statute of the Bank.

Article 309
(ex Article 267 TEC)

The task of the European Investment Bank shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union. For this purpose the Bank shall, operating on a non-profit- making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

(a) projects for developing less-developed regions;

(b) projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States;

(c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.

In carrying out its task, the Bank shall facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Union Financial Instruments.

TITLE II
FINANCIAL PROVISIONS

Article 310
(ex Article 268 TEC)

1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget.

The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314.

The revenue and expenditure shown in the budget shall be in balance.

2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 322.

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.

4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the

expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.

5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.

6. The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union.

CHAPTER 1
THE UNION'S OWN RESOURCES

Article 311
(ex Article 269 TEC)

The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.

CHAPTER 2
THE MULTIANNUAL FINANCIAL FRAMEWORK

Article 312

1. The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources.

It shall be established for a period of at least five years.

The annual budget of the Union shall comply with the multiannual financial framework.

2. The Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council shall act

unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph.

3. The financial framework shall determine the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations. The categories of expenditure, limited in number, shall correspond to the Union's major sectors of activity.

The financial framework shall lay down any other provisions required for the annual budgetary procedure to run smoothly.

4. Where no Council regulation determining a new financial framework has been adopted by the end of the previous financial framework, the ceilings and other provisions corresponding to the last year of that framework shall be extended until such time as that act is adopted.

5. Throughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption.

CHAPTER 3
THE UNION'S ANNUAL BUDGET

Article 313
(ex Article 272(1), TEC)

The financial year shall run from 1 January to 31 December.

Article 314
(ex Article 272(2) to (10), TEC)

The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions.

1. With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget. which may contain different estimates.

The draft budget shall contain an estimate of revenue and an estimate of expenditure.

2. The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented.

The Commission may amend the draft budget during the procedure until such time as the Conciliation Committee, referred to in paragraph 5, is convened.

3. The Council shall adopt its position on the draft budget and forward it to the European Parliament not later than 1 October of the year preceding that in which the budget is to be implemented. The Council shall inform the European Parliament in full of the reasons which led it to adopt its position.

4. If, within forty-two days of such communication, the European Parliament:

(a) approves the position of the Council, the budget shall be adopted;

(b) has not taken a decision, the budget shall be deemed to have been adopted;

(c) adopts amendments by a majority of its component members, the amended draft shall be forwarded to the Council and to the Commission. The President of the European Parliament, in agreement with the President of the Council, shall immediately convene a meeting of the Conciliation Committee. However, if within ten days of the draft being forwarded the Council informs the European Parliament that it has approved all its amendments, the Conciliation Committee shall not meet.

5. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament within twenty-one days of its being convened, on the basis of the positions of the European Parliament and the Council.

The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

6. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee agrees on a joint text, the European Parliament and the Council shall each have a period of fourteen days from the date of that agreement in which to approve the joint text.

7. If, within the period of fourteen days referred to in paragraph 6:

(a) the European Parliament and the Council both approve the joint text or fail to take a decision, or if one of these institutions approves the joint text while the other one fails to take a decision, the budget shall be deemed to be definitively adopted in accordance with the joint text; or

(b) the European Parliament, acting by a majority of its component members, and the Council both reject the joint text, or if one of these institutions rejects the joint text while the other one fails to take a decision, a new draft budget shall be submitted by the Commission; or

(c) the European Parliament, acting by a majority of its component members, rejects the joint text while the Council approves it, a new draft budget shall be submitted by the Commission; or

(d) the European Parliament approves the joint text whilst the Council rejects it, the European Parliament may, within fourteen days from the date of the rejection by the Council and acting by a majority of its component members and three-fifths of the votes cast, decide to confirm all or some of the amendments referred to in paragraph 4(c). Where a European Parliament amendment is not confirmed, the position agreed in the Conciliation Committee on the budget heading which is the subject of the amendment shall be retained. The budget shall be deemed to be definitively adopted on this basis.

8. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee does not agree on a joint text, a new draft budget shall be submitted by the Commission.

9. When the procedure provided for in this Article has been completed, the President of the European Parliament shall declare that the budget has been definitively adopted.

10. Each institution shall exercise the powers conferred upon it under this Article in compliance with the Treaties and the acts adopted thereunder, with particular regard to the Union's own resources and the balance between revenue and expenditure.

Article 315
(ex Article 273 TEC)

If, at the beginning of a financial year, the budget has not yet been definitively adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of any chapter of the budget in accordance with the provisions of the Regulations made pursuant to Article 322; that sum shall not, however, exceed one twelfth of the appropriations provided for in the same chapter of the draft budget.

The Council on a proposal by the Commission, may, provided that the other conditions laid down in the first paragraph are observed, authorise expenditure in excess of one twelfth in accordance with the regulations made pursuant to Article 322. The Council shall forward the decision immediately to the European Parliament.

The decision referred to in the second paragraph shall lay down the necessary measures relating to resources to ensure application of this Article, in accordance with the acts referred to in Article 311.

It shall enter into force thirty days following its adoption if the European Parliament, acting by a majority of its component Members, has not decided to reduce this expenditure within that time- limit.

Article 316
(ex Article 271 TEC)

In accordance with conditions to be laid down pursuant to Article 322, any appropriations, other than those relating to staff expenditure, that are unexpended at the end of the financial year may be carried forward to the next financial year only.
Appropriations shall be classified under different chapters grouping items of expenditure according to their nature or purpose and subdivided in accordance with the regulations made pursuant to Article 322.

The expenditure of the European Parliament, the European Council and the Council, the Commission and the Court of Justice of the European Union shall be set out in separate parts of the budget, without prejudice to special arrangements for certain common items of expenditure.

CHAPTER 4
IMPLEMENTATION OF THE BUDGET AND DISCHARGE

Article 317
(ex Article 274 TEC)

The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.

The regulations shall lay down the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities. They shall also lay down the responsibilities and detailed rules for each institution concerning its part in effecting its own expenditure.

Within the budget, the Commission may, subject to the limits and conditions laid down in the regulations made pursuant to Article 322, transfer appropriations from one chapter to another or from one subdivision to another.

Article 318
(ex Article 275 TEC)

The Commission shall submit annually to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget. The Commission shall also forward to them a financial statement of the assets and liabilities of the Union.

The Commission shall also submit to the European Parliament and to the Council an evaluation report on the Union's finances based on the results achieved, in particular in relation to the indications given by the European Parliament and the Council pursuant to Article 319.

Article 319
(ex Article 276 TEC)

1. The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget. To this end, the Council and the European Parliament in turn shall examine the accounts, the financial statement and the evaluation report referred to in Article 318, the annual report by the Court of Auditors together with the replies of the institutions under audit to the observations of the Court of Auditors, the statement of assurance referred to in Article 287(1), second subparagraph and any relevant special reports by the Court of Auditors.

2. Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request.

3. The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.

At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.

CHAPTER 5
COMMON PROVISIONS

Article 320
(ex Article 277 TEC)

The multiannual financial framework and the annual budget shall be drawn up in euro.

Article 321
(ex Article 278 TEC)

The Commission may, provided it notifies the competent authorities of the Member States concerned, transfer into the currency of one of the Member States its holdings in the currency of another Member State, to the extent necessary to enable them to be used for purposes which come within the scope of the Treaties. The Commission shall as far as possible avoid making such transfers if it possesses cash or liquid assets in the currencies which it needs.

The Commission shall deal with each Member State through the authority designated by the State concerned. In carrying out financial operations the Commission shall employ the services of the bank of issue of the Member State concerned or of any other financial institution

approved by that State.

Article 322
(ex Article 279 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;

(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.

2. The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Court of Auditors, shall determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements.

Article 323

The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties.

Article 324

Regular meetings between the Presidents of the European Parliament, the Council and the Commission shall be convened, on the initiative of the Commission, under the budgetary procedures referred to in this Title. The Presidents shall take all the necessary steps to promote consultation and the reconciliation of the positions of the institutions over which they preside in order to facilitate the implementation of this Title.

CHAPTER 6
COMBATTING FRAUD

Article 325
(ex Article 280 TEC)

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

TITLE III
ENHANCED COOPERATION

Article 326
(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Article 327
(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Article 328
(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly

informed regarding developments in enhanced cooperation.

Article 329

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

Article 330

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).

Article 331

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re- examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330.

Article 332

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article 333

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

Article 334

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

PART SEVEN
GENERAL AND FINAL PROVISIONS

Article 335

(ex Article 282 TEC)

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

Article 336

(ex Article 283 TEC)

The European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

Article 337

(ex Article 284 TEC)

The Commission may, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, collect any information and carry out any checks required for the performance of the tasks entrusted to it.

Article 338

(ex Article 285 TEC)

1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of

Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Union.

2. The production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; it shall not entail excessive burdens on economic operators.

Article 339
(ex Article 287 TEC)

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Article 340
(ex Article 288 TEC)

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

Article 341
(ex Article 289 TEC)

The seat of the institutions of the Union shall be determined by common accord of the governments of the Member States.

Article 342
(ex Article 290 TEC)

The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.

Article 343
(ex Article 291 TEC)

The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.

Article 344
(ex Article 292 TEC)

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Article 345
(ex Article 295 TEC)

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

Article 346
(ex Article 296 TEC)

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

Article 347
(ex Article 297 TEC)

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Article 348
(ex Article 298 TEC)

If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling in camera.

Article 349

(ex Article 299(2), second, third and fourth subparagraphs, TEC)

Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.

Article 350

(ex Article 306 TEC)

The provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties.

Article 351

(ex Article 307 TEC)

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the

one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Article 352
(ex Article 308 TEC)

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Article 353

Article 48(7) of the Treaty on European Union shall not apply to the following Articles:

— Article 311, third and fourth paragraphs,

— Article 312(2), first subparagraph,

— Article 352, and

— Article 354.

Article 354
(ex Article 309 TEC)

For the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article.

For the adoption of the decisions referred to in paragraphs 3 and 4 of Article 7 of the Treaty on European Union, a qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty.

Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Article 7 of the Treaty on European Union, the Council acts by a qualified majority on the basis of a provision of the Treaties, that qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty, or, where the Council acts on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 238(3)(a).

For the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members.

Article 355
(ex Article 299(2), first subparagraph, and Article 299(3) to (6) TEC)

In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.

Article 356
(ex Article 312 TEC)

This Treaty is concluded for an unlimited period.

Article 357
(ex Article 313 TEC)

This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The Instruments of ratification shall be deposited with the Government of the Italian Republic.

This Treaty shall enter into force on the first day of the month following the deposit of the Instrument of ratification by the last signatory State to take this step. If, however, such deposit is made less than 15 days before the beginning of the following month, this Treaty shall not enter into force until the first day of the second month after the date of such deposit.

Article 358

The provisions of Article 55 of the Treaty on European Union shall apply to this Treaty.

3. Meginmál EES-samningsins

SAMNINGUR UM EVRÓPSKA EFNAHAGSSVÆÐIÐ

EFNAHAGSBANDALAG EVRÓPU,
KOLA- OG STÁLBANDALAG EVRÓPU,
KONUNGSRÍKIÐ BELGÍA,
KONUNGSRÍKIÐ DANMÖRK,
SAMBANDSLÝÐVELDIÐ ÞÝSKALAND,
LÝÐVELDIÐ GRIKKLAND,
KONUNGSRÍKIÐ SPÁNN,
LÝÐVELDIÐ FRAKKLAND,
ÍRLAND,
LÝÐVELDIÐ ÍTALÍA,
STÓRHERTOGADÆMIÐ LÚXEMBORG,
KONUNGSRÍKIÐ HOLLAND,
LÝÐVELDIÐ PORTÚGAL,
HIÐ SAMEINAÐA KONUNGSRÍKI STÓRA-BRETLANDS OG NORÐUR-ÍRLANDS

OG

LÝÐVELDIÐ AUSTURRÍKI,
LÝÐVELDIÐ FINNLAND,
LÝÐVELDIÐ ÍSLAND,
FURSTADÆMIÐ LIECHTENSTEIN,
KONUNGSRÍKIÐ NOREGUR,
KONUNGSRÍKIÐ SVÍÞJÓÐ,
RÍKJASAMBANDIÐ SVISS,
sem nefnast hér á eftir SAMNINGSAÐILAR;

ERU SANNFÆRÐIR UM að Evrópskt efnahagssvæði muni stuðla að uppbyggingu Evrópu á grundvelli friðar, lýðræðis og mannréttinda;

ÁRÉTTA að höfuðáhersla er lögð á náin samskipti Evrópubandalagsins, aðildarríkja þess og EFTA-ríkjanna, sem grundvallast á nálægð, sameiginlegu gildismati frá fornu fari og evrópskri

samkennd;

HAFA EINSETT SÉR að stuðla á grundvelli markaðsbúskapar að auknu frjálsræði og samvinnu í viðskiptum um gjörvallan heim, einkum í samræmi við ákvæði Hins almenna samkomulags um tolla og viðskipti og samninginn um Efnahags- og framfarastofnunina;

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

HAFA EINSETT SÉR að beita sér fyrir því að frelsi til vöruflutninga, fólksflutninga, þjónustustarfsemi og fjármagnsflutninga verði sem víðtækast á öllu Evrópska efnahagssvæðinu, svo og að styrkja og auka samvinnu í jaðarmálum og tengdum málum;

HAFA ÞAÐ AÐ MARKMIÐI að stuðla að samræmdri þróun á Evrópska efnahagssvæðinu og eru sannfærðir um nauðsyn þess að draga með samningi þessum úr efnahagslegu og félagslegu misræmi milli svæða;

VILJA LEGGJA SITT AF MÖRKUM til að styrkja samvinnu milli þingmanna Evrópuþingsins og þjóðþinga EFTA-ríkjanna, svo og milli aðila vinnumarkaðarins í Evrópubandalaginu og EFTA-ríkjunum;

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

HAFA EINSETT SÉR að varðveita, vernda og bæta umhverfið og sjá til þess að náttúruauðlindir séu nýttar af varúð og skynsemi, einkum á grundvelli meginreglunnar um sjálfbæra þróun og þeirrar meginreglu að grípa skuli til varúðarráðstafana og fyrirbyggjandi aðgerða;

HAFA EINSETT SÉR að við mótun nýrra reglna verði lagðar til grundvallar strangar kröfur um að vernda beri heilsu, öryggi og umhverfi;

GERA SÉR LJÓST mikilvægi framþróunar í félagsmálum, þar á meðal jafnréttismálum karla og kvenna, á Evrópska efnahagssvæðinu og láta í ljós vilja sinn til að tryggja efnahagslegar og félagslegar framfarir, skapa skilyrði fyrir fullri atvinnu, bættum lífskjörum og bættum starfsskilyrðum á Evrópska efnahagssvæðinu;

HAFA EINSETT SÉR að efla hagsmuni neytenda og styrkja stöðu þeirra á markaðinum, með öfluga neytendavernd að markmiði;

SETJA SÉR ÞAU SAMEIGINLEGU MARKMIÐ að styrkja vísindalegar og tæknilegar undirstöður evrópsks iðnaðar og gera hann samkeppnishæfari á alþjóðavettvangi;

ÁLÍTA að gerð samnings þessa eigi ekki á nokkurn hátt að hafa áhrif á möguleika EFTA-ríkja til að gerast aðilar að Evrópubandalögunum;

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

ÞAR EÐ samningur þessi takmarkar hvorki sjálfræði samningsaðila til ákvarðanatöku né rétt þeirra til að gera samninga, samanber þó ákvæði samnings þessa og takmarkanir sem leiðir af reglum þjóðaréttar;

HAFA ÁKVEÐIÐ að gera með sér eftirfarandi samning:

I. HLUTI
MARKMIÐ OG MEGINREGLUR

1. gr.

1. Markmið þessa samstarfssamnings er að stuðla að stöðugri og jafnri eflingu viðskipta- og efnahagstengsla samningsaðila við sömu samkeppnisskilyrði og eftir sömu reglum með það fyrir augum að mynda einsleitt Evrópskt efnahagssvæði sem nefnist hér á eftir EES.

2. Til að ná þeim markmiðum sem sett eru í 1. mgr. skal samstarfið í samræmi við ákvæði samnings þessa fela í sér:

a) frjálsa fólksflutninga;

b) frjálsa vöruflutninga;

c) frjálsa þjónustustarfsemi;

d) frjálsa fjármagnsflutninga;

e) að komið verði á kerfi sem tryggi að samkeppni raskist ekki og að reglur þar að lútandi verði virtar af öllum; og einnig

f) nánari samvinnu á öðrum sviðum, svo sem á sviði rannsókna og þróunar, umhverfis mála, menntunar og félagsmála.

2. gr.

Í þessum samningi merkir:

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

b) hugtakið „EFTA-ríki“ samningsaðila sem eru aðilar að Fríverslunarsamtökum Evrópu;

c) hugtakið „samningsaðilar“, að því er varðar bandalagið og aðildarríki EB, bæði banda lagið og aðildarríki EB eða annaðhvort bandalagið eða aðildarríki EB. Merkingin, sem leggja ber í þetta orð í hverju tilviki, ræðst af viðkomandi ákvæðum samnings þessa hverju sinni og jafnframt viðkomandi valdsviði bandalagsins og aðildarríkja EB í samræmi við stofnsáttmála Efnahagsbandalags Evrópu og stofnsáttmála Kola- og stálbandalags Evrópu.

3. gr.

Samningsaðilar skulu gera allar viðeigandi almennar eða sérstakar ráðstafanir til að tryggja að staðið verði við þær skuldbindingar sem af samningi þessum leiðir. Þeir skulu varast ráðstafanir sem teflt geta því í tvísýnu að markmiðum samnings þessa verði náð.

Þeir skulu enn fremur auðvelda samvinnu innan ramma samnings þessa.

4. gr.

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

5. gr.

Samningsaðilar geta hvenær sem er vakið máls á áhyggjuefnum í sameiginlegu EES-nefndinni eða EES-ráðinu í samræmi við þær aðferðir sem mælt er fyrir um í 2. mgr. 92. gr. og 2. mgr. 89. gr. eftir því sem við á.

6. gr.

Með fyrirvara um þróun dómsúrlausna í framtíðinni ber við framkvæmd og beitingu ákvæða samnings þessa að túlka þau í samræmi við úrskurði dómstóls Evrópubandalaganna sem máli skipta og kveðnir hafa verið upp fyrir undirritunardag samnings þessa, þó að því tilskildu að þau séu efnislega samhljóða samsvarandi reglum stofnsáttmála Efnahagsbandalags Evrópu og stofnsáttmála Kola- og stálbandalagsins og gerðum sem samþykktar hafa verið vegna beitingar þessara tveggja sáttmála.

7. gr.

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

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

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

II. HLUTI
FRJÁLSIR VÖRUFLUTNINGAR

1. KAFLI

GRUNDVALLARREGLUR

8. gr.

1. Koma skal á frjálsum vöruflutningum milli samningsaðila í samræmi við ákvæði samnings þessa.

2. Ákvæði 10.–15., 19., 20. og 25.–27. gr. taka einungis til framleiðsluvara sem upprunnar eru í ríkjum samningsaðila nema annað sé tekið fram.

3. Ef annað er ekki tekið fram taka ákvæði samningsins einungis til:

a) framleiðsluvara sem falla undir 25.–97. kafla í samræmdu vörulýsingar- og vöru númeraskránni, að frátöldum þeim framleiðsluvörum sem skráðar eru í bókun 2;

b) framleiðsluvara sem tilgreindar eru í bókun 3 í samræmi við það sérstaka fyrirkomulag sem þar er greint frá.

9. gr.

1. Kveðið er á um upprunareglur í bókun 4. Þær eru settar með fyrirvara um alþjóðlegar skuldbindingar sem samningsaðilar eru eða kunna að verða bundnir af samkvæmt Hinu almenna samkomulagi um tolla og viðskipti.

2. Samningsaðilar skulu áfram leitast við að bæta og einfalda upprunareglur á allan hátt og auka samvinnu á sviði tollamála með það fyrir augum að byggja á grundvelli þess árangurs sem náðst hefur með samningi þessum.

3. Fyrsta endurskoðun skal fara fram fyrir árslok 1993. Síðan fer endurskoðun fram á tveggja ára fresti. Á grundvelli þessarar endurskoðunar skuldbinda samningsaðilar sig til að ákveða þær viðeigandi ráðstafanir sem eiga að verða hluti samningsins.

10. gr.

Tollar á innflutning og útflutning, svo og gjöld sem hafa samsvarandi áhrif, eru bannaðir milli samningsaðila. Með fyrirvara um það fyrirkomulag sem um getur í bókun 5 skal þetta einnig eiga við um fjáröflunartolla.

11. gr.

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

12. gr.

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

13. gr.

Ákvæði 11. og 12. gr. koma ekki í veg fyrir að leggja megi á innflutning, útflutning eða umflutning vara bönn eða höft sem réttlætast af almennu siðferði, allsherjarreglu, almannaöryggi, vernd lífs og heilsu manna eða dýra eða gróðurvernd, vernd þjóðarverðmæta, er hafa listrænt, sögulegt eða fornfræðilegt gildi, eða vernd eignarréttinda á sviði iðnaðar og

viðskipta. Slík bönn eða höft mega þó ekki leiða til gerræðislegrar mismununar eða til þess að duldar hömlur séu lagðar á viðskipti milli samningsaðila.

14. gr.

Einstökum samningsaðilum er óheimilt að leggja hvers kyns beinan eða óbeinan skatt innanlands á framleiðsluvörur annarra samningsaðila umfram það sem beint eða óbeint er lagt á sams konar innlendar framleiðsluvörur.

Samningsaðila er einnig óheimilt að leggja á framleiðsluvörur annarra samningsaðila innlendan skatt sem er til þess fallinn að vernda óbeint aðrar framleiðsluvörur.

15. gr.

Þegar framleiðsluvörur eru fluttar út til yfirráðasvæðis annars samningsaðila má endurgreiðsla á innlendum skatti ekki nema hærri fjárhæð en skattinum sem þegar hefur verið lagður á þær beint eða óbeint.

16. gr.

1. Samningsaðilar skulu tryggja breytingar á ríkiseinkasölum í viðskiptum þannig að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja EB og EFTA-ríkja hvað snertir skilyrði til aðdrátta og markaðssetningar vara.

2. Ákvæði þessarar greinar gilda um allar stofnanir sem þar til bær yfirvöld samningsaðil anna nota samkvæmt lögum eða í reynd, beint eða óbeint, til að hafa eftirlit með, ráða eða hafa umtalsverð áhrif á inn- eða útflutning milli samningsaðila. Þessi ákvæði gilda einnig um einkasölur sem ríki hefur fengið öðrum í hendur.

2. KAFLI

LANDBÚNAÐAR- OG SJÁVARAFURÐIR

17. gr.

Í I. viðauka eru sérstök ákvæði og fyrirkomulag varðandi heilbrigði dýra og plantna.

18. gr.

Með fyrirvara um sérstakt fyrirkomulag varðandi viðskipti með landbúnaðarafurðir skulu samningsaðilar tryggja að fyrirkomulaginu, sem kveðið er á um í 17. gr. og a- og b-lið 23. gr. varðandi aðrar vörur en þær er heyra undir 3. mgr. 8. gr., verði ekki stofnað í hættu vegna annarra tæknilegra viðskiptahindrana. Ákvæði 13. gr. skulu gilda.

19. gr.

1. Samningsaðilar skulu taka til athugunar alla erfiðleika sem upp kunna að koma í viðskiptum þeirra með landbúnaðarafurðir og leitast við að finna viðeigandi lausn á þeim.

2. Samningsaðilar skuldbinda sig til að halda áfram viðleitni sinni til að auka smám saman frjálsræði í viðskiptum með landbúnaðarafurðir.

3. Í þeim tilgangi skulu samningsaðilar sjá um að fram fari endurskoðun á skilyrðum fyrir viðskipti með landbúnaðarafurðir fyrir árslok 1993 og á tveggja ára fresti þaðan í frá.

4. Samningsaðilar munu, í ljósi þeirra niðurstaðna sem fást af þessari endurskoðun, innan ramma landbúnaðarstefnu hvers um sig og með tilliti til niðurstaðna Úrúgvæ-viðræðnanna, ákveða, innan ramma samnings þessa, á grundvelli fríðindaréttinda, með tvíhliða eða marghliða hætti og með gagnkvæmu samkomulagi sem er hagstætt hverjum aðila, frekara afnám hvers kyns viðskiptahindrana í landbúnaði, að meðtöldum þeim viðskiptahindrunum sem leiðir af ríkiseinkasölum í viðskiptum á sviði landbúnaðar.

20. gr.

Ákvæði og fyrirkomulag varðandi fisk og aðrar sjávarafurðir er að finna í bókun 9.

3. KAFLI

SAMVINNA Á SVIÐI TOLLAMÁLA OG AUÐVELDUN VIÐSKIPTA

21. gr.

1. Til að greiða fyrir viðskiptum skulu samningsaðilar einfalda eftirlit og formsatriði á landamærum. Fyrirkomulag í þessu skyni er að finna í bókun 10.

2. Samningsaðilar skulu aðstoða hver annan í tollamálum til þess að tryggja rétta framkvæmd tollalöggjafar. Fyrirkomulag í þessu skyni er að finna í bókun 11.

3. Samningsaðilar skulu styrkja og auka samvinnu sín í milli með það að markmiði að einfalda framkvæmd vöruviðskipta, einkum að því er varðar áætlanir, verkefni og aðgerðir bandalagsins sem miða að því að greiða fyrir viðskiptum í samræmi við reglurnar í VI. hluta.

4. Þrátt fyrir 3. mgr. 8. gr. skal þessi grein taka til allra framleiðsluvara.

22. gr.

Samningsaðili er hefur hug á að lækka virkt stig tolla eða gjalda sem hafa samsvarandi áhrif gagnvart þriðju löndum með bestu kjör eða íhugar frestun þeirra skal, sé slíkt gerlegt, tilkynna sameiginlegu EES-nefndinni það eigi síðar en þrjátíu dögum áður en lækkunin eða frestunin kemur til framkvæmda. Hlutaðeigandi samningsaðili skal gefa gaum athugasemdum frá öðrum samningsaðilum um röskun sem hlotist gæti af þessu.

4. KAFLI

AÐRAR REGLUR UM FRJÁLSA VÖRUFLUTNINGA

23. gr.

Sérstök ákvæði og fyrirkomulag er að finna í:

a) bókun 12 og II. viðauka varðandi tæknilegar reglugerðir, staðla, prófanir og vottanir;

b) bókun 47 varðandi afnám tæknilegra hindrana í viðskiptum með vín;

c) III. viðauka varðandi skaðsemisábyrgð.

Þau skulu taka til allra framleiðsluvara nema annað sé tekið fram.

24. gr.

Sérstök ákvæði og fyrirkomulag varðandi orkumál er að finna í IV. viðauka.

25. gr.

Leiði framkvæmd 10. og 12. gr. af sér:

a) endurútflutning til þriðja lands á framleiðsluvöru sem er af hálfu samningsaðila er flytur út háð magntakmörkunum, útflutningstollum eða ráðstöfunum eða gjöldum sem hafa samsvarandi áhrif; eða

b) alvarlegan skort, eða hættu á alvarlegum skorti, á framleiðsluvöru sem er mjög mikil væg samningsaðila er flytur út;

og valdi þær aðstæður, sem að ofan getur, samningsaðila er flytur út meiri háttar erfiðleikum eða eru líklegar til þess getur hann gert viðeigandi ráðstafanir í samræmi við reglurnar í 113. gr.

26. gr.

Í samskiptum samningsaðila skal ekki gera ráðstafanir gegn undirboðum, leggja á jöfnunartolla og grípa til aðgerða gegn ólöglegum viðskiptaháttum sem rekja má til þriðju landa nema annað sé tekið fram í samningi þessum.

5. KAFLI

KOLA- OG STÁLVÖRUR

27. gr.

Ákvæði og fyrirkomulag varðandi kola- og stálvörur er að finna í bókunum 14 og 25.

III. HLUTI

FRJÁLSIR FÓLKSFLUTNINGAR, FRJÁLS ÞJÓNUSTUSTARFSEMI OG FRJÁLSIR FJÁRMAGNSFLUTNINGAR

1. KAFLI

LAUNAFÓLK OG SJÁLFSTÆTT STARFANDI EINSTAKLINGAR

28. gr.

1. Frelsi launþega til flutninga skal vera tryggt í aðildarríkjum EB og EFTA-ríkjum.

2. Umrætt frelsi felur í sér afnám allrar mismununar milli launþega í aðildarríkjum EB og EFTA-ríkjum sem byggð er á ríkisfangi og lýtur að atvinnu, launakjörum og öðrum starfs- og ráðningarskilyrðum.

3. Með þeim takmörkunum sem réttlætast af allsherjarreglu, almannaöryggi og almannaheil brigði felur það í sér rétt til þess að:

a) þiggja atvinnutilboð sem raunverulega eru lögð fram;

b) fara að vild í þeim tilgangi um yfirráðasvæði aðildarríkja EB og EFTA-ríkja;

c) dveljast á yfirráðasvæði aðildarríkis EB eða EFTA-ríkis í atvinnuskyni í samræmi við ákvæði í lögum og stjórnsýslufyrirmælum um starfskjör ríkisborgara þess ríkis;

d) dveljast áfram á yfirráðasvæði aðildarríkis EB eða EFTA-ríkis eftir að hafa starfað þar.

4. Ákvæði þessarar greinar eiga ekki við um störf í opinberri þjónustu.

5. Í V. viðauka eru sérstök ákvæði um frelsi launþega til flutninga.

29. gr.

1. Til að veita launþegum og sjálfstætt starfandi einstaklingum frelsi til flutninga skulu samningsaðilar á sviði almannatrygginga, í samræmi við VI. viðauka, einkum tryggja launþegum og sjálfstætt starfandi einstaklingum og þeim sem þeir framfæra að:

a) lögð verði saman öll tímabil sem taka ber til greina samkvæmt lögum hinna ýmsu landa til að öðlast og viðhalda bótarétti, svo og reikna fjárhæð bóta;

b) bætur séu greiddar fólki sem er búsett á yfirráðasvæðum samningsaðila.

30. gr.

Til að auðvelda launþegum og sjálfstætt starfandi einstaklingum að hefja og stunda starfsemi skulu samningsaðilar í samræmi við VII. viðauka gera nauðsynlegar ráðstafanir varðandi gagnkvæma viðurkenningu á prófskírteinum, vottorðum og öðrum vitnisburði um formlega menntun og hæfi, svo og samræmingu ákvæða í lögum og stjórnsýslufyrirmælum samningsaðila varðandi rétt launþega og sjálfstætt starfandi einstaklinga til að hefja og stunda starfsemi.

2. KAFLI

STAÐFESTURÉTTUR

31. gr.

1. Innan ramma ákvæða samnings þessa skulu engin höft vera á rétti ríkisborgara aðildarríkis EB eða EFTA-ríkis til að öðlast staðfestu á yfirráðasvæði einhvers annars þessara ríkja. Hið sama gildir einnig þegar ríkisborgarar aðildarríkis EB eða EFTA-ríkis, sem hafa staðfestu á yfirráðasvæði einhvers þeirra, setja á stofn umboðsskrifstofu, útibú eða dótturfyrirtæki.

Staðfesturéttur felur í sér rétt til að hefja og stunda sjálfstæða atvinnustarfsemi og til að stofna og reka fyrirtæki, einkum félög eða fyrirtæki í skilningi annarrar málsgreinar 34. gr., með þeim skilyrðum sem gilda að landslögum um ríkisborgara þess ríkis þar sem staðfestan er fengin, þó með fyrirvara um ákvæði 4. kafla.

2. Í VIII.–XI. viðauka eru sérstök ákvæði um staðfesturétt.

32. gr.

Ákvæði þessa kafla gilda ekki um starfsemi sem á yfirráðasvæði ákveðins samningsaðila fellur undir meðferð opinbers valds jafnvel þótt svo sé aðeins í einstökum tilvikum.

33. gr.

Ákvæði þessa kafla og ráðstafanir í samræmi við þau útiloka ekki að beitt verði ákvæðum í lögum eða stjórnsýslufyrirmælum um sérstaka meðferð á erlendum ríkisborgurum er grundvallast á sjónarmiðum um allsherjarreglu, almannaöryggi eða almannaheilbrigði.

34. gr.

Með félög eða fyrirtæki, sem stofnuð eru í samræmi við lög aðildarríkis EB eða EFTA-ríkis

og hafa skráða skrifstofu, yfirstjórn eða aðalstarfsstöð á yfirráðasvæði samningsaðila, skal farið, að því er þennan kafla varðar, á sama hátt og einstaklinga sem eru ríkisborgarar í aðildarríkjum EB eða EFTA-ríkjum.

Með félögum eða fyrirtækjum er átt við félög eða fyrirtæki, stofnuð á grundvelli einkamálaréttar eða verslunarréttar, þar með talin samvinnufélög, svo og aðrar lögpersónur sem lúta allsherjarrétti eða einkamálarétti, þó að frátöldum þeim sem eru ekki rekin í hagnaðarskyni.

35. gr.

Ákvæði 30. gr. gilda um málefni sem fjallað er um í þessum kafla.

3. KAFLI

ÞJÓNUSTA

36. gr.

1. Innan ramma ákvæða samnings þessa skulu engin höft vera á frelsi ríkisborgara aðildarríkja EB og EFTA-ríkja til að veita þjónustu á yfirráðasvæði samningsaðila enda þótt þeir hafi staðfestu í öðru aðildarríki EB eða EFTA-ríki en sá sem þjónustan er ætluð.

2. Í IX.–XI. viðauka eru sérstök ákvæði um frelsi til að veita þjónustu.

37. gr.

Með „þjónustu“ er í samningi þessum átt við þjónustu sem að jafnaði er veitt gegn þóknun að því leyti sem hún lýtur ekki ákvæðum um frjálsa vöruflutninga, frjálsa fjármagnsflutninga og frjálsa fólksflutninga.

Undir „þjónustu“ fellur einkum:

a) starfsemi á sviði iðnaðar;

b) starfsemi á sviði viðskipta;

c) starfsemi handverksmanna;

d) sérfræðistörf.

Sá sem veitir þjónustu getur, með fyrirvara um ákvæði 2. kafla, í því skyni stundað starfsemi sína tímabundið í því ríki þar sem þjónustan er veitt, með sömu skilyrðum og það ríki setur eigin ríkisborgurum.

38. gr.

Frelsi til að veita þjónustu á sviði flutninga fellur undir ákvæði 6. kafla um flutningastarfsemi.

39. gr.

Ákvæði 30. og 32.–34. gr. gilda um málefni sem fjallað er um í þessum kafla.

4. KAFLI

FJÁRMAGN

40. gr.

Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar.

41. gr.

Gengar greiðslur í tengslum við þjónustustarfsemi, vöruflutninga, fólksflutninga eða fjármagnsflutninga milli samningsaðila samkvæmt ákvæðum samnings þessa skulu lausar við öll höft.

42. gr.

1. Ef beitt er innlendum reglum um fjármagnsmarkað og lánsviðskipti í fjármagnsflutningum sem höftum hefur verið létt af samkvæmt ákvæðum samnings þessa skal það gert án mismununar.

2. Lán til beinnar eða óbeinnar fjármögnunar aðildarríkis EB eða EFTA-ríkis eða sveitar stjórna þess skulu ekki boðin út eða tekin í öðrum aðildarríkjum EB eða EFTA-ríkjum nema viðkomandi ríki hafi gert með sér samkomulag um það.

43. gr.

1. Kunni munurinn milli gjaldeyrisreglna aðildarríkja EB og EFTA-ríkjanna að verða til þess að menn, búsettir í einu þessara ríkja, færi sér í nyt þær rýmri yfirfærslureglur á yfirráðasvæði samningsaðila sem kveðið er á um í 40. gr. til þess að fara fram hjá reglum einhvers þessara ríkja um fjármagnsflutninga til eða frá þriðju löndum getur viðkomandi samningsaðili gert viðeigandi ráðstafanir til að ráða bót á því.

2. Leiði fjármagnsflutningar til röskunar á starfsemi fjármagnsmarkaðar í aðildarríki EB eða EFTA-ríki getur hlutaðeigandi samningsaðili gripið til verndarráðstafana á sviði fjármagnsflutninga.

3. Breyti þar til bær yfirvöld samningsaðila gengisskráningu sinni þannig að alvarlegri rösk un á samkeppnisskilyrðum valdi geta hinir samningsaðilarnir gert nauðsynlegar ráðstafanir um mjög takmarkaðan tíma til að vinna gegn áhrifum breytingarinnar.

4. Eigi aðildarríki EB eða EFTA-ríki í örðugleikum með greiðslujöfnuð eða alvarleg hætta er á að örðugleikar skapist, hvort sem það stafar af heildarójafnvægi í greiðslujöfnuði eða því hvaða gjaldmiðli það hefur yfir að ráða, getur hlutaðeigandi samningsaðili gripið til verndarráðstafana, einkum ef örðugleikarnir eru til þess fallnir að stofna framkvæmd samnings þessa í hættu.

44. gr.

Bandalagið annars vegar og EFTA-ríkin hins vegar skulu beita eigin málsmeðferð, sem mælt er fyrir um í bókun 18, vegna framkvæmdar ákvæða 43. gr.

45. gr.

1. Tilkynna skal sameiginlegu EES-nefndinni ákvarðanir, álit og tilmæli vegna þeirra ráðstafana sem lýst er í 43. gr.

2. Ekki má grípa til neinna verndarráðstafana nema að höfðu samráði í sameiginlegu EES-nefndinni og eftir að henni hafa verið veittar upplýsingar.

3. Í því tilviki sem um ræðir í 2. mgr. 43. gr. getur hlutaðeigandi samningsaðili þó gert ráð stafanirnar, án þess að áður fari fram samráð eða skipti á upplýsingum, þegar það reynist óhjákvæmilegt vegna þess að þær verða að fara leynt eða þola ekki bið.

4. Komi skyndilega upp vandi er varðar greiðslujöfnuð, í því tilviki sem um ræðir í 4. mgr. 43. gr., og sé ekki unnt að fylgja málsmeðferðinni í 2. mgr., getur hlutaðeigandi samningsaðili gripið til nauðsynlegra fyrirbyggjandi verndarráðstafana. Ráðstafanirnar skulu hafa í för með sér eins litla röskun á framkvæmd samnings þessa og kostur er á og mega ekki vera víðtækari en brýnasta nauðsyn krefur til að ráða bót á þeim skyndilega vanda sem komið hefur upp.

5. Þegar gerðar eru ráðstafanir í samræmi við 3. og 4. mgr. skal tilkynna það eigi síðar en þann dag sem þær öðlast gildi og skulu upplýsingaskiptin, samráðið og tilkynningarnar sem um getur í 1. mgr. eiga sér stað eins fljótt og auðið er í kjölfar þess.

5. KAFLI

SAMVINNA UM STEFNU Í EFNAHAGS- OG PENINGAMÁLUM

46. gr.

Samningsaðilar skulu skiptast á skoðunum og upplýsingum um framkvæmd samnings þessa og áhrif samstarfsins á efnahagsstarfsemi og framkvæmd stefnu í efnahags- og peningamálum. Þeir geta enn fremur rætt stefnu, ástand og horfur í efnahagsmálum. Þessi skipti á skoðunum og

upplýsingum skulu fara fram án nokkurra skuldbindinga.

6. KAFLI

FLUTNINGASTARFSEMI

47. gr.

1. Ákvæði 48.–52. gr. gilda um flutninga á járnbrautum, vegum og skipgengum vatnaleiðum.

2. Í XIII. viðauka eru sérstök ákvæði um allar tegundir flutninga.

48. gr.

1. Engu aðildarríki EB eða EFTA-ríki er heimilt að setja nokkur þau ákvæði um flutninga á járnbrautum, vegum og skipgengum vatnaleiðum utan ramma XIII. viðauka sem beint eða óbeint eru óhagstæðari flutningsaðilum frá öðrum ríkjum en innlendum flutningsaðilum.

2. Sérhver samningsaðili er víkur frá meginreglunni í 1. mgr. skal tilkynna sameiginlegu EES-nefndinni það. Aðrir samningsaðilar, sem fallast ekki á frávikið, geta gripið til viðeigandi gagnráðstafana.

49. gr.

Aðstoð er samrýmanleg samningi þessum ef hún bætir úr þörf fyrir samræmingu á sviði flutninga eða í henni felst endurgjald fyrir að rækja tilteknar skyldur sem falla undir hugtakið opinber þjónusta.

50. gr.

1. Þegar um er að ræða flutninga á yfirráðasvæði samningsaðila skal ekki vera nokkur mismunun sem kemur fram í því að flutningsaðilar leggi á mismunandi gjöld eða setji mismunandi skilmála við flutning sams konar vöru á sömu flutningaleiðum, allt eftir því hvert uppruna- eða ákvörðunarland viðkomandi vöru er.

2. Þar til bært yfirvald samkvæmt VII. hluta skal að eigin frumkvæði eða að beiðni aðildarríkis EB eða EFTA-ríkis rannsaka öll tilvik um mismunun sem falla undir þessa grein og taka nauðsynlegar ákvarðanir samkvæmt eigin reglum.

51. gr.

1. Bannað er að leggja á gjöld og setja skilmála er varða flutningastarfsemi innan yfirráðasvæðis samningsaðila og fela í einhverjum mæli í sér aðstoð eða vernd, einu eða fleiri fyrirtækjum eða atvinnugreinum í hag, nema þar til bært yfirvald samkvæmt 2. mgr. 50. gr. heimili það.

2. Þar til bært yfirvald skal að eigin frumkvæði eða að beiðni aðildarríkis EB eða EFTA-ríkis kanna gjöld þau og skilmála sem um getur í 1. mgr., annars vegar einkum með kröfur um æskilega efnahagsstefnu á einstökum landsvæðum í huga, svo og þarfir vanþróaðra svæða og erfiðleika svæða þar sem alvarlegt stjórnmálaástand ríkir, og hins vegar með tilliti til áhrifa gjaldanna og skilmálanna á samkeppni milli mismunandi greina flutningastarfsemi.

Þar til bært yfirvald skal taka nauðsynlegar ákvarðanir samkvæmt eigin reglum.

3. Bannið sem um getur í 1. mgr. tekur ekki til gjalda sem ákveðin eru til að bregðast við samkeppni.

52. gr.

Álögur eða gjöld, sem flutningsaðili innheimtir umfram flutningsgjöld vegna flutnings yfir landamæri, mega ekki vera hærri en sanngjarnt er með hliðsjón af raunverulegum kostnaði vegna þessa. Samningsaðilar skulu leitast við að draga smám saman úr slíkum kostnaði.

IV. HLUTI

SAMKEPPNISREGLUR OG AÐRAR SAMEIGINLEGAR REGLUR

1. KAFLI

REGLUR UM FYRIRTÆKI

53. gr.

1. Eftirfarandi skal bannað og talið ósamrýmanlegt framkvæmd samnings þessa: allir samn ingar milli fyrirtækja, ákvarðanir samtaka fyrirtækja og samstilltar aðgerðir sem geta haft áhrif á viðskipti milli samningsaðila og hafa að markmiði eða af þeim leiðir að komið sé í veg fyrir samkeppni, hún sé takmörkuð eða henni raskað á því svæði sem samningur þessi tekur til, einkum samningar, ákvarðanir og aðgerðir sem:

a) ákveða kaup- eða söluverð eða önnur viðskiptakjör með beinum eða óbeinum hætti;

b) takmarka eða stýra framleiðslu, mörkuðum, tækniþróun eða fjárfestingu;

c) skipta mörkuðum eða birgðalindum;

d) mismuna öðrum viðskiptaaðilum með ólíkum skilmálum í sams konar viðskiptum og veikja þannig samkeppnisstöðu þeirra;

e) setja það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótarskuld bindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

2. Samningar og ákvarðanir sem grein þessi bannar eru sjálfkrafa ógildir.

3. Ákveða má að ákvæðum 1. mgr. verði ekki beitt um:

- samninga eða tegundir samninga milli fyrirtækja;
- ákvarðanir eða tegundir ákvarðana af hálfu samtaka fyrirtækja;
- samstilltar aðgerðir eða tegundir samstilltra aðgerða;

sem stuðla að bættri framleiðslu eða vörudreifingu eða efla tæknilegar og efnahagslegar framfarir, enda sé neytendum veitt sanngjörn hlutdeild í þeim ávinningi sem af þeim hlýst, án þess að:

a) höft, sem óþörf eru til að hinum settu markmiðum verði náð, séu lögð á hlutaðeigandi fyrirtæki;

b) slíkt veiti fyrirtækjunum færi á að koma í veg fyrir samkeppni að því er varðar verulegan hluta framleiðsluvaranna sem um er að ræða.

54. gr.

Misnotkun eins eða fleiri fyrirtækja á yfirburðastöðu á svæðinu sem samningur þessi tekur til, eða verulegum hluta þess, er ósamrýmanleg framkvæmd samnings þessa og því bönnuð að því leyti sem hún kann að hafa áhrif á viðskipti milli samningsaðila.

Slík misnotkun getur einkum falist í því að:

a) beint eða óbeint sé krafist ósanngjarns kaup- eða söluverðs eða aðrir ósanngjarnir við skiptaskilmálar settir;

b) settar séu takmarkanir á framleiðslu, markaði eða tækniþróun, neytendum til tjóns;

c) öðrum viðskiptaaðilum sé mismunað með ólíkum skilmálum í sams konar viðskiptum og samkeppnisstaða þeirra þannig veikt;

d) sett sé það skilyrði fyrir samningagerð að hinir viðsemjendurnir taki á sig viðbótar skuldbindingar sem tengjast ekki efni samninganna, hvorki í eðli sínu né samkvæmt viðskiptavenju.

55. gr.

1. Með fyrirvara um ákvæði sem hrinda 53. og 54. gr. í framkvæmd og er að finna í bókun 21

og XIV. viðauka við samning þennan skulu framkvæmdastjórn EB og eftirlitsstofnun EFTA, sem kveðið er á um í 1. mgr. 108. gr., tryggja beitingu meginreglnanna sem mælt er fyrir um í 53. og 54. gr.

Hin þar til bæra eftirlitsstofnun, sem kveðið er á um í 56. gr., skal að eigin frumkvæði eða að beiðni ríkis á viðkomandi svæði eða hinnar eftirlitsstofnunarinnar rannsaka tilvik þar sem grunur leikur á að meginreglur þessar séu brotnar. Hin þar til bæra eftirlitsstofnun skal framkvæma þessar rannsóknir í samvinnu við þar til bær stjórnvöld á viðkomandi svæði og í samvinnu við hina eftirlitsstofnunina sem skal veita henni aðstoð í samræmi við eigin reglur.

Komist hún að þeirri niðurstöðu að um brot hafi verið að ræða skal hún gera tillögur um viðeigandi ráðstafanir til að binda enda á það.

2. Ef ekki er bundinn endi á umrætt brot skal þar til bær eftirlitsstofnun skrá slíkt brot á meginreglunum í rökstuddri ákvörðun.

Hin þar til bæra eftirlitsstofnun getur birt ákvörðun sína og heimilað ríkjum á viðkomandi svæði, með þeim skilyrðum og á þann hátt sem hún kveður nánar á um, að gera nauðsynlegar ráðstafanir til að ráða bót á ástandinu. Hún getur einnig farið fram á það við hina eftirlitsstofnunina að hún heimili ríkjum á viðkomandi svæði að gera slíkar ráðstafanir.

56. gr.

1. Eftirlitsstofnanirnar skulu taka ákvarðanir í einstökum málum, sem falla undir 53. gr., í samræmi við eftirfarandi ákvæði:

a) eftirlitsstofnun EFTA skal taka ákvarðanir í þeim málum sem einungis hafa áhrif á viðskipti milli EFTA-ríkjanna;

b) með fyrirvara um c-lið skal eftirlitsstofnun EFTA taka ákvarðanir, eins og kveðið er á um í ákvæðum 58. gr., bókun 21 og reglum um framkvæmd hennar, bókun 23 og XIV. viðauka, í málum þar sem velta viðkomandi fyrirtækja á yfirráðasvæði EFTA-ríkjanna er 33% eða meiri en velta þeirra á svæðinu sem samningur þessi tekur til;

c) framkvæmdastjórn EB skal taka ákvarðanir í öðrum málum, svo og í þeim málum sem falla undir b-lið og hafa áhrif á viðskipti milli aðildarríkja EB, og skal hún þá taka tillit til ákvæðanna í 58. gr., bókun 21, bókun 23 og XIV. viðauka.

2. Eftirlitsstofnun á því svæði þar sem yfirburðastaða er talin vera fyrir hendi skal taka ákvarðanir í einstökum málum sem falla undir 54. gr. Reglurnar sem settar eru í b- og c-lið 1. mgr. gilda því aðeins að um yfirburðastöðu á svæðum beggja eftirlitsstofnananna sé að ræða.

3. Eftirlitsstofnun EFTA skal taka ákvarðanir í einstökum málum sem falla undir c-lið 1. mgr. og hafa ekki umtalsverð áhrif á viðskipti milli aðildarríkja EB eða samkeppni í bandalaginu.

4. Hugtökin „fyrirtæki“ og „velta“ eru, að því er þessa grein varðar, skilgreind í bókun 22.

57. gr.

1. Samfylkingar, sem gert er ráð fyrir eftirliti með í 2. mgr. og skapa eða efla yfirburðastöðu er hindrar virka samkeppni á samningssvæðinu eða umtalsverðum hluta þess, skal lýsa ósamrýmanlegar samningi þessum.

2. Eftirtaldir aðilar skulu hafa eftirlit með samfylkingum sem falla undir 1. mgr.:

a) framkvæmdastjórn EB í þeim málum sem falla undir reglugerð EBE nr. 4064/89, í sam ræmi við þá reglugerð, bókanir 21 og 24 og XIV. viðauka við samninginn. Með fyrirvara um endurskoðunarvald dómstóls EB hefur framkvæmdastjórn EB ein vald til að taka ákvarðanir í þessum málum.

b) eftirlitsstofnun EFTA í þeim málum sem falla ekki undir a-lið hafi viðmiðunarmörkum, sem sett eru í XIV. viðauka, verið fullnægt á yfirráðasvæði EFTA-ríkjanna í samræmi við bókanir 21 og 24 og XIV. viðauka við samninginn. Þetta er með þeim fyrirvara að aðildarríki EB séu ekki valdbær í þessu tilliti.

58. gr.

Með það fyrir augum að þróa og viðhalda samræmdu eftirliti á Evrópska efnahagssvæðinu á sviði samkeppni, svo og að stuðla að einsleitri framkvæmd, beitingu og túlkun ákvæða samningsins í þessu skyni, skulu lögbær yfirvöld hafa með sér samvinnu í samræmi við ákvæði bókana 23 og 24.

59. gr.

1. Eigi í hlut opinber fyrirtæki, og fyrirtæki sem aðildarríki EB eða EFTA-ríki veita sérstök réttindi eða einkarétt, skulu samningsaðilar tryggja að hvorki séu gerðar né viðhaldið nokkrum þeim ráðstöfunum sem fara í bága við reglur samnings þessa, einkum reglur sem kveðið er á um í 4. gr. og 53.–63. gr.

2. Reglur samnings þessa, einkum reglurnar um samkeppni, gilda um fyrirtæki sem falið er að veita þjónustu er hefur almenna efnahagslega þýðingu eða eru í eðli sínu fjáröflunareinkasölur, að því marki sem beiting þeirra kemur ekki í veg fyrir að þau geti að lögum eða í raun leyst af hendi þau sérstöku verkefni sem þeim eru falin. Þróun viðskipta má ekki raska í þeim mæli að það stríði gegn hagsmunum samningsaðilanna.

3. Framkvæmdastjórn EB og eftirlitsstofnun EFTA skulu hvor innan síns valdsviðs tryggja að ákvæðum þessarar greinar sé beitt og gera, eftir því sem þörf krefur, viðeigandi ráðstafanir gagnvart þeim ríkjum sem eru á svæðum hvorrar um sig.

60. gr.

Í XIV. viðauka eru sérstök ákvæði um framkvæmd þeirra meginreglna sem settar eru í 53., 54., 57. og 59. gr.

2. KAFLI

RÍKISAÐSTOÐ

61. gr.

1. Ef ekki er kveðið á um annað í samningi þessum er hvers kyns aðstoð, sem aðildarríki EB eða EFTA-ríki veitir eða veitt er af ríkisfjármunum og raskar eða er til þess fallin að raska samkeppni með því að ívilna ákveðnum fyrirtækjum eða framleiðslu ákveðinna vara, ósamrýmanleg framkvæmd samnings þessa að því leyti sem hún hefur áhrif á viðskipti milli samningsaðila.

2. Eftirtalið samrýmist framkvæmd samnings þessa;

a) aðstoð af félagslegum toga sem veitt er einstökum neytendum enda sé hún veitt án mismununar með tilliti til uppruna viðkomandi framleiðsluvara;

b) aðstoð sem veitt er til að bæta tjón af völdum náttúruhamfara eða óvenjulegra atburða.

c) aðstoð sem veitt er til atvinnuvega á ákveðnum svæðum í Sambandslýðveldinu Þýskalandi, þar sem skipting Þýskalands hefur áhrif, að því marki sem þörf er á slíku; aðstoð til að bæta upp efnahagslegt óhagræði vegna skiptingarinnar.

3. Eftirtalið getur talist samrýmanlegt framkvæmd samnings þessa:

a) aðstoð til að efla hagþróun á svæðum þar sem lífskjör eru óvenju bágborin eða atvinnuleysi mikið;

b) aðstoð til að hrinda í framkvæmd mikilvægum sameiginlegum evrópskum hagsmuna málum eða ráða bót á alvarlegri röskun á efnahagslífi aðildarríkis EB eða EFTA-ríkis;

c) aðstoð til að greiða fyrir þróun ákveðinna greina efnahagslífsins eða ákveðinna efna hagssvæða enda hafi hún ekki svo óhagstæð áhrif á viðskiptaskilyrði að stríði gegn sameiginlegum hagsmunum;

d) aðstoð af öðru tagi sem sameiginlega EES-nefndin kann að tiltaka í samræmi við VII. hluta.

62. gr.

1. Fylgjast skal stöðugt með öllum kerfum vegna ríkisaðstoðar sem eru til á yfirráðasvæðum samningsaðila, svo og öllum áætlunum um að veita slíka aðstoð eða breyta henni, með það í huga að þau samrýmist 61. gr. Eftirtaldir aðilar skulu framkvæma slíkt eftirlit:

a) framkvæmdastjórn Evrópubandalagsins, að því er varðar aðildarríki EB, í samræmi við reglurnar í 93. gr. stofnsáttmála Efnahagsbandalags Evrópu;

b) eftirlitsstofnun EFTA, að því er varðar EFTA-ríkin, í samræmi við þær reglur sem settar eru í samningi milli EFTA-ríkjanna um stofnun eftirlitsstofnunar EFTA en mælt er fyrir um valdsvið hennar og störf í bókun 26.

2. Með það fyrir augum að tryggja samræmt eftirlit á sviði ríkisaðstoðar á svæðinu sem samningur þessi tekur til skulu framkvæmdastjórn EB og eftirlitsstofnun EFTA hafa með sér samvinnu í samræmi við ákvæðin í bókun 27.

63. gr.

Í XV. viðauka eru sérstök ákvæði um ríkisaðstoð.

64. gr.

1. Ef önnur eftirlitsstofnunin telur að framkvæmd hinnar eftirlitsstofnunarinnar á 61. og 62. gr. samningsins, svo og 5. gr. bókunar 14, samræmist ekki kröfum um sömu samkeppnis skilyrði á svæðinu sem samningur þessi tekur til skal skipst á skoðunum innan tveggja vikna í samræmi við málsmeðferð f-liðar í bókun 27.

Hafi ekki fundist lausn innan þessara tveggja vikna sem aðilar geta sætt sig við getur þar til bært yfirvald samningsaðila, sem málið snertir, gripið án tafar til bráðabirgðaráðstafana til þess að ráða bót á þeirri röskun sem orðið hefur á samkeppni.

Samráð skal síðan hafa í sameiginlegu EES-nefndinni með það fyrir augum að finna lausn sem aðilar geta sætt sig við.

Hafi sameiginlegu EES-nefndinni ekki tekist að finna lausn innan þriggja mánaða og umræddar aðgerðir valda, eða hætta er á að þær valdi, röskun á samkeppni sem hefur áhrif á viðskipti milli samningsaðila er unnt að gera þær varanlegu ráðstafanir í stað bráðabirgðaráðstafananna sem eru bráðnauðsynlegar til að jafna áhrif röskunarinnar. Þær ráðstafanir skulu helst gerðar sem raska minnst starfsemi EES.

2. Ákvæði þessarar greinar skulu einnig gilda um ríkiseinkasölur sem settar eru á stofn eftir undirritunardag samningsins.

3. KAFLI

AÐRAR SAMEIGINLEGAR REGLUR

65. gr.

1. Í XVI. viðauka eru sérstök ákvæði og fyrirkomulag varðandi innkaup sem gilda, nema annað sé tekið fram, um allar framleiðsluvörur og þjónustu eins og tilgreint er.

2. Í bókun 28 og XVII. viðauka eru sérstök ákvæði og fyrirkomulag varðandi hugverk og

eignarréttindi á sviði iðnaðar og verslunar sem gilda um allar framleiðsluvörur og þjónustu nema annað sé tekið fram.

V. HLUTI

ALTÆK ÁKVÆÐI ER VARÐA FJÓRÞÆTTA FRELSIÐ

1. KAFLI

FÉLAGSMÁL

66. gr.

Samningsaðilar eru sammála um að nauðsynlegt sé að stuðla að bættum starfsskilyrðum og lífskjörum launþega.

67. gr.

1. Samningsaðilar skulu sérstaklega leggja áherslu á að hvetja til umbóta, einkum varðandi vinnuumhverfi, með tilliti til heilsu og öryggis launþega. Til að stuðla að því að þessu markmiði verði náð skulu lágmarkskröfur smám saman koma til framkvæmda og þá með hliðsjón af þeim aðstæðum og tæknilegu reglum er gilda hjá hverjum samningsaðila. Slíkar lágmarkskröfur eru því ekki til fyrirstöðu að samningsaðili láti strangari reglur um starfsskilyrði halda gildi sínu eða setji slíkar reglur enda samrýmist þær samningi þessum.

2. Í XVIII. viðauka eru tilgreind nauðsynleg ákvæði vegna framkvæmdar lágmarkskrafna samkvæmt 1. mgr.

68. gr.

Á sviði vinnulöggjafar skulu samningsaðilar gera nauðsynlegar ráðstafanir til að tryggja góða framkvæmd samnings þessa. Þessar ráðstafanir eru tilgreindar í XVIII. viðauka.

69. gr.

1. Hver samningsaðili skal tryggja og viðhalda beitingu þeirrar meginreglu að karlar og konur hljóti jöfn laun fyrir jafna vinnu.

Með „launum“ er í þessari grein átt við venjulegt grunn- eða lágmarkskaup ásamt öllum öðrum greiðslum, hvort heldur er í fé eða fríðu, sem launþegi fær beint eða óbeint frá vinnuveitanda sínum vegna starfa síns.

Með sömu launum án mismununar vegna kynferðis er átt við að:

a) laun fyrir sömu ákvæðisvinnu skuli miðuð við sömu mælieiningu;

b) laun fyrir tímavinnu skuli vera hin sömu fyrir sams konar starf.

2. Í XVIII. viðauka eru sérstök ákvæði um framkvæmd 1. mgr.

70. gr.

Samningsaðilar skulu stuðla að því að meginreglan um jafnrétti karla og kvenna verði virt með því að hrinda ákvæðunum sem tilgreind eru í XVIII. viðauka í framkvæmd.

71. gr.

Samningsaðilar skulu leitast við að auka skoðanaskipti milli vinnuveitenda og launþega í Evrópu.

2. KAFLI

NEYTENDAVERND

72. gr.

Í XIX. viðauka eru ákvæði um neytendavernd.

3. KAFLI

UMHVERFISMÁL

73. gr.

1. Aðgerðir samningsaðila á sviði umhverfismála skulu byggjast á eftirtöldum markmiðum:

a) að varðveita, vernda og bæta umhverfið;

b) að stuðla að því að vernda heilsu manna;

c) að tryggja að náttúruauðlindir séu nýttar af varúð og skynsemi.

2. Aðgerðir samningsaðila á sviði umhverfismála skulu grundvallaðar á þeim meginreglum að girt skuli fyrir umhverfisspjöll, áhersla sé lögð á úrbætur þar sem tjón á upphaf sitt og bótaskylda sé lögð á þann sem mengun veldur. Kröfur um umhverfisvernd skulu vera þáttur í stefnu samningsaðila á öðrum sviðum.

74. gr.

Í XX. viðauka eru sérstök ákvæði um verndarráðstafanir sem skulu gilda samkvæmt 73. gr.

75. gr.

Verndarráðstafanirnar, sem um getur í 74. gr., eru því ekki til fyrirstöðu að einstakir samningsaðilar láti strangari verndarráðstafanir halda gildi sínu eða grípi til þeirra enda samrýmist þær samningi þessum.

4. KAFLI

HAGSKÝRSLUGERÐ

76. gr.

1. Samningsaðilar skulu tryggja úrvinnslu og dreifingu samfelldra og sambærilegra hag skýrslna sem lýsi og geri kleift að fylgjast með öllum þeim þáttum sem máli skipta á sviði efnahags-, félags- og umhverfismála á Evrópska efnahagssvæðinu.

2. Í þessu skyni skulu samningsaðilar þróa með sér og nota samræmdar aðferðir, skýrgreiningar og flokkanir, svo og sameiginlegar starfsáætlanir og vinnubrögð við hagskýrslugerð hvar sem það á við í stjórnsýslunni og hafa þá í huga nauðsyn þess að fyllsta trúnaðar sé gætt.

3. Í XXI. viðauka eru sérstök ákvæði um hagskýslugerð.

4. Í bókun 30 eru sérstök ákvæði um skipulag samstarfs á sviði hagskýrslugerðar.

5. KAFLI

FÉLAGARÉTTUR

77. gr.

Í XXII. viðauka eru sérstök ákvæði um félagarétt.

VI. HLUTI

SAMVINNA UTAN MARKA FJÓRÞÆTTA FRELSISINS

78. gr.

Samningsaðilar skulu efla og auka samvinnu innan ramma starfsemi bandalagsins á sviði:

– rannsókna og tækniþróunar,

– upplýsingaþjónustu,

– umhverfismála,

– menntunar, þjálfunar og æskulýðsmála,

– félagsmála,

– neytendaverndar,

– lítilla og meðalstórra fyrirtækja,

– ferðamála,

– hljóð- og myndmiðlunar og

– almannavarna,

að því leyti sem samstarf á þessum sviðum lýtur ekki ákvæðum annarra hluta samnings þessa.

79. gr.

1. Samningsaðilar skulu auka skoðanaskipti sín í milli með öllum viðeigandi aðferðum, eink um samkvæmt reglum VII. hluta, með það fyrir augum að ákveða starfssvið og starfsemi þar sem nánari samvinna getur aukið líkur á að sameiginleg markmið náist á þeim sviðum sem um getur í 78. gr.

2. Þeir skulu einkum skiptast á upplýsingum og ræða í sameiginlegu EES-nefndinni, að beiðni einstakra samningsaðila, áform og tillögur um að stofna til eða breyta rammaáætlunum, einstökum áætlunum, aðgerðum og verkefnum á þeim sviðum sem um getur í 78. gr.

3. Ákvæði VII. hluta gilda að breyttu breytanda um þennan hluta þegar sérstaklega er kveðið á um það í þessum hluta eða bókun 31.

80. gr.

Samvinna samkvæmt 78. gr. skal að öðru jöfnu fara fram með eftirfarandi hætti:

– þátttöku EFTA-ríkja í rammaáætlunum EB, einstökum áætlunum, verkefnum eða öðrum aðgerðum;

– komið verði á sameiginlegri starfsemi á tilteknum sviðum þar sem meðal annars gæti

verið um að ræða samræmingu eða samstillingu á starfsemi, sameiningu starfsemi sem fyrir er og komið verði á sérstakri sameiginlegri starfsemi;

- formlegum og óformlegum upplýsingaskiptum eða -miðlun;

- sameiginlegu átaki til að hvetja til tiltekinnar starfsemi á yfirráðasvæði samningsaðila;

- hliðstæðri löggjöf, eftir því sem við á, með sömu eða svipuðum reglum;

- samræmingu aðgerða og starfsemi á vettvangi eða fyrir tilstilli alþjóðastofnana, svo og samræmingu samvinnu við þriðju lönd, þar sem um gagnkvæmt hagsmunamál er að ræða.

81. gr.

Þegar samvinna felur í sér þátttöku EFTA-ríkja í rammaáætlun EB, einstakri áætlun, verkefni eða annarri aðgerð skulu eftirfarandi meginreglur gilda:

a) EFTA-ríkin skulu hafa aðgang að öllum þáttum áætlunar.

b) Staða EFTA-ríkjanna í nefndum, sem aðstoða framkvæmdastjórn EB við stjórnun eða þróun starfsemi bandalagsins, skal vera í fullu samræmi við það fjárframlag sem EFTA-ríkin kunna að greiða vegna þátttöku sinnar.

c) Ákvæði 3. mgr. 79. gr. gilda um þær ákvarðanir bandalagsins er hafa bein eða óbein áhrif á rammaáætlun, einstaka áætlun, verkefni eða aðra aðgerð sem EFTA-ríki taka þátt í samkvæmt ákvörðun á grundvelli samnings þessa, þó ekki ákvarðanir sem varða fjárlög bandalagsins. Sameiginlega EES-nefndin getur endurskoðað skilmála og skilyrði fyrir áframhaldandi þátttöku í viðkomandi starfsemi í samræmi við 86. gr.

d) Þegar um samstarfsverkefni er að ræða skulu stofnanir, fyrirtæki, samtök og ríkisborg arar EFTA-ríkja hafa sömu réttindi og skyldur í áætlun bandalagsins eða annarri aðgerð sem um ræðir og samstarfsstofnanir, fyrirtæki, samtök og ríkisborgarar aðildarríkja EB. Hið sama gildir að breyttu breytanda um þátttakendur sem fara milli landa vegna viðkomandi samstarfs aðildarríkja EB og EFTA-ríkja.

e) EFTA-ríki, stofnanir þeirra, fyrirtæki, samtök og ríkisborgarar skulu hafa sömu rétt-indi og skyldur að því er varðar úrvinnslu, mat og nýtingu niðurstaðna og aðildarríki EB, stofnanir þeirra, fyrirtæki, samtök og ríkisborgarar.

f) Samningsaðilar skuldbinda sig í samræmi við viðkomandi reglugerðir og reglur sínar til að auðvelda flutninga þátttakenda í áætluninni og annarri starfsemi að því marki sem nauðsynlegt er.

82. gr.

1. Þegar samvinna samkvæmt þessum hluta felur í sér fjárframlag frá EFTA-ríkjunum skal framlagið látið í té á einhvern eftirtalinn hátt:

a) Framlag EFTA-ríkjanna vegna þátttöku þeirra í starfsemi bandalagsins skal reiknað í hlutfalli við:

– fjárhagsskuldbindingar; og

– greiðsluskuldbindingar;

sem varðandi bandalagið eru settar árlega á þann lið fjárlaga þess sem á við um viðkomandi starfsemi.

Hlutfallsstuðullinn sem ákvarðar framlag EFTA-ríkjanna skal vera summa hlutfallsins milli annars vegar vergrar landsframleiðslu hvers EFTA-ríkis um sig miðað við markaðsverð og hins vegar summa vergrar landsframleiðslu allra aðildarríkja EB og umræddra EFTA-ríkis miðað við markaðsverð. Stuðullinn skal reiknaður fyrir hvert fjárhagsár á grundvelli nýjustu tölfræðilegra upplýsinga.

Bæði að því er varðar fjárhagsskuldbindingar og greiðsluskuldbindingar skal fjárframlag EFTA-ríkjanna koma til viðbótar fjárframlagi bandalagsins á þeim lið fjárlaga þess sem á við um viðkomandi starfsemi.

Þau framlög sem EFTA-ríkin skulu greiða árlega skulu ákveðin á grundvelli greiðsluskuldbindinganna.

Skuldbindingar sem bandalagið tók á sig áður en EFTA-ríkin hófu á grundvelli samnings þessa þátttöku í viðkomandi starfsemi, svo og greiðslur sem af henni leiðir, kalla ekki á framlög af hálfu EFTA-ríkjanna.

b) Fjárframlag EFTA-ríkjanna vegna þátttöku þeirra í ákveðnum verkefnum eða annarri starfsemi skal grundvallast á þeirri meginreglu að sérhver samningsaðili skuli bera eigin kostnað, svo og viðeigandi hluta af fastakostnaði bandalagsins samkvæmt ákvörðun sameiginlegu EES-nefndarinnar.

c) Sameiginlega EES-nefndin skal taka nauðsynlegar ákvarðanir varðandi fjárframlag samningsaðila til þeirrar starfsemi sem um ræðir hverju sinni.

2. Nánari ákvæði um framkvæmd þessarar greinar eru í bókun 32.

83. gr.

Þegar samvinnan felst í upplýsingaskiptum milli opinberra aðila skulu EFTA-ríkin hafa sama rétt á að fá upplýsingar og aðildarríki EB og ber þeim jafnframt sama skylda til að veita upplýsingar, samanber þó kröfur um trúnað sem sameiginlega EES-nefndin ákveður.

84. gr.

Ákvæði um samvinnu á tilteknum sviðum eru í bókun 31.

85. gr.

Ef ekki er kveðið á um annað í bókun 31 skal samvinna, sem þegar fer fram milli bandalagsins og einstakra EFTA-ríkja á sviðunum sem um getur í 78. gr. við gildistöku samnings þessa, eftir það lúta viðeigandi ákvæðum þessa hluta og bókunar 31.

86. gr.

Sameiginlega EES-nefndin skal, í samræmi við VII. hluta, taka allar nauðsynlegar ákvarðanir vegna framkvæmdar 78.–85. gr. og ráðstafana sem af henni leiðir og geta þær meðal annars falið í sér viðbætur við og breytingar á bókun 31, ásamt því að ákveða nauðsynlegar bráðabirgðaráðstafanir vegna framkvæmdar 85. gr.

87. gr.

Samningsaðilar skulu gera nauðsynlegar ráðstafanir til að þróa, efla eða auka samvinnu innan ramma starfsemi bandalagsins á sviðum sem eru ekki tilgreind í 78. gr. þegar slík samvinna þykir líkleg til að greiða fyrir því að markmiðum samnings þessa verði náð eða samningsaðilar telja slíkt hagstætt báðum aðilum af öðrum ástæðum. Slíkar ráðstafanir geta haft það í för með sér að 78. gr. verði breytt þannig að nýjum sviðum verði bætt við þau sem þar eru tilgreind.

88. gr.

Með fyrirvara um ákvæði annarra hluta samnings þessa skulu ákvæði þessa hluta ekki koma í veg fyrir að einstakir samningsaðilar geti undirbúið, samþykkt og hrundið ráðstöfunum í framkvæmd einhliða.

VII. HLUTI

ÁKVÆÐI UM STOFNANIR

1. KAFLI

SKIPULAG SAMSTARFSINS

1. ÞÁTTUR

EES-RÁÐIÐ

89. gr.

1. EES-ráði er hér með komið á fót. Hlutverk þess er einkum að vera pólitískur aflvaki varð andi framkvæmd samnings þessa og setja almennar viðmiðunarreglur fyrir sameiginlegu EES-nefndina.

Í þessum tilgangi skal EES-ráðið meta hvernig samningurinn í heild hefur verið framkvæmdur og hvernig hann hefur þróast. Það skal taka stjórnmálalegar ákvarðanir sem leiða til breytinga á samningnum.

2. Samningsaðilar, að því er varðar bandalagið og aðildarríki EB eftir valdsviði viðkomandi, geta tekið mál er valda erfiðleikum upp í EES-ráðinu eftir að hafa rætt þau í sameiginlegu EES-nefndinni, eða geta tekið þau beint upp í EES-ráðinu er mjög brýna nauðsyn ber til.

3. EES-ráðið setur sér starfsreglur með ákvörðun þar að lútandi.

90. gr.

1. EES-ráðið skipa fulltrúar í ráði Evrópubandalaganna og úr framkvæmdastjórn EB ásamt einum fulltrúa ríkisstjórnar hvers EFTA-ríkis.

Skipa skal fulltrúa í EES-ráðið í samræmi við þau skilyrði sem mælt verður fyrir um í starfsreglum þess.

2. Ákvarðanir EES-ráðsins skulu teknar með samkomulagi milli bandalagsins annars vegar og EFTA-ríkjanna hins vegar.

91. gr.

1. Fulltrúi ráðs Evrópubandalaganna og ráðherra í ríkisstjórn EFTA-ríkis skulu gegna embætti forseta EES-ráðsins til skiptis sex mánuði í senn.

2. Forseti EES-ráðsins skal kalla það saman tvisvar á ári. EES-ráðið skal einnig koma saman, þegar aðstæður krefjast, í samræmi við starfsreglur sínar.

2. ÞÁTTUR

SAMEIGINLEGA EES-NEFNDIN

92. gr.

1. Sameiginlegu EES-nefndinni er hér með komið á fót. Skal hún tryggja virka framkvæmd samnings þessa. Í þeim tilgangi skal þar skipst á skoðunum og upplýsingum og taka ákvarðanir í þeim málum sem kveðið er á um í samningi þessum.

2. Samningsaðilar, að því er varðar bandalagið og aðildarríki EB eftir valdsviði viðkomandi, skulu hafa samráð í sameiginlegu EES-nefndinni um öll þau mál á grundvelli samningsins sem valda erfiðleikum og einhver þeirra hefur tekið upp.

3. Sameiginlega EES-nefndin setur sér starfsreglur með ákvörðun þar að lútandi.

93. gr.

1. Sameiginlegu EES-nefndina skipa fulltrúar samningsaðila.

2. Ákvarðanir sameiginlegu EES-nefndarinnar skulu teknar með samkomulagi milli banda lagsins annars vegar og EFTA-ríkjanna, sem mæla einum rómi, hins vegar.

94. gr.

1. Fulltrúi bandalagsins, þ.e. framkvæmdastjórnar EB, og fulltrúi eins EFTA-ríkis skulu gegna embætti formanns sameiginlegu EES-nefndarinnar til skiptis sex mánuði í senn.

2. Sameiginlega EES-nefndin skal að öðru jöfnu koma saman að minnsta kosti einu sinni í mánuði til að gegna störfum sínum. Hana má einnig kalla saman að frumkvæði formannsins eða samkvæmt beiðni einhvers samningsaðila í samræmi við starfsreglur hennar.

3. Sameiginlega EES-nefndin getur ákveðið að skipa undirnefndir eða starfshópa sér til að stoðar við framkvæmd verkefna sinna. Sameiginlega EES-nefndin skal í starfsreglum sínum mæla fyrir um skipan og starfshætti umræddra undirnefnda og starfshópa. Sameiginlega EES-nefndin skal ákveða verkefni þeirra í hverju tilviki fyrir sig.

4. Sameiginlega EES-nefndin skal gefa út ársskýrslu um framkvæmd og þróun samnings þessa.

3. ÞÁTTUR

SAMVINNA ÞINGMANNA

95. gr.

1. Sameiginlegri EES-þingmannanefnd er hér með komið á fót. Hana skipa jafnmargir þing menn Evrópuþingsins annars vegar og þjóðþinga EFTA-ríkjanna hins vegar. Heildarfjöldi þingmanna í nefndinni kemur fram í stofnsamþykktinni í bókun 36.

2. Fundir sameiginlegu EES-þingmannanefndarinnar skulu haldnir til skiptis í bandalaginu og EFTA-ríki í samræmi við ákvæði bókunar 36.

3. Sameiginlega EES-þingmannanefndin skal með umræðum og fundum stuðla að auknum skilningi milli bandalagsins og EFTA-ríkjanna á þeim sviðum sem samningur þessi tekur til.

4. Sameiginlegu EES-þingmannanefndinni er heimilt að láta álit sitt í ljós í formi skýrslna eða ályktana eftir því sem við á. Hún skal einkum taka til athugunar ársskýrslu sameiginlegu EES-nefndarinnar um framkvæmd og þróun samnings þessa sem gefin er út í samræmi við 4. mgr. 94. gr.

5. Forseti EES-ráðsins má koma fyrir sameiginlegu EES-þingmannanefndina og taka þar til máls.

6. Sameiginlega EES-þingmannanefndin setur sér starfsreglur.

4. ÞÁTTUR

SAMVINNA AÐILA ER STARFA

Á SVIÐI EFNAHAGS- OG FÉLAGSMÁLA

96. gr.

1. Fulltrúar efnahags- og félagsmálanefndarinnar og annarra samtaka, sem eru í fyrirsvari fyrir aðila á sviði félagsmála í bandalaginu, og fulltrúar samsvarandi aðila í EFTA-ríkjunum skulu vinna að því að styrkja tengslin sín í milli og eiga samstarf á skipulagðan og reglubundinn hátt með það að markmiði að auka skilning á efnahagslegum og félagslegum þáttum í stöðugt samofnara efnahagssamstarfi samningsaðilanna og á hagsmunum þeirra innan EES.

2. Ráðgjafarnefnd EES er hér með komið á fót í þessum tilgangi. Hana skipa jafnmargir full trúar efnahags- og félagsmálanefndar bandalagsins annars vegar og ráðgjafarnefndar EFTA hins vegar. Ráðgjafarnefnd EES er heimilt að láta í ljós álit sitt í formi skýrslna eða ályktana eftir því sem við á.

3. Ráðgjafarnefnd EES setur sér starfsreglur.

2. KAFLI

TILHÖGUN ÁKVARÐANATÖKU

97. gr.

Með fyrirvara um meginregluna um jafnræði, og eftir að öðrum samningsaðilum hafa verið veittar upplýsingar þar um, hefur samningur þessi ekki áhrif á rétt einstakra samningsaðila til að breyta innlendri löggjöf á þeim sviðum sem samningurinn tekur til:

– ef sameiginlega EES-nefndin kemst að þeirri niðurstöðu að löggjöf, eins og henni hefur verið breytt, hafi ekki áhrif til hins verra á framkvæmd samningsins; eða

– ef skilyrðum 98. gr. hefur verið fullnægt.

98. gr.

Breyta má viðaukum samningsins, svo og bókunum 1–7, 9–11, 19–27, 30–32, 37, 39, 41 og 47, eftir því sem við á, með ákvörðun sameiginlegu EES-nefndarinnar í samræmi við 93. (2. mgr.), 99., 100., 102. og 103. gr.

99. gr.

1. Þegar framkvæmdastjórn EB hefur undirbúning að nýrri löggjöf á sviði sem samningur þessi tekur til skal hún leita óformlega ráða hjá sérfræðingum EFTA-ríkjanna á sama hátt og hún leitar ráða hjá sérfræðingum aðildarríkja EB við mótun tillagnanna.

2. Þegar framkvæmdastjórnin sendir ráði Evrópubandalaganna tillögur sínar skal hún senda afrit af þeim til EFTA-ríkjanna. Fyrstu skoðanaskipti skulu fara fram í sameiginlegu EES-nefndinni óski einhver samningsaðila þess.

3. Á þeim tíma sem líður fram að töku ákvörðunar í ráði Evrópubandalaganna skulu samn ingsaðilar, í samfelldu ferli upplýsingaskipta og samráðs, ráðgast hver við annan í sameiginlegu EES-nefndinni að beiðni einhvers þeirra á öllum tímamótum á leið að endanlegri töku ákvörðunar.

4. Samningsaðilar skulu starfa saman af heilum hug á upplýsinga- og samráðstímabilinu með það fyrir augum að auðvelda ákvarðanatöku í sameiginlegu EES-nefndinni í lok meðferðar málsins.

100. gr.

Framkvæmdastjórn EB skal tryggja sérfræðingum EFTA-ríkjanna eins víðtæka þátttöku og unnt er á viðkomandi sviðum við undirbúning á drögum að tillögum er síðar eiga að fara fyrir þær nefndir sem eru framkvæmdastjórninni til aðstoðar við beitingu framkvæmdarvalds hennar. Í þessum málum skal framkvæmdastjórn EB, þegar hún gengur frá tillögum, ráðgast við sérfræðinga EFTA-ríkjanna á sama grundvelli og hún ráðgast við sérfræðinga aðildarríkja EB.

Í þeim tilvikum þegar mál er til meðferðar hjá ráði Evrópubandalaganna í samræmi við starfsreglur sem gilda um viðkomandi nefnd skal framkvæmdastjórn EB koma áliti sérfræðinga EFTA-ríkjanna á framfæri við ráð Evrópubandalaganna.

101. gr.

1. Að því er varðar nefndir, sem falla hvorki undir 81. né 100. gr., skal haft samstarf við sér fræðinga EFTA-ríkjanna þegar góð framkvæmd samningsins krefst slíks.

Þessar nefndir eru skráðar í bókun 37. Kveðið er á um tilhögun slíks samstarfs í bókunum og viðaukum um einstök svið þar sem fjallað er um viðkomandi málefni.

2. Telji samningsaðilar að slíkt samstarf ætti að taka til annarra nefnda sem eru svipaðs eðlis getur sameiginlega EES-nefndin breytt bókun 37.

102. gr.

1. Til að tryggja réttaröryggi og einsleitni EES skal sameiginlega EES-nefndin taka ákvörðun um breytingu á viðauka við samning þennan eins fljótt og unnt er, eftir að bandalagið hefur samþykkt nýja samsvarandi löggjöf bandalagsins, með það að markmiði að unnt sé að beita samtímis þeirri löggjöf og breytingunum á viðaukunum við samninginn. Bandalagið skal í þessum tilgangi tilkynna öðrum samningsaðilum í sameiginlegu EES-nefndinni eins fljótt og unnt er þegar það samþykkir réttargerð um málefni sem fjallað er um í samningi þessum.

2. Sameiginlega EES-nefndin skal meta á hvaða hluta viðauka við samning þennan þessi nýja löggjöf hefur bein áhrif.

3. Samningsaðilar skulu gera sitt ýtrasta til að komast að samkomulagi um málefni sem samningur þessi tekur til.

Sameiginlega EES-nefndin skal einkum gera sitt ítrasta til að finna lausn sem aðilar geta sætt sig við þegar upp koma alvarleg vandamál á sviðum sem falla undir valdsvið löggjafans í EFTA-ríkjunum.

4. Ef ekki er unnt að komast að samkomulagi um breytingar á viðauka við samning þennan, þrátt fyrir beitingu undanfarandi málsgreinar, skal sameiginlega EES-nefndin kanna alla frekari möguleika á því að tryggja áframhaldandi góða framkvæmd samningsins og taka nauðsynlegar ákvarðanir þar að lútandi, meðal annars möguleika á viðurkenningu á sambærilegri löggjöf. Taka verður slíka ákvörðun eigi síðar en við lok sex mánaða tímabils, frá því að málinu er vísað til sameiginlegu EES-nefndarinnar, eða á gildistökudegi samsvarandi löggjafar bandalagsins ef sá dagur er síðar.

5. Hafi sameiginlega EES-nefndin ekki tekið ákvörðun um breytingu á viðauka við þennan samning við lok frests sem settur er í 4. mgr. skal litið svo á að framkvæmd viðkomandi hluta viðaukans, sem ákveðinn er samkvæmt 2. mgr., sé frestað til bráðabirgða nema sameiginlega EES-nefndin ákveði annað. Frestun af þessu tagi gengur í gildi sex mánuðum eftir lok tímabilsins sem um getur í 4. mgr., þó ekki fyrir þann dag er samsvarandi gerð EB kemur til framkvæmda í bandalaginu. Sameiginlega EES-nefndin skal áfram leitast við að koma á samkomulagi um lausn sem aðilar geta sætt sig við svo að draga megi frestunina til baka við fyrsta tækifæri.

6. Ræða skal um raunhæfar afleiðingar þeirrar frestunar sem um getur í 5. mgr. í sameigin legu EES-nefndinni. Réttindi og skyldur sem einstaklingar og aðilar í atvinnurekstri hafa þegar áunnið sér með samningi þessum skulu haldast. Samningsaðilar skulu, eftir því sem við á, ákveða hvaða breytingar þurfi að gera vegna frestunarinnar.

103. gr.

1. Ef ákvörðun sameiginlegu EES-nefndarinnar getur einungis verið bindandi fyrir samn ingsaðila eftir að hann hefur uppfyllt stjórnskipuleg skilyrði skal ákvörðunin ganga í gildi á þeim degi sem getið er í henni, ef sérstakur dagur er tiltekinn, að því tilskildu að hlutaðeigandi samningsaðili hafi tilkynnt hinum samningsaðilunum fyrir þann dag að stjórnskipuleg skilyrði hafi verið uppfyllt.

Hafi tilkynningin ekki farið fram fyrir umræddan dag gengur ákvörðunin í gildi fyrsta dag annars mánaðar eftir síðustu tilkynningu.

2. Hafi tilkynningin ekki átt sér stað sex mánuðum eftir að sameiginlega EES-nefndin tók ákvörðun sína skal ákvörðun sameiginlegu EES-nefndarinnar gilda til bráðabirgða meðan stjórnskipulegum skilyrðum hefur ekki verið fullnægt, nema samningsaðili tilkynni að slík gildistaka til bráðabirgða geti ekki átt sér stað. Í síðara tilvikinu, eða tilkynni samningsaðili að ákvörðun sameiginlegu EES-nefndarinnar hafi ekki hlotið samþykki, skal frestunin sem kveðið er á um í 5. mgr. 102. gr. ganga í gildi einum mánuði eftir að tilkynningin fer fram en þó ekki fyrir þann dag er samsvarandi gerð EB kemur til framkvæmda í bandalaginu.

104. gr.

Ákvarðanir teknar af sameiginlegu EES-nefndinni í tilvikum sem kveðið er á um í samningi þessum skulu vera bindandi fyrir samningsaðila frá og með gildistökudegi þeirra, nema kveðið sé á um annað í þeim, og skulu þeir gera nauðsynlegar ráðstafanir til að tryggja framkvæmd þeirra og beitingu.

3. KAFLI

EINSLEITNI, TILHÖGUN EFTIRLITS OG LAUSN DEILUMÁLA

1. ÞÁTTUR

EINSLEITNI

105. gr.

1. Til að ná því markmiði samningsaðila að ná fram og halda sig við eins samræmda túlkun og unnt er á ákvæðum samningsins og þeim ákvæðum í löggjöf bandalagsins sem tekin eru efnislega upp í samninginn skal sameiginlega EES-nefndin starfa í samræmi við þessa grein.

2. Sameiginlega EES-nefndin skal stöðugt hafa til skoðunar þróun dómsúrlausna dómstóls Evrópubandalaganna og EFTA-dómstólsins sem kveðið er á um í 2. mgr. 108. gr. Í þessum tilgangi skal senda dóma þessara dómstóla til sameiginlegu EES-nefndarinnar sem skal gera ráðstafanir til að varðveita einsleita túlkun á samningnum.

3. Ef sameiginlegu EES-nefndinni hefur ekki tekist að varðveita einsleita túlkun á samn ingnum innan tveggja mánaða frá því að mismunur á úrlausnum dómstólanna tveggja var lagður fyrir hana má beita málsmeðferðinni sem mælt er fyrir um í 111. gr.

106. gr.

Til að tryggja að samningur þessi verði túlkaður á eins samræmdan hátt og kostur er, með fullri virðingu fyrir sjálfstæði dómstólanna, skal sameiginlega EES-nefndin koma á kerfi til að skiptast á upplýsingum um dóma EFTA-dómstólsins, dómstóls Evrópubandalaganna og dómstóls Evrópubandalaganna á fyrsta dómstigi og dómstóla EFTA-ríkjanna á síðasta dómstigi. Í kerfi þessu skal felast:

a) að þessir dómstólar sendi ritara dómstóls Evrópubandalaganna dóma sína um túlkun og beitingu annars vegar samnings þessa og hins vegar stofnsáttmála Efnahagsbandalags Evrópu og stofnsáttmála Kola- og stálbandalags Evrópu, með áorðnum breytingum og viðbótum, auk þeirra gerða sem hafa verið samþykktar í samræmi við þá, að því leyti sem þeir varða ákvæði sem eru efnislega samhljóða ákvæðum samnings þessa;

b) að ritari dómstóls Evrópubandalaganna sjái um að flokka þessa dóma og semja og birta, eins og þörf krefur, þýðingar og útdrætti;

c) að ritari dómstóls Evrópubandalaganna sendi þau skjöl sem máli skipta til lögbærra yfirvalda hvers lands sem sérhver samningsaðili tilnefnir fyrir sig.

107. gr.

Í bókun 34 eru ákvæði er gefa EFTA-ríki kost á að heimila dómstóli eða rétti að biðja dómstól Evrópubandalaganna að ákveða túlkun EES-reglna.

2. ÞÁTTUR

TILHÖGUN EFTIRLITS

108. gr.

1. EFTA-ríkin skulu koma á fót sjálfstæðri eftirlitsstofnun (eftirlitsstofnun EFTA) svo og kerfi svipuðu og fyrir er í bandalaginu, meðal annars kerfi til að tryggja efndir á skuldbindingum samkvæmt samningi þessum og til eftirlits með lögmæti aðgerða eftirlitsstofnunar EFTA á sviði samkeppni.

2. EFTA-ríkin skulu koma á fót dómstóli (EFTA-dómstóli).

Undir valdsvið EFTA-dómstólsins skal með tilliti til beitingar samnings þessa og í samræmi við sérstakan samning milli EFTA-ríkjanna einkum heyra:

a) mál um tilhögun eftirlits er varðar EFTA-ríkin;

b) áfrýjanir á ákvörðunum eftirlitsstofnunar EFTA á sviði samkeppni;

c) lausn deilumála milli tveggja eða fleiri EFTA-ríkja.

109. gr.

1. Annars vegar skal eftirlitsstofnun EFTA fylgjast með efndum á skuldbindingum sam kvæmt samningi þessum og hins vegar framkvæmdastjórn EB sem starfar samkvæmt stofnsáttmála Efnahagsbandalags Evrópu, stofnsáttmála Kola- og stálbandalagsins og samningi þessum.

2. Til að tryggja samræmt eftirlit á öllu Evrópska efnahagssvæðinu skulu eftirlitsstofnun EFTA og framkvæmdastjórn EB hafa samstarf sín í milli, skiptast á upplýsingum og ráðgast hvor við aðra um stefnu í eftirlitsmálum og einstök mál.

3. Framkvæmdastjórn EB og eftirlitsstofnun EFTA skulu taka við umkvörtunum varðandi beitingu samnings þessa. Þær skulu skiptast á upplýsingum um kvartanir sem borist hafa.

4. Hvor þessara stofnana um sig skal rannsaka allar kvartanir sem falla undir valdsvið hennar og koma kvörtunum sem falla undir valdsvið hinnar stofnunarinnar til hennar.

5. Komi upp ósamkomulag milli þessara tveggja stofnana um það til hvaða aðgerða skuli gripið í tengslum við kvörtun eða um niðurstöðu rannsóknar getur hvor þeirra sem er vísað málinu til sameiginlegu EES-nefndarinnar sem skal fjalla um það í samræmi við 111. gr.

110. gr.

Ákvarðanir eftirlitsstofnunar EFTA og framkvæmdastjórnar EB, samkvæmt samningi þessum, sem leggja fjárskuldbindingar á aðra aðila en ríki skulu vera fullnustuhæfar. Hið sama skal eiga við um slíka dóma dómstóls Evrópubandalaganna, dómstóls Evrópubandalaganna á fyrsta dómstigi og EFTA-dómstólsins samkvæmt samningi þessum.

Fullnustan skal fara fram í samræmi við gildandi réttarfarsreglur í einkamálum í ríkinu þar sem fullnustan fer fram. Fullnustuúrskurður skal fylgja ákvörðuninni með því eina formskilyrði að gengið hafi verið úr skugga um að ákvörðunin hafi verið tekin af þar til bæru yfirvaldi sem sérhver samningsaðili tilnefnir í þessu skyni og sendir öðrum samningsaðilum, svo og eftirlitsstofnun EFTA, framkvæmdastjórn EB, dómstóli Evrópubandalaganna, dómstóli Evrópubandalaganna á fyrsta dómstigi og EFTA-dómstólnum, tilkynningu um.

Þegar þessum formsatriðum hefur verið fullnægt að beiðni hlutaðeigandi aðila má hinn sami

láta fullnustu fara fram, í samræmi við lög þess ríkis þar sem fullnustan á að fara fram, með því að fara með málið beint fyrir lögbært yfirvald.

Fullnustunni verður einungis frestað með úrskurði dómstóls Evrópubandalaganna hvað varðar ákvarðanir framkvæmdastjórnar EB, úrskurði dómstóls Evrópubandalaganna á fyrsta dómstigi eða dómstóls Evrópubandalaganna, eða með úrskurði EFTA-dómstólsins hvað varðar ákvarðanir eftirlitsstofnunar EFTA eða úrskurði EFTA-dómstólsins. Dómstólar hlutaðeigandi ríkja hafa þó lögsögu varðandi kvartanir um að ekki sé staðið rétt að fullnustunni.

3. ÞÁTTUR

LAUSN DEILUMÁLA

111. gr.

1. Bandalagið eða EFTA-ríki getur lagt deilumál er varðar túlkun eða beitingu samnings þessa fyrir sameiginlegu EES-nefndina í samræmi við eftirfarandi ákvæði.

2. Sameiginlegu EES-nefndinni er heimilt að leysa deilumálið. Henni skulu gefnar allar upp lýsingar sem hún kann að þarfnast til þess að framkvæma nákvæma rannsókn á málinu, með það fyrir augum að finna lausn sem aðilar geta sætt sig við. Í þessum tilgangi skal sameiginlega EES-nefndin rannsaka alla möguleika til að viðhalda góðri framkvæmd samningsins.

3. Varði deilumál túlkun ákvæða samnings þessa, sem eru efnislega samhljóða samsvarandi reglum stofnsáttmála Efnahagsbandalags Evrópu og stofnsáttmála Kola- og stálbandalagsins og gerðum sem samþykktar hafa verið vegna beitingar þessara tveggja sáttmála, og hafi málið ekki verið leyst innan þriggja mánaða frá því að það var lagt fyrir sameiginlegu EES-nefndina, geta samningsaðilar, sem eiga aðild að deilumálinu, samþykkt að fara fram á það við dómstól Evrópubandalaganna að hann kveði upp úrskurð um túlkun á viðkomandi reglum.

Hafi sameiginlega EES-nefndin ekki náð samkomulagi um lausn á slíku deilumáli innan sex mánaða frá þeim degi er þessi málsmeðferð hófst, eða hafi samningsaðilar, sem eiga aðild að deilumálinu, á þeim tíma ekki ákveðið að fara fram á úrskurð dómstóls Evrópubandalaganna, getur samningsaðili, til að draga úr hugsanlegu ójafnvægi,

- annaðhvort gripið til öryggisráðstafana í samræmi við 2. mgr. 112. gr. og málsmeðferð 113. gr.;

- eða beitt 102. gr. að breyttu breytanda.

4. Varði deilumál umfang eða gildistíma öryggisráðstafana, sem gripið er til í samræmi við 3. mgr. 111. gr. eða 112. gr., eða umfang jöfnunarráðstafana, sem gerðar eru í samræmi við 114. gr., og hafi sameiginlegu EES-nefndinni ekki tekist að leysa deiluna þremur mánuðum eftir þann dag er málið var lagt fyrir hana getur hver samningsaðila sem er vísað deilumálinu til gerðardóms samkvæmt málsmeðferð sem mælt er fyrir um í bókun 33. Óheimilt er að fjalla um

túlkun á ákvæðum samnings þessa, sem um getur í 3. mgr., samkvæmt þessari málsmeðferð. Gerðin er bindandi fyrir deiluaðila.

4. KAFLI

ÖRYGGISRÁÐSTAFANIR

112. gr.

1. Ef upp koma alvarlegir efnahagslegir, þjóðfélagslegir eða umhverfislegir erfiðleikar í sérstökum atvinnugreinum eða á sérstökum svæðum, sem líklegt er að verði viðvarandi, getur samningsaðili gripið einhliða til viðeigandi ráðstafana með þeim skilyrðum og á þann hátt sem mælt er fyrir um í 113. gr.

2. Slíkar ÖRYGGISRÁÐSTAFANIR skulu vera takmarkaðar, að því er varðar umfang og gildistíma, við það sem telst bráðnauðsynlegt til þess að ráða bót á ástandinu. Þær ráðstafanir skulu helst gerðar sem raska minnst framkvæmd samnings þessa.

3. Öryggisráðstafanirnar skulu gilda gagnvart öllum samningsaðilum.

113. gr.

1. Samningsaðili sem hyggst grípa til öryggisráðstafana í samræmi við 112. gr. skal tilkynna hinum samningsaðilunum það án tafar fyrir milligöngu sameiginlegu EES-nefndarinnar og skal hann veita allar nauðsynlegar upplýsingar.

2. Samningsaðilar skulu tafarlaust bera saman ráð sín í sameiginlegu EES-nefndinni með það fyrir augum að finna viðunandi lausn fyrir alla aðila.

3. Hlutaðeigandi samningsaðili má ekki grípa til öryggisráðstafana fyrr en einum mánuði eftir dagsetningu tilkynningarinnar samkvæmt 1. mgr. nema samráði samkvæmt 2. mgr. hafi verið lokið áður en umræddur frestur var liðinn. Þegar óvenjulegar aðstæður, sem krefjast tafarlausra aðgerða, útiloka könnun fyrir fram getur hlutaðeigandi samningsaðili strax gripið til þeirra verndarráðstafana sem bráðnauðsynlegar teljast til þess að ráða bót á ástandinu.

Framkvæmdastjórn EB skal grípa til öryggisráðstafana fyrir bandalagið.

4. Hlutaðeigandi samningsaðili skal án tafar tilkynna ráðstafanirnar, sem gerðar hafa verið, til sameiginlegu EES-nefndarinnar og veita allar nauðsynlegar upplýsingar.

5. Í sameiginlegu EES-nefndinni skal hafa samráð um öryggisráðstafanirnar á þriggja mánaða fresti frá því að gripið er til þeirra með það fyrir augum að fella þær niður fyrir áætluð lok gildistímabilsins eða takmarka umfang þeirra.

Hver samningsaðilanna um sig getur hvenær sem er farið fram á það við sameiginlegu EES-nefndina að hún endurskoði umræddar ráðstafanir.

114. gr.

1. Ef öryggisráðstöfun, sem samningsaðili hefur gripið til, veldur misvægi milli réttinda og skyldna samkvæmt samningi þessum getur hver hinna samningsaðilanna gripið til jafnumfangsmikilla jöfnunarráðstafana gagnvart fyrrnefndum samningsaðila og bráðnauðsynlegar eru til að jafna umrætt misvægi. Þær ráðstafanir skulu helst gerðar sem raska minnst starfsemi Evrópska efnahagssvæðisins.

2. Málsmeðferðin sem kveðið er á um í 113. gr. gildir.

VIII. HLUTI

FJÁRMAGNSKERFI

115. gr.

Samningsaðilar eru sammála um nauðsyn þess að draga úr efnahagslegu og félagslegu misræmi milli svæða sinna með það fyrir augum að stuðla að jafnri og stöðugri eflingu viðskipta- og efnahagstengsla samningsaðila eins og kveðið er á um í 1. gr. Í þessu tilliti hafa þeir í huga ákvæði sem er að finna annars staðar í samningi þessum og bókanir er tengjast honum, að meðtöldum tilteknum ráðstöfunum er varða landbúnað og sjávarútveg.

116. gr.

EFTA-ríkin skulu koma upp fjármagnskerfi í þeim tilgangi að leggja sitt af mörkum, í tengslum við EES og til viðbótar því sem bandalagið gerir þegar á þessu sviði, til framgangs markmiðunum sem sett eru í 115. gr.

117. gr.

Í bókun 38 eru ákvæði um fjármagnskerfið.

IX. HLUTI

ALMENN ÁKVÆÐI OG LOKAÁKVÆÐI

118. gr.

1. Álíti samningsaðili það öllum samningsaðilum til hagsbóta að þróa tengslin, sem stofnað er til með samningi þessum, með því að láta þau ná til fleiri sviða en þar er gert ráð fyrir skal hann leggja fram rökstudda beiðni til hinna samningsaðilanna í EES-ráðinu. Ráðið getur falið sameiginlegu EES-nefndinni að rannsaka alla þætti beiðninnar og leggja fram skýrslu.

EES-ráðið getur, eftir því sem við á, tekið stjórnmálalegar ákvarðanir með það fyrir augum

að hafnar verði samningaviðræður milli samningsaðila.

2. Samningar sem samningaviðræður samkvæmt 1. mgr. leiða til skulu háðir fullgildingu eða samþykki samningsaðila í samræmi við þeirra eigin reglur.

119. gr.

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

120. gr.

Ef ekki er kveðið á um annað í samningi þessum og einkum í bókunum 41, 43 og 44 skulu ákvæði samningsins ganga framar ákvæðum í gildandi tvíhliða eða marghliða samningum sem Efnahagsbandalag Evrópu annars vegar og eitt eða fleiri EFTA-ríki hins vegar eru bundin af að því leyti sem samningur þessi tekur til sömu efnisatriða.

121. gr.

Ákvæði samnings þessa útiloka ekki samstarf:

a) innan ramma norrænnar samvinnu að því leyti sem slík samvinna raskar ekki góðri framkvæmd samnings þessa;

b) innan ramma svæðissambandsins milli Sviss og Liechtensteins að því leyti sem markmið sambandsins nást ekki með beitingu ákvæða samnings þessa og góð framkvæmd samningsins raskast ekki;

c) innan ramma samvinnu Austurríkis og Ítalíu varðandi Tíról, Vorarlberg og Trentínó Suður-Tíról/Altó Adíge að því leyti sem slík samvinna raskar ekki góðri framkvæmd samnings þessa.

122. gr.

Fulltrúar, sendimenn og sérfræðingar samningsaðila, svo og embættismenn og aðrir starfsmenn samkvæmt samningi þessum, skulu bundnir þagnarskyldu, sem helst enda þótt þeir láti af störfum, um vitneskju sem á að fara leynt í starfi þeirra, einkum upplýsingar um fyrirtæki, viðskiptatengsl þeirra og kostnaðarþætti.

123. gr.

Ekkert í samningi þessum skal hindra samningsaðila í að gera ráðstafanir:

a) sem hann telur nauðsynlegar til að girða fyrir uppljóstrun upplýsinga andstætt mikilvægum öryggishagsmunum sínum;

b) sem snerta framleiðslu á eða viðskipti með vopn, skotfæri og hergögn eða aðrar fram

leiðsluvörur, nauðsynlegar til varna, eða varða rannsóknir, þróun eða framleiðslu, nauðsynlega til varna, enda raski þessar ráðstafanir ekki samkeppnisskilyrðum hvað varðar framleiðsluvörur sem eru ekki sérstaklega ætlaðar til hernaðarþarfa;

c) sem hann telur nauðsynlegar vegna eigin öryggis þegar alvarlegar innanlandserjur ógna lögum og reglu, stríð geisar eða alvarleg spenna ríkir í alþjóðamálum, sem leitt getur til styrjaldar, eða til að uppfylla skyldur sem hann hefur tekið á sig til að gæta friðar og alþjóðaöryggis.

124. gr.

Með fyrirvara um beitingu annarra ákvæða samnings þessa skulu samningsaðilar sjá til þess að ríkisborgarar aðildarríkja EB og EFTA-ríkja sitji við sama borð og eigin ríkisborgarar hvað varðar hlutdeild í fjármagni félaga eða fyrirtækja í skilningi 34. gr.

125. gr.

Samningur þessi hefur engin áhrif á reglur samningsaðila um skipan eignarréttar.

126. gr.

1. Samningurinn gildir á þeim svæðum sem stofnsáttmáli Efnahagsbandalags Evrópu og stofnsáttmáli Kola- og stálbandalags Evrópu taka til, með þeim skilmálum sem þar eru settir, og á yfirráðasvæðum Lýðveldisins Austurríkis, Lýðveldisins Finnlands, Lýðveldisins Íslands, Furstadæmisins Liechtensteins, Konungsríkisins Noregs, Konungsríkisins Svíþjóðar og Ríkjasambandsins Sviss.

2. Þrátt fyrir 1. mgr. skal samningur þessi ekki gilda um Álandseyjar. Ríkisstjórn Finnlands getur þó gefið út yfirlýsingu, sem lögð skal fram hjá vörsluaðila við fullgildingu samnings þessa og hann skal senda samningsaðilum staðfest endurrit af, þess efnis að samningurinn skuli gilda um þessar eyjar með sömu skilmálum og hann gildir um aðra hluta Finnlands, samanber þó eftirfarandi ákvæði:

a) Ákvæði samnings þessa skulu ekki hindra beitingu ákvæða er gilda hverju sinni á Álandseyjum og varða:

i. höft á rétti einstaklinga, sem hafa ekki svæðisbundinn borgararétt á Álandseyjum, og lögpersóna til að eignast og eiga fasteignir á Álandseyjum án heimildar þar til bærra yfirvalda eyjanna;

ii. höft á rétti einstaklinga, sem hafa ekki svæðisbundinn borgararétt á Álandseyjum, eða lögpersóna til staðfestu og til að veita þjónustu án heimildar þar til bærra yfirvalda eyjanna.

b) Samningur þessi hefur ekki á áhrif á réttindi íbúa Álandseyja í Finnlandi.

c) Yfirvöld á Álandseyjum skulu veita öllum einstaklingum og lögpersónum

samningsaðila sömu kjör.

127. gr.

Sérhver samningsaðili getur sagt upp aðild sinni að samningi þessum að því tilskildu að hann veiti öðrum samningsaðilum að minnsta kosti tólf mánaða fyrirvara með skriflegum hætti.

Jafnskjótt og fyrirhuguð uppsögn hefur verið tilkynnt skulu hinir samningsaðilarnir boða til ráðstefnu stjórnarerindreka til þess að meta hvaða breytingar sé nauðsynlegt að gera á samningnum.

128. gr.

1. Evrópuríki sem gengur í bandalagið er skylt, en heimilt gangi það í EFTA, að gerast aðili að samningi þessum. Það skal senda EES-ráðinu umsókn sína.

2. Samningsaðilar og ríki sem sækir um skulu gera með sér samkomulag um skilmála og skil yrði fyrir slíkri aðild. Slíkt samkomulag skal lagt fyrir alla samningsaðila til fullgildingar eða samþykktar í samræmi við eigin reglur þeirra.

129. gr.

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

Textar gerða, sem vísað er til í viðaukunum, eru jafngildir á dönsku, ensku, frönsku, grísku, hollensku, ítölsku, portúgölsku, spænsku og þýsku, eins og þeir birtast í Stjórnartíðindum Evrópubandalagsins, og skulu með tilliti til jafngildingar gerðir á finnsku, íslensku, norsku og sænsku.

2. Samningsaðilar skulu fullgilda eða samþykkja samning þennan í samræmi við stjórnskipu leg skilyrði hvers um sig.

Honum skal komið í vörslu hjá aðalskrifstofu ráðs Evrópubandalaganna sem skal senda hverjum hinna samningsaðilanna staðfest endurrit.

Fullgildingar- og samþykktarskjölunum skal komið í vörslu hjá aðalskrifstofu ráðs Evrópubandalaganna sem skal tilkynna öllum hinum samningsaðilunum það.

3. Samningur þessi öðlast gildi 1. janúar 1993 að því tilskildu að allir samningsaðilar hafi afhent fullgildingar- eða samþykktarskjöl sín til vörslu fyrir þann dag. Eftir þann dag skal samningurinn öðlast gildi fyrsta dag annars mánaðar eftir síðustu tilkynninguna. Lokafrestur varðandi þá tilkynningu skal vera 30. júní 1993. Eftir þann dag skulu samningsaðilar boða til ráðstefnu stjórnarerindreka til að meta stöðu mála.

II

Dómar og álit ESB-dómstólsins

1. *Van Gend en Loos*, mál nr. 26/62, ECR [1963] 2

Judgment of the Court of 5 February 1963

Reference for a preliminary ruling under Article 177 of the EEC Treaty made by the Tariefcommissie, Amsterdam, on 16 August 1962 in the proceedings between

N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos

and

Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)

Case 26-62

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and the procedure may be summarized as follows:

1. On 9 September 1960 the company N. V. Algemene Transport- en Expedide Onderneming van Gend en Loos (hereinafter called 'Van Gend & Loos'), according to a customs declaration of 8 September on form D.5061, imported into the Netherlands from the Federal Republic of Germany a quantity of ureaformaldehyde, described in the import document as 'Harnstoffharz (U.F. resin) 70, aqueous emulsion of ureaformaldehyde'.

2. On the date of importation, the product in question was classified in heading 39.01-a-1 of the tariff of import duties listed in the 'Tariefbesluit' which entered into force on 1 March 1960. The nomenclature of the 'Tariefbesluit' is taken from the protocol concluded between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands at Brussels on 25 July 1958, ratified in the Netherlands by the Law of 16 December 1959.

3. The wording of heading 39.01-a-1 was as follows:

'Products of condensation, poly-condensation and poly-addition, whether modified or not, polymerized, or linear (phenoplasts, aminoplasts, alkyds, allylic polyesters and other non-saturated polyesters, silicones etc. …)

(a) Liquid or paste products, including emulsions, dispersions and solutions:
1. Aminoplasts in aqueous emulsions, dispersions or solutions

Duties applicable

gen. % spec. %

10% 8%'

4. On this basis, the Dutch revenue authorities applied an ad valorem import duty of 8 % to the importation in question.

5. On 20 September 1960 Van Gend & Loos lodged an objection with the Inspector of Customs and Excise at Zaandam against the application of this duty in the present case. The company put forward in particular the following arguments:

On 1 January 1958, the date on which the EEC Treaty entered into force, aminoplasts in emulsion were classified under heading 279-a-2 of the tariff in the 'Tariefbesluit' of 1947, and charged with an ad valorem import duty of 3 %. In the 'Tariefbesluit' which entered into force on 1 March 1960, heading 279-a-2 was replaced by heading 39.01-a.

Instead of applying, in respect of intra-Community trade, an import duty of 3 % uniformly to all products under the old heading 279-a-2, a sub-division was created: 39.01-a-1, which contained only aminoplasts in aqueous emulsions, dispersions or solutions, and in respect of which import duty was fixed at 8 %. For the other products in heading 39.01-a, which also had been included in the old heading 279-a-2, the import duty of 3 % applied on 1 January 1958 was maintained.

By thus increasing the import duty on the product in question after the entry into force of the EEC Treaty, the Dutch Government infringed Article 12 of that Treaty, which provides that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

6. The objection of Van Gend & Loos was dismissed on 6 March 1961 by the Inspector of Customs and Excise at Zaandam on the ground of inadmissibility, because it was not directed against the actual application of the tariff but against the rate.

7. Van Gend & Loos appealed against this decision to the Tariefcommissie, Amsterdam, on 4 April 1961.

8. The case was heard by the Tariefcommissie on 21 May 1962. In support of its application for the annulment of the contested decision Van Gend & Loos put forward the arguments already submitted in its objection of 20 September 1960. The Nederlandse administratie der belastingen replied in particular that when the EEC Treaty entered into force the product in question was not charged under the heading 279-a-2 with a duty of only 3 % but, because of its composition and intended application, was classified under heading 332 bis ('synthetic and other adhesives, not stated or included elsewhere') and charged with a duty of 10 % so that there had not in fact been any increase.

9. The Tariefcommissie, without giving a formal decision on the question whether the product in question fell within heading 332 bis or heading 279-a-2 of the 1947 'Tariefbesluit', took the view that the arguments of the parties raised a question concerning the interpretation of the EEC Treaty. It therefore suspended the proceedings and, in conformity with the third paragraph of Article 177 of the Treaty, referred to the Court of Justice on 16 August 1962, for a preliminary ruling, the two questions set out above.

10. The decision of the Tariefcommissie was notified on 23 August 1962 by the Registrar of the Court to the parties to the action, to the Member States and to the Commission of the EEC.

11. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted to the Court by the parties to the main action, by the Government of the Kingdom of Belgium, the Government of the Federal Republic of Germany, the Commission of the EEC and the Government of the Kingdom of the Netherlands.

12. At the public hearing the Court on 29 November 1962, the oral submissions of the plaintiff in the main action and of the Commission of the EEC were heard. At the same hearing questions were put to them by the Court. Written replies to these were supplied within the prescribed time.

13. The Advocate-General gave his reasoned oral opinion at the hearing on 12 December 1962, in which he proposed that the Court should in its judgment only answer the first question referred to it and hold that Article 12 of the EEC Treaty imposes a duty only on Member States.

II — Arguments and observations

The arguments contained in the observations submitted in accordance with the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community by the parties to the main action, the Member States and the Commission may be summarized as follows:

A — *The first question*

Admissibility

The Netherlands Government, the Belgian Government and the Nederlandse administratie der belastingen (which in its statement of case declared that it was in complete agreement with the observations submitted by the Netherlands Government) confirm that the main complaint of Van Gend & Loos against the Governments of the Benelux countries is that by the Brussels Protocol of 25 July 1958 they infringed Article 12 of the EEC Treaty by increasing after its entry into force a customs duty applied in their trade with other Member States of the Communities.

The Netherlands Government disputes whether an alleged infringement of the Treaty by a Member State can be submitted to the judgment of the Court by a procedure other than that laid

down by Article 169 or 170, that is to say on the initiative of another Member State or of the Commission. It maintains in particular that the matter cannot be brought before the Court by means of the procedure of reference for a preliminary ruling under Article 177.

The Court, according to the Netherlands Government, cannot, in the context of the present proceedings, decide a problem of this nature, since it does not relate to the interpretation but to the application of the Treaty in a specific case.

The Belgian Government maintains that the first question is a reference to the Court of a problem of constitutional law, which falls exclusively within the jurisdiction of the Netherlands court.

That court is confronted with two international treaties both of which are part of the national law. It must decide under national law — assuming that they are in fact contradictory — which treaty prevails over the other or more exactly whether a prior national law of ratification prevails over a subsequent one.

This is a typical question of national constitutional law which has nothing to do with the interpretation of an Article of the EEC Treaty and is within the exclusive jurisdiction of the Netherlands court, because it can only be answered according to the constitutional principles and jurisprudence of the national law of the Netherlands.

The Belgian Government also points out that a decision on the first question referred to the Court is not only unnecessary to enable the Tariefcommissie to give its judgment but cannot even have any influence on the solution to the actual problem which it is asked to resolve.

In fact, whatever answer the Court may give, the Tariefcommissie has to solve the same problem: Has it the right to ignore the law of 16 December 1959 ratifying the Brussels Protocol, because it conflicts with an earlier law of 5 December 1957 ratifying the Treaty establishing the EEC?

The question raised is not therefore an appropriate question for a preliminary ruling, since its answer cannot enable the court which has to adjudicate upon the merits of the main action to make a final decision in the proceedings pending before it.

The Commission of the EEC, on the other hand, observes that the effect of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself. The problem is therefore without doubt one of interpretation of the Treaty.

Further the Commission calls attention to the fact that a finding of inadmissibility would have the paradoxical and shocking result that the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State.

On the substance

Van Gend & Loos answers in the affirmative the question whether the Article has internal

effect.

It maintains in particular that:

— Article 12 is applicable without any preliminary incorporation in the national legislation of Member States, since it only imposes a negative obligation;

— it has direct effect without any further measures of implementation under Community legislation, as all the customs duties applied by Member States in their trade with each other were bound on 1 January 1957 (Article 14 of the Treaty);

— although the Article does not directly refer to the nationals of Member States but to the national authorities, infringement of it adversely affects the fundamental principles of the Community, and individuals as well as the Community must be protected against such infringements;

— it is particularly well adapted for direct application by the national court which must set aside the application of customs duties introduced or increased in breach of its provisions.

The Commission emphasizes the importance of the Court's answer to the first question. It will have an effect not only on the interpretation of the provision at issue in a specific case and on the effect which will be attributed to it in the legal systems of Member States but also on certain other provisions of the Treaty which are as clear and complete as Article 12.

According to the Commission an analysis of the legal structure of the Treaty and of the legal system which it establishes shows on the one hand that the Member States did not only intend to undertake mutual commitments but to establish a system of Community law, and on the other hand that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts of law.

However, Community law must be effectively and uniformly applied throughout the whole of the Community.

The result is first that the effect of Community law on the internal law of Member Stares cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.

The Commission observes in this context that the fact that a Community rule is, as regards its form, directed to the states does not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts.

As regards more particularly the question referred to the Court, the Commission is of the opinion that Article 12 contains a rule of law capable of being effectively applied by the national court.

It is a provision which is perfectly clear in the sense that it creates for Member States a specific unambiguous obligation relating to the extension of their internal law in a matter which directly affects their nationals and it is not affected or qualified by any other provision of the Treaty.

It is also a complete and self-sufficient provision in that it does not require on a Community level any new measure to give concrete form to the obligation which it defines.

The Netherlands Government draws a distinction between the question of the internal effect and that of the direct effect (or direct applicability), the first, according to it, being a precondition of the second.

It considers that the question whether a particular provision of the Treaty has an internal effect can only be answered in the affirmative, if all the essential elements, namely the intention of the contracting parties and the material terms of the provision under consideration, allows such a conclusion.

With regard to the intention of the parties to the Treaty the Netherlands Government maintains that an examination of the actual wording is sufficient to establish that Article 12 only places an obligation on Member States, who are free to decide how they intend to fulfil this obligation. A comparison with other provisions of the Treaty confirms this finding.

As Article 12 does not have internal effect it cannot, a fortiori, have direct effect.

Even if the fact that Article 12 places an obligation on Member States were to be considered as an internal effect, it cannot have direct effect in the sense that it permits the nationals of Member States to assert subjective rights which the courts must protect.

Alternatively the Netherlands Government argues that, so far as the necessary conditions for its direct application are concerned, the EEC Treaty does not differ from a standard international treaty. The conclusive factors in this respect are the intention of the parties and the provisions of the Treaty.

However the question whether under Netherlands constitutional law Article 12 is directly applicable is one concerning the interpretation of Netherlands law and does not come within the jurisdiction of the Court of Justice.

Finally the Netherlands Government indicates what the effect would be, in its view, of an affirmative answer to the first question put by the Tariefcommissie:

— it would upset the system which the authors of the Treaty intended to establish;

— it would create, with regard to the many provisions in Community regulations which expressly impose obligations on Member States, an uncertainty in the law of a kind which could call in question the readiness of these States to cooperate in the future;

— it would put in issue the responsibility of States by means of a procedure which was not designed for this purpose.

The Belgian Government maintains that Article 12 is not one of the provisions

— which are the exception in the Treaty

— having direct internal effect.

Article 12 does not constitute a rule of law of general application providing that any introduction of a new customs duty or any increase in an existing duty is automatically without effect or is absolutely void. It merely obliges Member States to refrain from taking such measures.

It does not create therefore a directly applicable right which nationals could invoke and enforce. It requires from Governments action at a later date to attain the objective fixed by the Treaty. A national court cannot be asked to enforce compliance with this obligation.

The German Government is also of the opinion that Article 12 of the EEC Treaty does not constitute a legal provision which is directly applicable in all Member States. It imposes on them an international obligation (in the field of customs policy) which must be implemented by national authorities endowed with legislative powers.

Customs duties applicable to a citizen of a Member State of the Community, at least during the transitional period, thus do not derive from the EEC Treaty or the legal measures taken by the institutions, but from legal measures enacted by Member States. Article 12 only lays down the provisions with which they must comply in their customs legislation.

Moreover the obligation laid down only applies to the other contracting Member States.

In German law a legal provision which laid down a customs duty contrary to the provisions of Article 12 would be perfectly valid.

Within the framework of the EEC Treaty the legal protection of nationals of Member States is secured, by provisions derogating from their national constitutional system, only in respect of those measures taken by the institutions of the Community which are of direct and individual concern to such nationals.

B — *The second question*

Admissibility

The Netherlands and Belgian Governments are of the opinion that the second as well as the first question is inadmissible.

According to them the answer to the question whether in fact the Brussels Protocol of 1958 represents a failure by those states who are signatories to fulfil the obligations laid down in Article 12 of the EEC Treaty cannot be given in the context of a preliminary ruling, because the issue is the application of the Treaty and not its interpretation. Moreover such an answer

presupposes a careful study and a specific evaluation of the facts and circumstances peculiar to a given situation, and this is also inadmissible under Article 177.

The Netherlands Government emphasizes, furthermore, that if a failure by a state to fulfil its Community obligations could be brought before the Court by a procedure other than those under Articles 169 and 170 the legal protection of that state would be considerably diminished.

The German Government, without making a formal objection of inadmissibility, maintains that Article 12 only imposes an international obligation on states and that the question whether national rules enacted for its implementation do not comply with this obligation cannot depend upon a decision of the Court under Article 177 since it does not involve the interpretation of the Treaty.

Van Gend & Loos also considers that direct form of the second question would necessitate an examination of the facts for which the Court has no jurisdiction when it makes a ruling under Article 177. The real question for interpretation according to it could be worded as follows:

Is it possible for a derogation from the rules applied before 1 March 1960 (or more accurately, before 1 January 1958) not to be in the nature of an increase prohibited by Article 12 of the Treaty, even though this derogation arithmetically represents an increase?

On the substance

Van Gend & Loos repeats in detail the history of the classification of aminoplasts in the successive tariffs to show that the company was charged with a duty of 8 % instead of 3 % intentionally and not because of the inevitable effect of adapting the old tariff to the new. The Netherlands Government was therefore in breach of Article 12 of the EEC Treaty when it increased a customs duty applied in its trade with other Member States.

The Netherlands and Belgian Governments reply that, before the modification of the Benelux Tariff of 1958, ureaformaldehyde was not subject to an import duty of 3 % laid down for heading 279-a-2 of the 'Tariefbesluit' of 1947, but to an import duty of 10 % laid down for heading 332 bis (adhesives).

In fact experience showed that the goods in question were usually used as glue and that as a general rule they could be used as such. Therefore the ministries concerned decided that the product in question was always to be taxed as glue and was to be included under heading 332 bis.

Although, when the intended application of the product in dispute was not sufficiently specified, the Tariefcommissie in certain cases classified it under heading 279-a-2, the authorities of the Benelux States charged it with an import duty of 10 % from the date of the entry into force of the Brussels nomenclature, which put an end to any possible argument.

There can be no question, therefore, in this case, of an increase of a customs duty or of a derogation from the provisions of Article 12 of the Treaty.

Van Gend & Loos replies that only aqueous solutions of aminoplasts to which fillers or binders had been added and which only required the addition of a hardener to make an effective adhesive, that is to say, solutions which could be considered as raw materials, could be classified under heading 332 bis.

The Commission of the EEC is of the opinion first that the prohibition in Article 12 relates to all goods which are capable of being the subject matter of trade between Member States (to the extent to which such trade relates to products complying with the conditions of Article 9(2)).

Article 12 not only aims at the general maintenance of customs duties applied by the various Member States in their relations with each other but also relates to each individual product. It allows no exception even partial or provisional.

The Commission then points out that, in the context of Article 12, regard must be had to the duty actually applied when the Treaty entered into force. This duty results from the whole of the provisions and customary practice of administrative law.

However, an isolated classification under another tariff heading is in itself insufficient proof that the duty of 10 % chargeable under heading 332 bis is not in fact applied to aminoplasts.

In this case it is necessary to recognize a concept of prima facie legality: when there is an official interpretation by the competent administration and instructions in conformity with this interpretation have been given to executive officers to fix the detailed rules for levying a duty, that is the 'duty applied' within the meaning of Article 12 of the Treaty.

The Commission, therefore, considers the duty of 10 % as the duty applied on the entry into force of the Treaty. There has not therefore been in this case any increase contrary to Article 12.

Grounds of judgment

I — Procedure

No objection has been raised concerning the procedural validity of the reference to the Court under Article 177 of the EEC Treaty by the Tariefcommissie, a court or tribunal within the meaning of that Article. Further, no grounds exist for the Court to raise the matter of its own motion.

II — The first question

A — *Jurisdiction of the Court*

The Government of the Netherlands and the Belgian Government challenge the jurisdiction of the Court on the ground that the reference relates not to the interpretation but to the application of the Treaty in the context of the constitutional law of the Netherlands, and that in particular the Court has no jurisdiction to decide, should the occasion arise, whether the provisions of the

EEC Treaty prevail over Netherlands legislation or over other agreements entered into by the Netherlands and incorporated into Dutch national law. The solution of such a problem, it is claimed, falls within the exclusive jurisdiction of the national courts, subject to an application in accordance with the provisions laid down by Articles 169 and 170 of the Treaty.

However in this case the Court is not asked to adjudicate upon the application of the Treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but is asked, in conformity with subparagraph (a) of the first paragraph of Article 177 of the Treaty, only to interpret the scope of Article 12 of the said Treaty within the context of Community law and with reference to its effect on individuals. This argument has therefore no legal foundation.

The Belgian Government further argues that the Court has no jurisdiction on the ground that no answer which the Court could give to the first question of the Tariefcommissie would have any bearing on the result of the proceedings brought in that court.

However, in order to confer jurisdiction on the Court in the present case it is necessary only that the question raised should clearly be concerned with the interpretation of the Treaty. The considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice.

It appears from the wording of the questions referred that they relate to the interpretation of the Treaty. The Court therefore has the jurisdiction to answer them.

This argument, too, is therefore unfounded.

B — *On the substance of the Case*

The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international Treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to

secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

III — The second question

A — *The jurisdiction of the Court*

According to the observations of the Belgian and Netherlands Governments, the wording of this question appears to require, before it can be answered, an examination by the Court of the tariff classification of ureaformaldehyde imported into the Netherlands, a classification on which Van Gend & Loos and the Inspector of Customs and Excise at Zaandam hold different opinions with regard to the 'Tariefbesluit' of 1947. The question clearly does not call for an interpretation of the Treaty but concerns the application of Netherlands customs legislation to the classification of aminoplasts, which is outside the jurisdiction conferred upon the Court of Justice of the European Communities by subparagraph (a) of the first paragraph of Article 177.

The Court has therefore no jurisdiction to consider the reference made by the Tariefcommissie.

However, the real meaning of the question put by the Tariefcommissie is whether, in law, an effective increase in customs duties charged on a given product as a result not of an increase in the rate but of a new classification of the product arising from a change of its tariff description contravenes the prohibition in Article 12 of the Treaty.

Viewed in this way the question put is concerned with an interpretation of this provision of the Treaty and more particularly of the meaning which should be given to the concept of duties applied before the Treaty entered into force.

Therefore the Court has jurisdiction to give a ruling on this question.

B — *On the substance*

It follows from the wording and the general scheme of Article 12 of the Treaty that, in order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in the said Article, regard must be had to the customs duties and charges actually applied at the date of the entry into force of the Treaty.

Further, with regard to the prohibition in Article 12 of the Treaty, such an illegal increase may arise from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty.

It is of little importance how the increase in customs duties occurred when, after the Treaty

entered into force, the same product in the same Member State was subjected to a higher rate of duty.

The application of Article 12, in accordance with the interpretation given above, comes within the jurisdiction of the national court which must enquire whether the dutiable product, in this case ureaformaldehyde originating in the Federal Republic of Germany, is charged under the customs measures brought into force in the Netherlands with an import duty higher than that with which it was charged on 1 January 1958.

The Court has no jurisdiction to check the validity of the conflicting views on this subject which have been submitted to it during the proceedings but must leave them to be determined by the national courts.

IV — Costs

The costs incurred by the Commission of the EEC and the Member States which have submitted their observations to the Court are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Tariefcommissie, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 9, 12, 14, 169, 170 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it for a preliminary ruling by the Tariefcommissie by decision of 16 August 1962, hereby rules:

1. Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.

2. In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12 of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty.

   Such an increase can arise both from a re-arrangement of the tariff resulting in the

classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.

3. The decision as to costs in these proceedings is a matter for the Tariefcommissie.

Donner Delvaux Rossi
Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 5 February 1963.

A. Van Houtte
Registrar

A. M. Donner
President

2. *Costa gegn Enel*, mál nr. 6/64, ECR [1964] 585

Judgment of the Court of 15 July 1964

Reference to the Court under Article 177 of the EEC Treaty by the Giudice Conciliatore, Milan, for a preliminary ruling in the action pending before that court between

FLAMINIO COSTA

and

ENEL (Ente Nazionale Energia Elettrica (National Electricity Board), formerly the Edison Volta undertaking)

Case 6/64

JUDGMENT

Issues of fact and of law

I — Facts and procedure

By Law No 1643 of 6 December 1962 and subsequent decrees the Italian Republic nationalized the production and distribution of electric energy and created an organization, the Ente Nazionale Energia Elettrica (or ENEL) (National Electricity Board) to which the assets of the electricity undertakings were transferred.

In proceedings about the payment of an invoice for electricity between Flaminio Costa and ENEL, before the Giudice Conciliatore, Milan, Mr Costa, as a shareholder of Edison Volta, a company affected by the nationalization, and as an electricity consumer, requested the court to apply Article 177 of the EEC Treaty so as to obtain an interpretation of Articles 102, 93, 53 and 37 of the said Treaty, which Articles, he alleged, had been infringed by the Law of 6 December 1962. The Giudice Conciliatore, by order of 16 January 1964 acceding to this request, decided as follows:

'Having regard to Article 177 of the Treaty of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203 of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law (No 1670 of 15 December 1962, No 36 of 4 February 1963, No 138 of 25 February 1963 and No 219 of 14 March 1963) infringe Articles 102, 93, 53 and 37 of the aforementioned Treaty, the Court hereby stays the proceedings and orders that a certified copy of the file be transmitted to the Court of Justice of the European Economic Community in Luxembourg.'

This application for a preliminary ruling was transmitted by the Registrar of the Giudice Conciliatore to the Court and was received in the Court Registry on 20 February 1964.

Mr Costa set out his observations in his written statement of case lodged on 15 May 1964. He asked the Court 'for an interpretation of the Treaty, in particular of Articles 102, 93, 53 and 37'.

In its statement of case lodged on 23 May 1964, the Italian Government submitted that the application for a preliminary ruling was 'absolutely inadmissible' and that there were no grounds for raising the questions referred. ENEL, in its statement of case lodged on the same day, also submitted that there were no grounds for raising these questions.

In its statement of case dated 23 May 1964, the EEC Commission made its observations both on the relevance of the questions put and on the interpretation of the abovementioned Articles.

The Court also received an 'application to intervene', filed in the Registry on 20 May 1964, which was declared inadmissible by order of 3 June 1964.

II — Observations submitted under Article 20 of the Statute of the Court

On the admissibility of the reference for a preliminary ruling

The Italian Government complains that the Giudice Conciliatore did not restrict itself to asking the Court to interpret the Treaty but also asked it to declare whether the Italian law in dispute was in conformity with the Treaty, and that because of this the preliminary ruling is inadmissible.

A national court, it is claimed, cannot have recourse to this procedure when, for the purposes of deciding a dispute it has only to apply a domestic law and not a provision of the Treaty. Article 177 cannot be used as a means of allowing a national court, on the initiative of a national of a Member State, to subject a law of that State to the procedure for a preliminary ruling for infringement of the obligations of the Treaty. The only procedure possible is that under Articles 169 and 170 and consequently the present proceedings before the Court of Justice are 'absolutely inadmissible'.

Mr Costa claims on the other hand that by the Treaty the jurisdiction of the Court depends on the mere existence of a request within the meaning of Article 177 and it appears from the question submitted that it involves a case of interpretation of the Treaty; it is not for the Court of Justice to judge the facts or the considerations which may have led the national court to make its choice of questions.

Finally the Commission raises the point that the Court's examination cannot concern itself with the reasons which led the national court to adopt its questions or with their importance for the solution of the dispute. In this case their wording seems to bear a resemblance to an action for failure to fulfil a Community obligation as envisaged under Articles 169 and 170 and as such is

inadmissible. It is however for the Court to decide from the questions referred those relating solely to the subject of interpretation as permitted by Article 177.

Finally the Commission points out that in a judgment dated 7 March 1964 the Italian constitutional court failed to apply this Article in a similar case and thus took a decision involving certain repercussions on the future of Community law as a whole.

On the interpretation of Article 102

As to the interpretation of Article 102, Mr Costa suggests that prior consultation with the Commission should be regarded as an obligation for the Member State in question and not as a mere right. Any other interpretation of Article 102 would deprive it of its purpose. Failure to consult the Commission, when faced with the existence of a potential danger of distortion, constitutes an irregularity. A Member State cannot itself appreciate the likelihood of distortion without unilaterally assuming a power which has not been conferred on it.

The Commission denies the existence of a distortion. It seems to state however that, if there is any doubt as to its existence, then there would be grounds for consulting the Commission and that, at the time when the disputed law concerning nationalization was adopted, the Italian Republic did not respect the rule of procedure applicable in this case. The Italian Government points out that the Commission, when informed by a written question submitted by a German deputy, accepted nationalization in this case and referred to Article 222. There is no distortion within the meaning of Article 102 as long as it is a question of setting up a public service intended to achieve the objectives of public utility indicated in Article 43 of the Italian constitution and as long as the conditions of competition are not adversely affected.

ENEL puts forward similar arguments and points out that the establishment of a public service applies equally to all those coming under the scheme.

On the interpretation of Article 93

With regard to the interpretation of Article 93, Mr Costa considers that the nationalization of an economic activity automatically results in the creation of a system in which hidden aid is granted to the nationalized sector. The Commission must accordingly intervene in accordance with the procedure prescribed by Article 93.

The Commission considers that Member States which do not respect the provisions of Article 93 (3) are committing a procedural infringement which itself suffices to entitle the Commission to take action under Article 169. The Commission nevertheless retains the power to bring the matter before the Court of Justice in cases where the material incompatibility of the aid in dispute is accompanied by infringement of the procedural rule under consideration.

The Commission has studied the draft law in dispute but without coming to the conclusion that it is incompatible with the Common Market. In the Commission's opinion the only question relates to the matter of procedure and concerns the failure to notify. The Commission reserves the right to take action if the aid in question proves to be incompatible with the Treaty.

The Italian Government and ENEL point out that the facts show that there is no incompatibility between the Law on nationalization and Article 93.

The establishment of ENEL has nothing to do with Community law.

On the interpretation of Article 53

With regard to the interpretation of Article 53 which prohibits States from introducing any new restrictions on the right of establishment in their territories, Mr Costa claims to see in the nationalization of a sector of the economy a measure incompatible with the above Article.

Article 222 cannot justify the legality of every conceivable system of property ownership and the abolition of private property is contrary to the above Article. No rule exempts a nationalized sector from the application of Article 53. Nationalization constitutes a denial of a Community system and is the method best calculated to prevent the freedom of establishment enshrined by the said Article with regard to nationals both of other Member States and of the nationalizing state.

Finally, Article 55 cannot be considered as derogating from Article 53, as the former is exclusively concerned with exempting from the ambit of the latter the official powers of the State and not the power to pursue an economic activity.

The Italian Government objects to this interpretation on the ground that Article 53 does not apply where the Member State concerned leaves to free private enterprise (without any distinction as to nationality) that part of the economy which is not reserved to the public authorities.

In support of the same interpretation ENEL suggests that Article 53 should be regarded as intended to place foreigners on the same footing as nationals as regards the exercise of a productive activity.

This principle is not infringed if a law instituting a public service reserves to the State the relevant sector of the economy, by the same token excluding nationals and foreigners alike from this sector.

The Commission considers that, when regarded in the light of Article 222, nationalization is not inconsistent with the Treaty. Articles 5 and 90 are aimed at alleviating the consequences resulting from the operation of nationalizing sectors of the economy. Article 53 however applies to possible restrictions on the right of establishment of nationals of other States which might result from a case of nationalization, such restrictions not being justified by technical requirements in the sector in question.

On the interpretation of Article 37

In respect of the requirements of Article 37 to the effect that Member States shall progressively adjust any State monopolies of a commercial character so as to avoid all discrimination between nationals of Member States regarding the conditions under which goods are procured

and marketed, Mr Costa asks the Court to interpret this provision very widely in such a way that it refers to every measure by which a State confers either on itself or on a body subject to it a monopoly which is by its very nature commercial.

The said Article applies, he claims, not only to actual cases of discrimination but also to potential discrimination and it would have no effect if its only purpose were to eliminate existing cases of discrimination whilst allowing the establishment of new ones. The consequences of nationalization are identical to those of a legal monopoly, in other words the sole power of management, the binding and ineluctable character of its decisions, the power in reaching those decisions to adopt criteria outside the field of economics and the exclusion of competition. Therefore, the result of such a monopoly is to render the importation of similar goods produced by foreign undertakings difficult if not impossible.

By creating a commercial monopoly, nationalization has the same restrictive effect on imports as protective duties or quantitative restrictions.

Rebutting this interpretation the Italian Government submits that Article 37 can have nothing to do with the operation of a public service nor with an article whose production depends on limited natural sources (themselves subject to a public concession) which can only be used by a necessarily limited number of producers. The rules of the Treaty safeguarding a free market cannot be concerned with the system of public services.

Moreover, as Article 222 in no way prejudices the rules in Member States governing the system of property ownership, it is possible for the constitutional authorities in each to prescribe the goods and services capable of being considered as public property and which, on the basis of objective decisions, remain outside any rule on competition. Consequently, the exclusion of exports and imports in such a sector must be considered not in terms of a commercial activity but rather of the exercise of a public service.

In support of this interpretation and by reference to the position of Article 37 in the Treaty, ENEL considers the 'commercial monopolies' specified in the said Article to be public or private organizations aiming, as institutions, to make a concentration of exports and imports calculated to disturb the free movement of goods. That could never be the objective of a public service; moreover international trade in a particular article depends on international agreements and complex administrative procedures and is by its very nature outside the requirements of Article 37 and any provision relating to competition.

The Commission finally considers that Article 37 should be applied whenever a State establishes an exclusive right to import or export. To fall within the prohibitions in Article 37 the impugned measure must be intended to operate in the field of the circulation of goods or services. Although nationalization may be considered as permissible under Article 222, the creation of a new monopoly cannot.

However, a factual estimate of the trade in existence between Member States in respect of the commodity in question must be taken into consideration.

There is no need to inquire whether the creation of a monopoly of a commercial character is

inconsistent with Article 37 (2), where the importation and exportation of the said commodity are not subject to the discretionary power of the administering body.

Grounds of judgment

By Order dated 16 January 1964, duly sent to the Court, the Giudice Conciliatore of Milan, 'having regard to Article 177 of the Treaty of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203 of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law … infringe Articles 102, 93, 53 and 37 of the aforementioned Treaty', stayed the proceedings and ordered that the file be transmitted to the Court of Justice.

On the application of Article 177

On the submission regarding the working of the question

The complaint is made that the intention behind the question posed was to obtain, by means of Article 177, a ruling on the compatibility of a national law with the Treaty.

By the terms of this Article, however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them. This provision gives the Court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article 169.

Nevertheless, the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty. Consequently a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned Articles in the context of the points of law stated by the Giudice Conciliatore.

On the submission that an interpretation is not necessary

The complaint is made that the Milan court has requested an interpretation of the Treaty which was not necessary for the solution of the dispute before it.

Since, however, Article 177 is based upon a clear separation of functions between national courts and the Court of Justice, it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

On the submission that the court was obliged to apply the national law

The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot

avail itself of Article 177.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The questions put by the Giudice Conciliatore regarding Articles 102, 93, 53, and 37 are directed first to enquiring whether these provisions produce direct effects and create individual rights which national courts must protect, and, if so, what their meaning is.

On the interpretation of Article 102

Article 102 provides that, where 'there is reason to fear' that a provision laid down by law may cause 'distortion', the Member State desiring to proceed therewith shall 'consult the Commission'; the Commission has power to recommend to the Member States the adoption of suitable measures to avoid the distortion feared.

This Article, placed in the chapter devoted to the 'Approximation of Laws', is designed to prevent the differences between the legislation of the different nations with regard to the objectives of the Treaty from becoming more pronounced. By virtue of this provision, Member States have limited their freedom of initiative by agreeing to submit to an appropriate procedure of consultation. By binding themselves unambiguously to prior consultation with the Commission in all those cases where their projected legislation might create a risk, however slight, of a possible distortion, the States have undertaken an obligation to the Community which binds them as States, but which does not create individual rights which national courts must protect. For its part, the Commission is bound to ensure respect for the provisions of this Article, but this obligation does not give individuals the right to allege, within the framework of Community law and by means of Article 177 either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of Article 93

Under Article 93 (1) and (2), the Commission, in cooperation with Member States, is to 'keep under constant review all systems of aid existing in those States' with a view to the adoption of appropriate measures required by the functioning of the Common Market.

By virtue of Article 93 (3), the Commission is to be informed, in sufficient time, of any plans to grant or alter aid, the Member State concerned not being entitled to put its proposed measures into effect until the Community procedure, and, if necessary, any proceedings before the Court of Justice, have been completed.

These provisions, contained in the section of the Treaty headed 'Aids granted by States', are designed, on the one hand, to eliminate progressively existing aids and, on the other hand, to prevent the individual States in the conduct of their internal affairs from introducing new aids 'in any form whatsoever' which are likely directly or indirectly to favour certain undertakings or products in an appreciable way, and which threaten, even potentially, to distort competition. By virtue of Article 92, the Member States have acknowledged that such aids are incompatible with the Common Market and have thus implicitly undertaken not to create any more, save as otherwise provided in the Treaty; in Article 93, on the other hand, they have merely agreed to submit themselves to appropriate procedures for the abolition of existing aids and the introduction of new ones.

By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in Article 93, the States have entered into an obligation with the Community, which binds them as States but creates no individual rights except in the case of the final provision of Article 93 (3), which is not in question in the present case.

For its part, the Commission is bound to ensure respect for the provisions of this Article, and is required, in cooperation with Member States, to keep under constant review existing systems of aids. This obligation does not, however, give individuals the right to plead, within the framework of Community law and by means of Article 177, either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of Article 53

By Article 53 the Member States undertake not to introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in the Treaty. The obligation thus entered into by the States simply amounts legally to a duty not to act, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any measure either by the States or by the Commission. It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals. Such an express prohibition which came into force with the Treaty throughout the Community, and thus became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it has created individual rights which national courts must protect.

The interpretation of Article 53 which is sought requires that it be considered in the context of the Chapter relating to the right of establishment in which it occurs. After enacting in Article 52 that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages', this chapter goes on in Article 53 to provide that 'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States'. The question is, therefore, on what conditions the nationals of other Member States have a right of establishment. This is dealt with by the second paragraph of Article 52, where it is stated that freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.

Article 53 is therefore satisfied so long as no new measure subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertaking.

On the interpretation of Article 37

Article 37 (1) provides that Member States shall progressively adjust any 'State monopolies of a commercial character' so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. By

Article 37 (2), the Member States are under an obligation to refrain from introducing any new measure which is contrary to the principles laid down in Article 37 (1).

Thus, Member States have undertaken a dual obligation: in the first place, an active one to adjust State monopolies, in the second place, a passive one to avoid any new measures. The interpretation requested is of the second obligation together with any aspects of the first necessary for this interpretation.

Article 37 (2) contains an absolute prohibition: not an obligation to do something but an obligation to refrain from doing something. This obligation is not accompanied by any reservation which might make its implementation subject to any positive act of national law. This prohibition is essentially one which is capable of producing direct effects on the legal relations between Member States and their nationals.

Such a clearly expressed prohibition which came into force with the Treaty throughout the Community, and so became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it creates individual rights which national courts must protect. By reason of the complexity of the wording and the fact that Articles 37 (1) and 37 (2) overlap, the interpretation requested makes it necessary to examine them as a part of the Chapter in which they occur. This Chapter deals with the 'elimination of quantitative restrictions between Member States'. The object of the reference in Article 37 (2) to 'the principles laid down in paragraph (1)' is thus to prevent the establishment of any new 'discrimination regarding the conditions under which goods are procured and marketed … between nationals of Member States'. Having specified the objective in this way, Article 37 (1) sets out the ways in which this objective might be thwarted in order to prohibit them.

Thus, by the reference in Article 37 (2), any new monopolies or bodies specified in Article 37 (1) are prohibited in so far as they tend to introduce new cases of discrimination regarding the conditions under which goods are procured and marketed. It is therefore a matter for the court dealing with the main action first to examine whether this objective is being hampered, that is whether any new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed results from the disputed measure itself or will be the consequence thereof.

There remain to be considered the means envisaged by Article 37 (1). It does not prohibit the creation of any State monopolies, but merely those 'of a commercial character', and then only in so far as they tend to introduce the cases of discrimination referred to. To fall under this prohibition the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.

It is a matter for the court dealing with the main action to assess in each case whether the economic activity under review relates to such a product which, by virtue of its nature and the technical or international conditions to which it is subject, is capable of playing an effective part in imports or exports between nationals of the Member States.

Costs

The costs incurred by the Commission of the European Economic Community and the Italian Government, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Giudice Conciliatore, Milan, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties to the main action, the Commission of the European Economic Community and the Italian Government;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 37, 53, 93, 102 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

Ruling upon the plea of inadmissibility based on Article 177 hereby declares:

> As a subsequent unilateral measure cannot take precedence over Community law, the questions put by the Giudice Conciliatore, Milan, are admissible in so far as they relate in this case to the interpretation of provisions of the EEC Treaty;

and also rules:

1. Article 102 contains no provisions which are capable of creating individual rights which national courts must protect;

2. Those individual portions of Article 93 to which the question relates equally contain no such provisions;

3. Article 53 constitutes a Community rule capable of creating individual rights which national courts must protect. It prohibits any new measure which subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings.

4. Article 37 (2) is in all its provisions a rule of Community law capable of creating individual rights which national courts must protect. In so far as the question put to the Court is concerned, it prohibits the introduction of any new measure contrary to the principles of Article 37 (1), that is, any measure having as its object or effect a

new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade;

and further declares:

The decision on the costs of the present action is a matter for the Giudice Conciliatore, Milan.

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 15 July 1964.

A. Van Houtte
Registrar

A. M. Donner
President

3. *Internationale Handelsgesellschaft*, mál nr. 11/70, ECR [1970] 1125

Judgment of the Court of 17 december 1970

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main, for a preliminary ruling in the case pending before that court between

INTERNATIONALE HANDELSGESELLSCHAFT MBH, the registered office of which is at Frankfurt-am-Main,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-am-Main,

Case 11/70

JUDGMENT

Issues of fact and of law

I - Facts and procedure

On 7 August 1967 Internationale Handelsgesellschaft mbH, an import-export undertaking based at Frankfurt-am-Main, obtained an export licence in respect of 20 000 metric tons of maize meal, the validity of which expired on 31 December 1967.

In accordance with the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, p. 33) the issue of the licence was conditional on the lodging of a deposit, amounting to 0.5 units of account per metric ton, guaranteeing that exportation would be effected during the period of validity of the licence. As exportation was only partially effected (11 486.764 metric tons) during the period of validity of the said licence, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel declared DM 17 026.47 of the deposit to be forfeited, in accordance with Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products (OJ 1967, No 204, p.16).

On the Einfuhr- and Vorratsstelle's failure to come to a decision on the objections of Internationale Handelsgesellschaft mbH, that undertaking on 18 November 1969 brought an action before the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main.

By order of 18 March 1970, received at the Court Registry on 26 March, the

Verwaltungsgericht Frankfurt-am-Main, asked the Court under Article 177 of the EEC Treaty for a preliminary ruling on the following questions:

1. Are the obligation to export, laid down in the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967, the lodging of a deposit, upon which such obligation is made conditional, and forfeiture of the deposit, where exportation is not effected during the period of validity of the export licence, legal?

2. In the event of the Court's confirming the legal validity of the said provision, is Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967, adopted in implementation of Regulation No 120/67, legal in that it excludes forfeiture of the deposit only in cases of force majeure?

In its order the Verwaltungsgericht emphasized the following considerations in particular:

As the court has refused, by reason of established case-law, to accept the legality of the provisions cited, it appears to it essential to put an end to the resultant legal uncertainty.

Although Community regulations are not German national laws, but legal rules pertaining to the Community, they must respect the elementary, fundamental rights guaranteed by the German Constitution and the essential structural principles of national law. In the event of contradiction with those principles, the primacy of supranational law conflicts with the principles of the German Basic Law.

The system of deposits instituted by Regulation No 120/67 is contrary to the principles of freedom of action and disposition, of economic liberty and of proportionality stemming in particular from Articles 2 (1) and 14 of the German Basic Law. More particularly, the adverse effects of the system of deposits on the interests of trade appear disproportionate to the objective sought by the regulation, which is to ensure for the competent authorities as precise and comprehensive a view as possible of market trends. The same result could in fact be obtained by less radical means.

Even if the Court of Justice were to confirm the validity of the system of deposits, the court of reference still has doubts as to the validity of Article 9 of Regulation No 473/67, by reason of the fact that forfeiture of the deposit is excluded only in cases of force majeure and not in other cases in which exportation has not been effected without nevertheless any fault being attributable to the persons concerned.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 15 June 1970 by the Government of the Kingdom of The Netherlands, the defendant in the main action and the Commission of the European Communities, on 17 June by the plaintiff in the main action and on 18 June by the Government of the Federal Republic of Germany.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry. The plaintiff in the main action and, the Commission submitted their oral observations at the hearing on 11

November 1970. The Advocate-General delivered his opinion at the hearing on 2 December 1970.

For the procedure before the Court Fritz Modest, Advocate, of Hamburg, appeared for the plaintiff in the main action, Albrecht Stockburger, Advocate, of Frankfurt-am-Main, for the defendant in the main action, W. Riphagen, Legal Adviser to the Ministry for Foreign Affairs, for the Government of the Kingdom of The Netherlands, Rudolf Morawitz, Ministerialrat to the Ministry for Economic Affairs, for the Government of the Federal Republic of Germany and Claus-Dieter Ehlermann, the Commission's Legal Adviser, for the Commission of the European Communities.

II -Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows: Internationale HandelsgeselIschaft mbH, the plaintiff in the main action, after pointing out the factual reasons for which it did not during the period of its validity fully utilize the export licence granted to it, disputes the validity of the system of deposits as instituted by the third subparagraph of Article 12 (1) of Regulation No 120/67 and Article 9 of Regulation No 473/67, for the following reasons:

(a) Forfeiture of the deposit, which is the consequence of failure to carry out the obligation to import or export, in reality constitutes a fine or a penalty. The provisions of the Treaty concerning the organization of the agricultural markets contain no provision enabling the Council or the Commission to impose sanctions of a penal nature.

(b) The system of deposits, as it is instituted by the provisions criticized, is contrary to the principle of proportionality which forms part of the general principles of law, recognition of which is essential in the framework of any structure based on respect for the law. As these principles are recognized by all the Member States, the principle of proportionality forms an integral part of the EEC Treaty.

The plaintiff in the main action points out more particularly in this connexion that the agricultural regulations of the Community, in particular Regulation No 120/67, are limited in principle to the formation of market policy by means of prices. The regulation of prices has an automatic sluice-gate effect on quantitative movements in the Community market and avoids any disturbance to it. Consequently, the point of prime importance in the assessment of the market and market trends is the observance and checking first, of the prices on the internal market and, secondly, of the situation on the world market. On the other hand, a quantitative check, such as arises from the system of import and export licences, the implementation of which must be guaranteed by means of a deposit, is only of secondary importance.

It appears therefore that the system of deposits is ineffectual in attaining the objective sought by the regulation and is therefore contrary to the scheme of the regulation.

Moreover, it is also ineffectual in view of the fact that it can neither guarantee that the obligation to import or export is actually carried out, nor enable the competent authorities in

good time to have a sure view of the state of the market, much less future market trends.

This is all the more true as the Commission's departments are not technically in a position to exploit the information provided by the system criticized.

Lastly, the amount of the deposit, particularly in cases of advance fixing of levies or refunds, is excessive when compared to trade profit margins.

It follows from these findings that a substantial charge is imposed without any necessity on importers and exporters. Any measure constituting a charge, whether or not it is in itself tolerable, infringes the principle between the charge and the result which it may or must endeavour to achieve, when that objective cannot be attained by the method employed or when, in order to attain it, there are other methods which may be more conveniently applied.

(c) The plaintiff in the main action casts doubt on the validity of Article 9 of Regulation No 473/67, which allows importers and exporters to be relieved of their obligations and of forfeiture of the deposit in cases of force majeure, for the following reasons:

- the system of Article 9 infringes the principle of proportionality in that it refuses, otherwise than in cases of force majeure, to take into consideration situations in which the authorization to import or export has not been utilized for justifiable commercial reasons;

- the provision in dispute does not take into account the peculiarities of the inward processing trade, a system to which the goods concerned in the main action are subject;

- the whole of Regulation No 473/67, including Article 9 thereof, was adopted, by virtue of Article 26 of Regulation No 120/67, according to the 'Management Committee' procedure; the application of that procedure is incompatible with the institutional structure laid down by the EEC Treaty.

The Einfuhr- und Vorratsstelle für Getreide und Futtermittel, the defendant in the main action, first of all observes that the Court of Justice of the Communities cannot assess the validity of measures taken by Community institutions with regard to the rules of national law, even constitutional law, or to the fundamental rights enshrined therein. However, the fundamental right to free expression and free choice in commercial decisions, enounced by the Basic Law of the Federal Republic, constitutes an element of that common fund of fundamental values which form part of Community law; as to the principle of proportionality, it is recognized by several provisions of the EEC Treaty, in particular Article 40, and the Court of Justice has already had recourse to it in assessing various measures adopted by Community institutions.

But both in Community law and in national law there is violation of the principle of proportionality only where no objectively defensible consideration can justify recourse to a specific method intended to attain a given objective. In this instance, therefore, it is merely a question of establishing whether or not the economic assessment on which the legislature of the EEC based the regulations in dispute is vitiated by obvious errors.

(a) With regard to the first question submitted to the Court, the defendant in the main action

considers that the significance and objective of the system of licences and deposits is to enable the agencies entrusted with the organization of the market to have a permanent, sure and comprehensive view of future imports and exports and to put them in a position to check market activities. Such a permanent check is indispensable, not to establish statistics, but to enable the powers with regard to market guidance to be exercised to the correct degree, to facilitate intervention without delay in case of crisis and to enable any precautionary measures to be taken. The available information must continuously provide a prospective, comprehensive view of the market.

However, the informatory value of licences can only be trusted when they are actually made use of, when, in other words, there is an obligation to import or export, sanctioned by a penalty which consists precisely in the forfeiture of the deposit. This system alone is equally capable of preventing with sufficient certainty speculations which, when made in the context of import and export licences and of levies and refunds, have a decisive effect on the informatory value of the unused licences. The absence of such a system would in all probability lead to an unlimited number of import and export licences being renounced and it would no longer be possible effectively to keep watch over the market.

The system of deposits is perfectly capable of fulfilling the function accorded it: the penalty constituted by the risk of forfeiture of the deposit in the event of non-utilization of the licence is sufficient guarantee that the intended transaction is effected and the competent authorities are informed in good time of the utilization or otherwise of the licence.

It is impossible to substitute for the system of deposits other methods imposing lesser charges on the persons concerned. Neither the system whereby exporters report exports actually effected nor that consisting in the obligation to report non-exportation is capable of providing the Commission and the competent national administration with the necessary comprehensive view over the market and to prevent speculation. The result of both procedures, taking into account the long period of validity of the licences; is that it is impossible at any given moment to determine, even approximately, the actual quantities which are expected to be imported or exported. Moreover, the duration of the validity of the licences cannot be reduced, as they have been fixed by reference to periods usual in the commercial world.

The amount of the deposit does not impose an excessive burden on the exporter; it is in particular very much less than the normal profit margin for this type of transaction. In the case of export licences with the refund fixed in advance, it was obviously necessary to fix the amount of the deposit at a higher figure, as the deposit must forestall the risk of more serious speculation on the fixed rate of refund, which could lead to the nonutilization of the licence.

(b) With regard to the second question, the defendant in the main action denies that the principle of proportionality is violated by the fact that Article 9 of Regulation No 473/67 excludes the obligation to utilize the licence within the prescribed period only in circumstances which may be considered to amount to force majeure.

The cases of force majeure provided for by this provision are not exhaustively listed; since the competent agencies are enabled to countenance circumstances other than those expressly referred to therein. The list of additional circumstances to be considered as cases of force

majeure, as drawn up and intimated by the Federal Republic of Germany, is so complete that it takes into account all serious cases capable of justifying the non-application of forfeiture of the deposit. The Court of Justice itself, in its judgment of 11 July 1968 in Case 4/68, has to a remarkable extent taken into account the interests of importers and exporters, by defining the meaning of the expression 'force majeure' by reference to general criteria and leaving the application of that concept to the administration and the courts.

(c) In conclusion, the defendant in the main action is of the opinion that if the scope of the system of deposits is considered in its true light it cannot seriously be maintained that the provisions referred to the Court violate the principle of proportionality or that of freedom of trade.

The Government of the Federal Republic of Germany is of the opinion that in order to reply to the questions put it is unnecessary to examine whether there may be deduced from the EEC Treaty an unwritten reservation in favour of the constitutions of the Member States and, more particularly, of fundamental rights recognized by those constitutions or whether the Community Treaties provide individual rights analogous or equivalent to the fundamental rights generally recognized in the Member States or stipulated by the European Convention on Human Rights.

The Court of Justice has in fact accepted on various occasions that the principle of proportionality is equally valid in the context of the Community. This principle is not put in issue by the provisions in dispute. The functioning of all the mechanisms instituted by Regulation No 120/67 is only ensured by a prospective comprehensive view of the market. The issue of licences by itself cannot guarantee it. Certain information on imports and exports can only be obtained if the transactions to which the licences relate are actually effected. Such is the object of the lodging and possible forfeiture of the deposit; they also avoid speculation.

The Government of the Kingdom of The Netherlands considers that the obligation to effect within a certain period the import or export transactions to which the licences relate, the lodging of a deposit to this end and the forfeiture of that deposit when the obligation is not fulfilled are in accordance with the objective sought by Regulation No 120/67 and cannot be considered to be illegal.

The objective of these measures is to enable a common policy for the market in cereals to be established; this presupposes a correct view of the state of the market in that sector and a valid prospective study of market trends. These conditions are not satisfied if certain data relating to expected imports and exports remain uncertain.

The obligation to export and the lodging of a deposit have other than purely statistical functions; they form an integral part of the system established by the common organizations of the agricultural markets. Export refunds vary in accordance with the estimated size of stocks, assessed on the basis of predicted exports; the spreading of those stocks over the whole marketing year is one of the objectives of the policy of the markets; the determination of the number of exports and the quantities intended for other uses, for denaturing for example, are particularly important in a surplus situation. A notice of non-exportation or nonimportation cannot be substituted for the system in force. Such notification is incompatible with the necessity to fix in advance the amount of the imports and exports which will be effected during

given periods. Moreover, the policy of the markets would find itself paralysed by it, as it would be several months behind events. Finally, such a solution would promote speculation.

The Commission of the European Communities makes the preliminary observation that the Community institutions are bound by Community law alone and that in their regard the protection conferred by the fundamental rights of national constitutions flows only from Community law, written or unwritten. Further, even according to German constitutional law, the system of deposits is only capable of infringing the provisions concerning free development of the person, freedom of action and economic freedom if, at the same time, it runs counter to the principle of proportionality.

This principle is in no way put in issue by the system in dispute, as that system is indispensable to the proper functioning of the common organization of the market in cereals.

(a) The common organization of the market in cereals involves essentially the regulation of prices, the object of which is to stabilize the price of cereals in the Community at a level higher than that on the world markets. Such regulation protects the internal market from falls in prices provoked either by over-production by the Community or by imports from third countries. It can only function if the regulatory mechanisms are used in a rational manner; it is therefore essential that data be available indicating not only the imports and exports already effected but also enabling a valid assessment of future market trends to be made. This prospective comprehensive view of the market is essential not only for the possible application of protective measures in the face of a threat of serious disturbances to the market but also for the fixing of export refunds and denaturing premiums.

The system of deposits is a necessary instrument for such a prospective comprehensive view of the market.

Such a view requires sure data on future imports and exports; the licence only provides such information if it can be expected with sufficient certainty that the issue of the licence will actually lead to importation or exportation. This is only the case if non-utilization of the licence involves some disadvantage for the licensee; such is the object of the deposit which is forfeited in cases where the licence is not used. The obligation to import or export involves no disadvantage for the licensee other than forfeiture of the deposit; thus it in no way has a particularly adverse effect on the rights of the individual.

In the absence of a deposit, the licence is not capable of providing sure data as to future imports or exports. In fact, there are several reasons for a trader to apply for more licences than he needs.

It is not possible to obtain a valid comprehensive view of the market by obliging the licensee to report non-utilization of his licence and by penalizing any failure to fulfil that obligation by the imposition of a fine; in fact, in order to acquire a prospective comprehensive view of the market it is necessary that at the time when the licence is issued there should be sufficient certainty that the quantity mentioned in the licence will be imported or exported during the period of its validity. Notice of nonutilization would merely lead to piecemeal correction of the initially false image of the future state of the market.

A reduction in the duration of the validity of licences is not an adequate solution: it runs counter to the objectives of the common organization of the market in cereals and is incompatible with the principle that trade must be taxed as lightly as possible. The cases in which the licences remain unused are the exception and do not prevent the system of deposits from attaining its objective.

The complaint that the system of deposits transforms the economy of the market into a planned or directed economy is not justified. The common organization of the market in cereals cannot dispense with all intervention on the market; it is characterized, however, by the concern to make such intervention conform as much as possible to the rules of the market and to allow the widest scope for competition.

To sum up, the Commission considers that with regard to the first question posed by the Verwaltungsgericht Frankfurt it should be held that the functioning of the common organization of the market in cereals requires a prospective comprehensive view of the market and therefore demands sufficiently certain knowledge of future imports and exports; only a licence subject to the risk of forfeiture of the deposit is capable of giving such knowledge. The system complained of not only conforms to the objective sought but is necessary to its attainment; thus it does not run counter to the principle of proportionality of the method to the objective sought.

(b) With regard to the second question, the Commission repeats that the system of deposits must ensure that utilization of the licence remains the general rule and its nonutilization the exception; this is only possible if, where the licence is not used, the deposit is forfeited as a general rule and the release of the deposit is limited to exceptional cases.

Limitation by Article 9 of Regulation No 473/67 of the release of the deposit to cases of force majeure runs counter neither to the principle of proportionality nor to the theory of the rule of law.

In fact, it follows from the case-law of the Court that the existence of a case of force majeure must be recognized when the application of strictly objective criteria indicates that the failure to effect importation or exportation is not due to negligence and that, in such examination, the principle of proportionality must be respected; furthermore, the fact that a trader has to bear an excessive loss may constitute a case of force majeure capable of releasing him from the obligation to effect the intended transaction.

In conclusion on the second question, the Commission maintains that, in order to attain its objective, the system of deposits must include a strict definition of the conditions which, if satisfied, justify the release of the deposit. Such is the concept of force majeure. Limitation to cases of force majeure, in the interpretation given to this concept by the Court, runs counter neither to the principle of proportionality nor to any other legal principle.

Grounds of judgment

1 By order of 18 March 1970 received at the Court on 26 March 1970, the Verwaltungsgericht Frankfurt-am-Main, pursuant to Article 177 of the EEC Treaty, has referred to the Court of Justice two questions on the validity of the system of export licences and of the deposit attaching to them - hereinafter referred to as 'the system of deposits' - provided for by Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, p. 33) and Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences (OJ 1967, No 204, p. 16).

2 It appears from the grounds of the order referring the matter that the Verwaltungsgericht has until now refused to accept the validity of the provisions in question and that for this reason it considers it to be essential to put an end to the existing legal uncertainty. According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of Community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law. More particularly, the system of deposits runs counter to the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2 (1) and 14 of the Basic Law. The obligation to import or export resulting from the issue of the licences, together with the deposit attaching thereto, constitutes an excessive intervention in the freedom of disposition in trade, as the objective of the regulations could have been attained by methods of intervention having less serious consequences.

The protection of fundamental rights in the Community legal system

3 Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4 However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

The first question (legality of the system of deposits)

5 By the first question the Verwaltungsgericht asks whether the undertaking to export based on the third subparagraph of Article 12 (1) of Regulation No 120/67, the lodging of a deposit which accompanies that undertaking and forfeiture of the deposit should exportation not occur during the period of validity of the export licence comply with the law.

6 According to the terms of the thirteenth recital of the preamble to Regulation No 120/67, 'the competent authorities must be in a position constantly to follow trade movements in order to assess market trends and to apply the measures ... as necessary' and 'to that end, provision should be made for the issue of import and export licences accompanied by the lodging of a deposit guaranteeing that the - transactions for which such licenses are requested are effected'. It follows from these considerations and from the general scheme of the regulation that the system of deposits is intended to guarantee that the imports and exports for which the licences are requested are actually effected in order to ensure both for the Community and for the Member States precise knowledge of the intended transactions.

7 This knowledge, together with other available information on the state of the market, is essential to enable the competent authorities to make judicious use of the instruments of intervention, both ordinary and exceptional, which are at their disposal for guaranteeing the functioning of the system of prices instituted by the regulation, such as purchasing, storing and distributing, fixing denaturing premiums and export refunds, applying protective measures and choosing measures intended to avoid deflections of trade. This is all the more imperative in that the implementation of the common agricultural policy involves heavy financial responsibilities for the Community and the Member States.

8 It is necessary, therefore, for the competent authorities to have available not only statistical information on the state of the market but also precise forecasts on future imports and exports. Since the Member States are obliged by Article 12 of Regulation No 120/67 to issue import and export licences to any applicant, a forecast would lose all significance if the licences did not involve the recipients in an undertaking to act on them. And the undertaking would be ineffectual if observance of it were not ensured by appropriate means.

9 The choice for that purpose by the Community legislature of the deposit cannot be criticized in view of the fact that that machinery is adapted to the voluntary nature of requests for licences and that it has the dual advantage over other possible systems of simplicity and efficacy.

10 A system of mere declaration of exports effected and of unused licences, as proposed by the plaintiff in the main action, would, by reason of its retrospective nature and lack of any guarantee of application, be incapable of providing the competent authorities with sure data on trends in the movement of goods.

11 Likewise, a system of fines imposed a posteriori would involve considerable administrative and legal complications at the stage of decision and of execution, aggravated by the fact that the traders concerned may be beyond the reach of the intervention agencies by reason of their residence in another Member State, since Article 12 of the regulation imposes on Member States the obligation to issue the licences to any applicant 'irrespective of the place of his establishment in the Community.'

12 It therefore appears that the requirement of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals.

13 The principle of the system of deposits cannot therefore be disputed.

14 However, examination should be made as to whether or not certain detailed rules of the system of deposits might be contested in the light of the principles enounced by the Verwaltungsgericht, especially in view of the allegation of the plaintiff in the main action that the burden of the deposit is excessive for trade, to the extent of violating fundamental rights.

15 In order to assess the real burden of the deposit on trade, account should be taken not so much of the amount of the deposit which is repayable - namely 0.5 unit of account per 1000 kg - as of the costs and charges involved in lodging it. In assessing this burden, account cannot be taken of forfeiture of the deposit itself, since traders are adequately protected by the provisions of the regulation relating to circumstances recognized as constituting force majeure.

16 The costs involved in the deposit do not constitute an amount disproportionate to the total value of the goods in question and of the other trading costs. It appears therefore that the burdens resulting from the system of deposits are not excessive and are the normal consequence of a system of organization of the markets conceived to meet the requirements of the general interest, defined in Article 39 of the Treaty, which aims at ensuring a fair standard of living for the agricultural community while ensuring that supplies reach consumers at reasonable prices.

17 The plaintiff in the main action also points out that forfeiture of the deposit in the event of the undertaking to import or export not being fulfilled really constitutes a fine or a penalty which the Treaty has not authorized the Council and the Commission to institute.

18 This argument is based on a false analysis of the system of deposits which cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out.

19 Finally, the arguments relied upon by the plaintiff in the main action based first on the fact that the departments of the Commission are not technically in a position to exploit the information supplied by the system criticized, so that it is devoid of all practical usefulness, and secondly on the fact that the goods with which the dispute is concerned are subject to the system of inward processing are irrelevant. These arguments cannot put in issue the actual principle of the system of deposits.

20 It follows from all these considerations that the fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of Article 40 (3) of the Treaty, for carrying out the common organization of the agricultural markets and also conforms to the requirements of

Article 43.

The second question (concept of 'force majeure')

21 By the second question the Verwaltungsgericht asks whether, in the event of the Court's confirming the validity of the disputed provision of Regulation No 120/67, Article 9 of Regulation No 473/67 of the Commission, adopted in implementation of the first regulation, is in conformity with the law, in that it only excludes forfeiture of the deposit in cases of force majeure.

22 It appears from the grounds of the order referring the matter that the court considers excessive and contrary to the abovementioned principles the provision in Article 1 [sic] of Regulation No 473/67, the effect of which is to limit the cancellation of the obligation to import or export and release of the deposit only to 'circumstances which may be considered to be a case of force majeure'. In the light of its experience, the Verwaltungsgericht considers that provision to be too narrow, leaving exporters open to forfeiture of the deposit in circumstances in which exportation would not have taken place for reasons which were justifiable but not assimilable to a case of force majeure in the strict meaning of the term. For its part, the plaintiff in the main action considers this provision to be too severe because it limits the release of the deposit to cases of force majeure without taking into account the arrangements of importers or exporters which are justified by considerations of a commercial nature.

23 The concept of force majeure adopted by the agricultural regulations takes into account the particular nature of the relationships in public law between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the positive provisions of the regulations in question that the concept of force majeure is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice. This concept implies a sufficient flexibility regarding not only the nature of the occurrence relied upon but also the care which the exporter should have exercised in order to meet it and the extent of the sacrifices which he should have accepted to that end.

24 The cases of forfeiture cited by the court as imposing an unjustified and excessive burden on the exporter appear to concern situations in which exportation has not taken place either through the fault of the exporter himself or as a result of an error on his part or for purely commercial considerations. The criticisms made against Article 9 of Regulation No 473/67 lead therefore in reality to the substitution of considerations based solely on the interest and behaviour of certain traders for a system laid down in the public interest of the Community. The system established, under the principles of Regulation No 120/67, by implementing Regulation No 473/67 is intended to release traders from their undertaking only in cases in which the import or export transaction was not able to be carried out during the period of validity of the licence as a result of the occurrences referred to by the said provisions. Beyond such occurrences, for which they cannot be held responsible, importers and exporters are obliged to comply with the provisions of the agricultural regulations and may not substitute for them considerations based upon their own interests.

25 It therefore appears that by limiting the cancellation of the undertaking to export and the release of the deposit to cases of force majeure the Community legislature adopted a provision which, without imposing an undue burden on importers or exporters, is appropriate for ensuring the normal functioning of the organization of the market in cereals, in the general interest as defined in Article 39 of the Treaty. It follows that no argument against the validity of the system of deposits can be based on the provisions limiting release of the deposit to cases of force majeure.

Costs

26 The costs incurred by the Government of the Kingdom of The Netherlands, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

27 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Verwaltungsgericht Frankfurt-am-Main, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 39, 40, 43 and 177;
Having regard to Regulation No 120/67/EEC of the Council of 13 June 1967 and Regulation No 473/67/EEC of the Commission of 21 August 1967;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt-am-Main, by order of that court of 18 March 1970, hereby rules:

Examination of the questions put reveals no factor capable of affecting the validity of:

(1) the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 making the issue of import and export licences conditional on the lodging of a deposit guaranteeing performance of the undertaking to import or export during the period of validity of the licence;

(2) Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967, the effect of which is to limit the cancellation of the undertaking to import or export and the release of the deposit only to circumstances which may be considered to **be a case of 'force majeure'.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Houtte
Registrar

R. Lecourt
President

4. *Dassonville*, mál nr. 8/74, ECR [1974] 837

Judgment of the Court of 11 July 1974

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Première Instance of Brussels for a preliminary ruling in the criminal proceedings pending before that court between

PROCUREUR DU ROI (Public Prosecutor)

and

BENOÎT AND GUSTAVE DASSONVILLE
and in the civil action between

SA ÉTS. FOURCROY

SA BREUVAL ET CIE

and

BENOÎT AND GUSTAVE DASSONVILLE

Case 8/74

JUDGMENT

Facts

The Judgment making the reference and the written observations submitted in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1. According to the Belgian Law of 18 April 1927, recognition of designations of origin is subject to a declaration to the Belgian Government by the Government concerned that such designations of origin are officially and definitively adopted.

Article 1 of the Royal Decree No 57 of 2 December 1934 provides that it is prohibited, on pain of penal sanctions, to import, sell, display for sale, have possession of or transport for the purposes of sale or delivery, spirits bearing a designation of origin duly adopted by the Belgian Government when such spirits are not accompanied by any official document certifying their right to such designation.

The designation of origin ‘Scotch whisky’ has been duly adopted by the Belgian Government.

2. In 1970, Gustave Dassonville, a wholesaler in business in France, and his son Benoît Dassonville, who manages a branch of his father's business in Belgium, imported into Belgium 'Scotch whisky' under the brand names 'Johnnie Walker' and 'Vat 69', which Gustave Dassonville had purchased from the French importers and distributors of these two brands of whisky.

On the bottles, the Dassonvilles affixed, with a view to their sale in Belgium, labels bearing in particular the printed words 'British Customs Certificate of Origin', followed by a hand-written note of the number and date of the French excise bond on the permit register. This excise bond constituted the official document which, according to French rules, had to accompany a product bearing a designation of origin. France does not require a certificate of origin for 'Scotch whisky'.

Although the goods were duly imported into Belgium on the basis of the French documents required and cleared for customs purposes as 'Community goods', the Belgian authorities considered that these documents did not properly satisfy the objective envisaged by the Royal Decree No 57 of 1934.

3. Following this importation, the Public Prosecutor instituted proceedings against the Dassonvilles before a court of summary jurisdiction. It is alleged that, between the dates of 1 and 31 December 1970, they:

— committed forgeries or assisted therein in affixing to the bottles the aforementioned labels, with fraudulent intent to induce belief that they were in possession, quod non, of an official document certifying the origin of the whisky, and made use of forged documents;

— contravened Articles 1 and 4 of the Royal Decree No 57 of 20 December 1934 by knowingly importing, selling, displaying for sale, holding in their possession or transporting for the purposes of sale and delivery, whisky bearing a designation duly adopted by the Belgian Government without causing the whisky to be accompanied by an official document certifying its right to such designation.

4. The limited liability companies Fourcroy and Breuval of Brussels have brought a civil claim in these proceedings and have claimed compensation for the damage which they have allegedly suffered by reason of the illegal importation with which the accused are charged. The latter ought either to have imported the whisky directly from the United Kingdom or to have asked their French suppliers or the British authorities themselves for the official documents before importing this whisky into Belgium.

The two companies are the exclusive importers and distributors of whisky in Belgium, one for 'Vat 69', the other for 'Johnnie Walker'. The Commission was notified within the proper time of the exclusive dealing agreement and it did not institute the procedure laid down by Article 9 of Regulation No 17.

The companies Fourcroy and Breuval consider that, even if the exclusive dealing contracts are not effective against third parties according to Belgian law they have in any case the right, as parties bringing a civil claim, to prevent third parties from importing into Belgium, in an

irregular manner the brands of whisky which they have the sole right to distribute.

5. The Dassonvilles claim that the provisions of the Royal Decree No 57, in the way they are interpreted by the Belgian authorities, are incompatible with the prohibition on quantitative restrictions and measures having equivalent effect laid down by Article 30 et seq. of the EEC Treaty.

The Royal Decree No 57 renders impossible imports into Belgium from any country other than that in which the goods originate, in the case where the country concerned has no rules similar to those operating in Belgium with regard to certificates of origin. These rules involve a strict walling-off of markets or, at the very least, discrimination or a disguised restriction on trade between Member States, which is not justified by Article 36 of the EEC Treaty.

Secondly, the Dassonvilles consider that the companies Fourcroy and Breuval have brought a civil claim merely to protect their position as exclusive distributors against parallel imports of genuine branded whiskies obtained in a regular manner from foreign concessionaires so as to establish for themselves an absolute territorial protection. In support of their argument, the Dassonvilles cite the case-law of the Court, in particular the Judgment in Béguelin (Case 22/71, Rec. 1971, p. 949), according to which an exclusive agreement may be considered to be contrary to the provisions of Article 85 of the Treaty where the concessionaire can prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effect of the agreement and a national law on unfair competition.

6: By Judgment of 11 January 1974, the Belgian court referred to the Court of Justice the following questions:

‘1. Must Articles 30, 31, 32, 33 and 36 be interpreted as meaning that a national provision prohibiting, in particular, the import of goods such as spirits bearing a designation of origin duly adopted by a national government where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation, must be considered as a quantitative restriction or as a measure having equivalent effect?

2. Is an agreement to be considered void if its effect is to restrict competition and adversely to affect trade between Member States only when taken in conjunction with national rules with regard to certificates of origin when that agreement merely authorizes or does not prohibit the exclusive importer from exploiting that rule for the purpose of preventing parallel imports?’

I — Procedure

The Judgment making the reference was lodged at the Registry of the Court on 8 February 1974.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on behalf of the Dassonvilles by Roger Strowel, advocate

at the Cour d'Appel of Brussels, on behalf of SA Fourcroy and SA Breuval et Cie by Jean Dassesse, advocate at the Cour de Cassation of Belgium, on behalf of the Government of the United Kingdom by the Treasury Solicitor, acting as agent, and on behalf of the Commission of the European Communities by its Legal Advisers René-Christian Béraud and Dieter Oldekop, acting as agents.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided that there was no need for any preparatory inquiry.

…

Law

1 By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Première Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.

2 By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

3 This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules.

4 It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate: only with great difficulty, unlike the importer who imports directly from the producer country.

5 All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

6 In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7 Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

8 That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9 Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

10 By the second question it is asked whether an agreement the effect of which is to restrict competition and adversely to affect trade between Member States when taken in conjunction with a national rule with regard to certificates of origin is void when that agreement merely authorizes the exclusive importer to exploit that rule for the purpose of preventing parallel imports or does not prohibit him from doing so.

11 An exclusive dealing agreement falls within the prohibition of Article 85 when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer.

12 More particularly, an exclusive dealing agreement may adversely affect trade between Member States and can have the effect of hindering competition if the concessionaire is able to prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity.

13 For the purpose of judging whether this is the case, account must be taken not only of the rights and obligations flowing from the provisions of the agreement, but also of the legal and economic context in which it is situated and, in particular, the possible existence of similar agreements concluded between the same producer and concessionaires established in other Member States.

14 In this connexion, the maintenance within a Member State of prices appreciably higher than those in force in another Member State may prompt an examination as to whether the exclusive dealing agreement is being used for the purpose of preventing importers from obtaining the means of proof of authenticity of the product in question, required by national rules of the type envisaged by the question.

15 However, the fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so, does not suffice, in itself, to render the agreement null and void.

Costs

16 The costs incurred by the Governments of Belgium and of the United Kingdom as well as by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

17 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the Tribunal de Première Instance of Brussels, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal de Première Instance of Brussels by Judgment of 11 January 1974, hereby rules:

1. The requirement of a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

2. The fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so does not suffice, in itself, to render the agreement null and void.

Lecourt Donner Sørensen Monaco Mertens de Wilmars

Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 11 July 1974.

A. Van Houtte
Registrar

R. Lecourt
President

5. *Van Duyn*, mál nr. 41/74, ECR [1974] 1337

Judgment of the Court of 4 December 1974

Reference to the Court under Article 177 of the EEC Treaty by the Chancery Division of the High Court of Justice, England, for a preliminary ruling in the action pending before that court between

YVONNE VAN DUYN

and

HOME OFFICE

Case 41/74

JUDGMENT

Facts

The order for reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The Church of Scientology is a body established in the United States of America, which functions in the United Kingdom through a college at East Grinstead, Sussex. The British Government regards the activities of the Church of Scientology as contrary to public policy. On 25 July 1968, the Minister of Health stated in the House of Commons that the Government was satisfied that Scientology was socially harmful. The statement included the following remarks: 'Scientology is a pseudo-philosophical cult … The Government are satisfied having reviewed all the available evidence that Scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those so deluded as to become its followers; above all its methods can be a serious danger to the health of those who submit to them. There is evidence that children are now being indoctrinated. There is no power under existing law to prohibit the practice of Scientology; but the Government have concluded that it is so objectionable that it would be right to take all steps within their power to curb its growth … Foreign nationals come here to study Scientology and to work at the so-called College in East Grinstead. The Government can prevent this under existing law … and have decided to do so. The following steps are being taken with immediate effect …

……

(e) Work permits and employment vouchers will not be issued to foreign nationals … for work at a Scientology establishment.'

No legal restrictions are placed upon the practice of Scientology in the United Kingdom nor upon British nationals (with certain immaterial exceptions) wishing to become members of or take employment with the Church of Scientology.

2. Miss van Duyn is a Dutch national. By a letter dated 4 May 1973 she was offered employment as a secretary with the Church of Scientology at its college at East Grinstead. With the intention of taking up that offer she arrived at Gatwick Airport on 9 May 1973 where she was interviewed by an immigration officer and refused leave to enter the United Kingdom. It emerged in the course of the interview that she had worked in a Scientology establishment in Amsterdam for six months, that she had taken a course in the subject of Scientology, that she was a practising Scientologist and that she was intending to work at a Scientology establishment in the United Kingdom.

The ground of refusal of leave to enter which is stated in the document entitled 'Refusal of Leave to Enter' handed by the immigration officer to Miss van Duyn reads: 'You have asked for leave to enter the United Kingdom in order to take employment with The Church of Scientology, but the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that organization'.

The power to refuse entry into the United Kingdom is vested in immigration officers by virtue of section 4 (1) of the Immigration Act 1971. Leave to enter was refused by the immigration officer acting in accordance with the policy of the Government and with Rule 65 of the relevant Immigration Rules for Control of Entry which Rules have legislative force. Rule 65 reads:

'Any passenger except the wife or child under 18 of a person settled in the United Kingdom may be refused leave to enter on the ground that the exclusion is conducive to the public good where —

(a) the Secretary of State has personally so directed, or

(b) from information available to the Immigration Officer it seems right to refuse leave to enter on that ground — if, for example, in the light of the passenger's character, conduct or associations it is undesirable to give him leave to enter.'

3. Relying on the Community rules on freedom of movement of workers and especially on Article 48 of the EEC Treaty, Regulation 1612/68 and Article 3 of Directive 64/221, Miss van Duyn claims that the refusal of leave to enter was unlawful and seeks a declaration from the High Court that she is entitled to stay in the United Kingdom for the purpose of employment and to be given leave to enter the United Kingdom.

Before deciding further, the High Court has stayed the proceedings and requested the Court of Justice, pursuant to Article 177 of the EEC Treaty, to give a preliminary ruling on the following questions:

1. Whether Article 48 of the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the Court of a Member State.

2. Whether Directive 64/221 adopted on 25 February 1964 in accordance with the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the Courts of a Member State.

3. Whether upon the proper interpretation of Article 48 of the Treaty establishing the European Economic Community and Article 3 of Directive 64/221/EEC a Member State in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct

   (a) the fact that the individual is or has been associated with some body or organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State

   (b) the fact that the individual intends to take employment in the Member State with such a body or organization it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.

4. The order of the High Court of 1 March 1974 was registered at the Court on 13 June 1974.

Written observations have been submitted on behalf of Miss van Duyn by Alan Newman, on behalf of the United Kingdom by W. H. Godwin and on behalf of the Commission by its Legal Adviser, A. McClellan.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

…

Law

1 By order of the Vice-Chancellor of 1 March 1974, lodged at the Court on 13 June, the Chancery Division of the High Court of Justice of England, referred to the Court, under Article 177 of the EEC Treaty, three questions relating to the interpretation of certain provisions of Community law concerning freedom of movement for workers.

2 These questions arise out of an action brought against the Home Office by a woman of Dutch nationality who was refused leave to enter the United Kingdom to take up employment as a

secretary with the 'Church of Scientology'.

3 Leave to enter was refused in accordance with the policy of the Government of the United Kingdom in relation to the said organization, the activities of which it considers to be socially harmful.

First question

4 By the first question, the Court is asked to say whether Article 48 of the EEC Treaty is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.

5 It is provided, in Article 48 (1) and (2), that freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail 'the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.'

6 These provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power.

7 Paragraph 3, which defines the rights implied by the principle of freedom of movement for workers, subjects them to limitations justified on grounds of public policy, public security or public health. The application of these limitations is, however, subject to judicial control, so that a Member State's right to invoke the limitations does not prevent the provisions of Article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect.

8 The reply to the first question must therefore be in the affirmative.

Second question

9 The second question asks the Court to say whether Council Directive No 64/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.

10 It emerges from the order making the reference that the only provision of the Directive which is relevant is that contained in Article 3 (1) which provides that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'

11 The United Kingdom observes that, since Article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the

Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.

12 If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

13 By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, Article 3 (1) of Directive No 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.

14 If the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the courts, taking into account also the procedure under Article 177 of the Treaty.

15 Accordingly, in reply to the second question, Article 3 (1) of Council Directive No 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.

Third question

16 By the third question the Court is asked to rule whether Article 48 of the Treaty and Article 3 of Directive No 64/221 must be interpreted as meaning that

'a Member State, in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct:

(a) the fact that the individual is or has been associated with some body or organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State;

(b) the fact that the individual intends to take employment in the Member State with such a body or organization it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.'

17 It is necessary, first, to consider whether association with a body or an organization can in itself constitute personal conduct within the meaning of Article 3 of Directive No 64/221. Although a person's past association cannot, in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.

18 This third question further raises the problem of what importance must be attributed to the fact that the activities of the organization in question, which are considered by the Member State as contrary to the public good, are not however prohibited by national law. It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

19 It follows from the above that where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

20 The question raises finally the problem of whether a Member State is entitled, on grounds of public policy, to prevent a national of another Member State from taking gainful employment within its territory with a body or organization, it being the case that no similar restriction is placed upon its own nationals.

21 In this connexion, the Treaty, while enshrining the principle of freedom of movement for workers without any discrimination on grounds of nationality, admits, in Article 48 (3), limitations justified on grounds of public policy, public security or public health to the rights

deriving from this principle. Under the terms of the provision cited above, the right to accept offers of employment actually made, the right to move freely within the territory of Member States for this purpose, and the right to stay in a Member State for the purpose of employment are, among others all subject to such limitations. Consequently, the effect of such limitations, when they apply, is that leave to enter the territory of a Member State and the right to reside there may be refused to a national of another Member State.

22 Furthermore, it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.

23 It follows that a Member State, for reasons of public policy, can, where it deems necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals.

24 Accordingly, the reply to the third question must be that Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 are to be interpreted as meaning that a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with these same bodies or organizations.

Costs

25 The costs incurred by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the High Court of Justice, by order of that court, dated 1 March 1974, hereby rules:

1. Article 48 of the EEC Treaty has a direct effect in the legal orders of the Member States and confers on individuals rights which the national courts must protect.

2. Article 3 (1) of Council Directive No 64/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health

confers on individuals rights which are enforceable by them in the national courts of a Member State and which the national courts must protect.

3. Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 must be interpreted as meaning that a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with the same body or organization.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco

Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 4 December 1974.

A. Van Houtte
Registrar

R. Lecourt
President

6. *Defrenne gegn SABENA*, mál nr. 43/75, ECR [1976] 455

Judgment of the Court 8 April 1976

Reference to the Court under Article 177 of the EEC Treaty by the Cour du Travail (Labour Court), Brussels, for a preliminary ruling in the action pending before that court between

GABRIELLE DEFRENNE, former air hostess, residing in Brussels-Jette,

and

SOCIÉTÉ ANONYME BELGE DE NAVIGATION AÉRIENNE SABENA, the registered office of which is at Brussels,

Case 43/75

JUDGMENT

Facts

The facts of the case, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Miss Gabrielle Defrenne was engaged as an air hostess by the Société Anonyme Belge de Navigation Aérienne (hereinafter referred to as Sabena) on 10 December 1951. On 1 October 1963 her employment was confirmed by a new contract of employment which gave her the duties of 'Cabin Steward and Air Hostess — Principal Cabin Attendant'.

Miss Defrenne gave up her duties on 15 February 1968 in pursuance of the sixth paragraph of Article 5 of the contract of employment entered into by air crew employed by Sabena, which stated that contracts held by women members of the crew shall terminate on the day on which the employee in question reaches the age of 40 years.

When Miss Defrenne left she received an allowance on termination of service.

On 9 February 1970 Miss Defrenne brought an action before the Conseil d'État of Belgium for the annulment of the Royal Decree of 3 November 1969 which laid down special rules governing the acquisation of the right to a pension by air crew in civil aviation.

This action gave rise, following a request for a preliminary ruling, to a judgment of the Court of Justice of 25 May 1971 (Case 80/70 [1971] ECR 445). The Conseil d'État dismissed the

application by a judgment of 10 December 1971.

Miss Defrenne had previously brought an action before the Tribunal du travail of Brussels on 13 March 1968 for compensation for the loss she had suffered in terms of salary, allowance on termination of service and pension as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal pay.

In a judgment given on 17 December 1970 the Tribunal du travail of Brussels dismissed all Miss Defrenne's claims as unfounded.

On 11 January 1971 Miss Defrenne appealed from this judgment to the Cour du Travail of Brussels.

In a judgment given on 23 April 1975 the Fourth Chamber B of the Cour du travail of Brussels upheld the judgment at first instance on the second and third heads of claim.

As regards the first head of claim (arrears of salary) the court decided, in pursuance of Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

1. Does Article 119 of the Treaty of Rome introduce directly into the national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance, and if so as from what date?

2. Has Article 119 become applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community (if so, which, and as from what date?) or must the national legislature be regarded as alone competent in this matter?

The judgment of the Cour du travail of Brussels was received at the Court Registry on 2 May 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 14 July 1975 by the Commission of the European Communities and Miss Defrenne, the appellant in the main action, on 21 July by the Government of the United Kingdom of Great Britain and Northern Ireland and on 25 July by the Government of Ireland.

…

Law

1 By a judgment of 23 April 1975, received at the Court Registry on 2 May 1975, the Cour du travail, Brussels, referred to the Court under Article 177 of the EEC Treaty two questions

concerning the effect and implementation of Article 119 of the Treaty regarding the principle that men and women should receive equal pay for equal work.

2 These questions arose within the context of an action between an air hostess and her employer, Sabena S.A., concerning compensation claimed by the applicant in the main action on the ground that, between 15 February 1963 and 1 February 1966, she suffered as a female worker discrimination in terms of pay as compared with male colleagues who were doing the same work as 'cabin steward'.

3 According to the judgment containing the reference, the parties agree that the work of an air hostess is identical to that of a cabin steward and in these circumstances the existence of discrimination in pay to the detriment of the air hostess during the period in question is not disputed.

The first question (direct effect of Article 119)

4 The first question asks whether Article 119 of the Treaty introduces 'directly into the national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance?'

5 If the answer to this question is in the affirmative, the question further enquires as from what date this effect must be recognized.

6 The reply to the final part of the first question will therefore be given with the reply to the second question.

7 The question of the direct effect of Article 119 must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.

8 Article 119 pursues a double aim.

9 First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.

10 Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.

11 This aim is accentuated by the insertion of Article 119 into the body of a chapter devoted to social policy whose preliminary provision, Article 117, marks 'the need to promote improved

working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.

12 This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.

13 Furthermore, this explains why the Treaty has provided for the complete implementation of this principle by the end of the first stage of the transitional period.

14 Therefore, in interpreting this provision, it is impossible to base any argument on the dilatoriness and resistance which have delayed the actual implementation of this basic principle in certain Member States.

15 In particular, since Article 119 appears in the context of the harmonization of working conditions while the improvement is being maintained, the objection that the terms of this article may be observed in other ways than by raising the lowest salaries may be set aside.

16 Under the terms of the first paragraph of Article 119, the Member States are bound to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.

17 The second and third paragraphs of the same article add a certain number of details concerning the concepts of pay and work referred to in the first paragraph.

18 For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.

19 It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.

20 This view is all the more essential in the light of the fact that the Community measures on this question, to which reference will be made in answer to the second question, implement Article 119 from the point of view of extending the narrow criterion of 'equal work', in accordance in particular with the provisions of Convention No 100 on equal pay concluded by the International Labour Organization in 1951, Article 2 of which establishes the principle of equal pay for work 'of equal value'.

21 Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included in particular those which have their origin in

legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22 This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

23 As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.

24 In such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect.

25 Furthermore, as regards equal work, as a general rule, the national legislative provisions adopted for the implementation of the principle of equal pay as a rule merely reproduce the substance of the terms of Article 119 as regards the direct forms of discrimination.

26 Belgian legislation provides a particularly apposite illustration of this point, since Article 14 of Royal Decree No 40 of 24 October 1967 on the employment of women merely sets out the right of any female worker to institute proceedings before the relevant court for the application of the principle of equal pay set out in Article 119 and simply refers to that article.

27 The terms of Article 119 cannot be relied on to invalidate this conclusion.

28 First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word 'principle', since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to ‘Principles’ and by Article 113, according to which the commercial policy of the Community is to be based on ‘uniform principles’.

29 If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected.

30 It is also impossible to put forward arguments based on the fact that Article 119 only refers expressly to ‘Member States’.

31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.

32 The very wording of Article 119 shows that it imposes on States a duty to bring about a specific result to be mandatory achieved within a fixed period.

33 The effectiveness of this provision cannot be affected by the fact that the duty imposed by the

Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.

34 To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 of the Treaty.

35 Finally, in its reference to 'Member States', Article 119 is alluding to those States in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.

36 Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.

37 Therefore, the reference to 'Member States' in Article 119 cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.

38 Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.

39 In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

40 The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

The second question (implementation of Article 119 and powers of the Community and of the Member States)

41 The second question asks whether Article 119 has become 'applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community', or whether the national legislature must 'be regarded as alone competent in this matter'.

42 In accordance with what has been set out above, it is appropriate to join to this question the problem of the date from which Article 119 must be regarded as having direct effect.

43 In the light of all these problems it is first necessary to establish the chronological order of the

measures taken on a Community level to ensure the implementation of the provision whose interpretation is requested.

44 Article 119 itself provides that the application of the principle of equal pay was to be uniformly ensured by the end of the first stage of the transitional period at the latest.

45 The information supplied by the Commission reveals the existence of important differences and discrepancies between the various States in the implementation of this principle.

46 Although, in certain Member States, the principle had already largely been put into practice before the entry into force of the Treaty, either by means of express constitutional and legislative provisions or by social practices established by collective labour agreements, in other States its full implementation has suffered prolonged delays.

47 In the light of this situation, on 30 December 1961, the eve of the expiry of the time-limit fixed by Article 119, the Member States adopted a Resolution concerning the harmonization of rates of pay of men and women which was intended to provide further details concerning certain aspects of the material content of the principle of equal pay, while delaying its implementation according to a plan spread over a period of time.

48 Under the terms of that Resolution all discrimination, both direct and indirect, was to have been completely eliminated by 31 December 1964.

49 The information provided by the Commission shows that several of the original Member States have failed to observe the terms of that Resolution and that, for this reason, within the context of the tasks entrusted to it by Article 155 of the Treaty, the Commission was led to bring together the representatives of the governments and the two sides of industry in order to study the situation and to agree together upon the measures necessary to ensure progress towards the full attainment of the objective laid down in Article 119.

50 This led to be drawing up of successive reports on the situation in the original Member States, the most recent of which, dated 18. July 1973, recapitulates all the facts.

51 In the conclusion to that report the Commission announced its intention to initiate proceedings under Article 169 of the Treaty, for failure to take the requisite action, against those of the Member States who had not by that date discharged the obligations imposed by Article 119, although this warning was not followed by any further action.

52 After similar exchanges with the competent authorities in the new Member States the Commission stated in its report dated 17 July 1974 that, as regards those States, Article 119 had been fully applicable since 1 January 1973 and that from that date the position of those States was the same as that of the original Member States.

53 For its part, in order to hasten the full implementation of Article 119, the Council on 10 February 1975 adopted Directive No 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45, p. 19).

54 This Directive provides further details regarding certain aspects of the material scope of Article 119 and also adopts various provisions whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by Article 119.

55 Article 8 of this Directive allows the Member States a period of one year to put into force the appropriate laws, regulations and administrative provisions.

56 It follows from the express terms of Article 119 that the application of the principle that men and women should receive equal pay was to be fully secured and irreversible at the end of the first stage of the transitional period, that is, by 1 January 1962.

57 Without prejudice to its possible effects as regards encouraging and accelerating the full implementation of Article 119, the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty.

58 In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236.

59 Moreover, it follows from the foregoing that, in the absence of transitional provisions, the principle contained in Article 119 has been fully effective in the new Member States since the entry into force of the Accession Treaty, that is, since 1 January 1973.

60 It was not possible for this legal situation to be modified by Directive No 75/117, which was adopted on the basis of Article 100 dealing with the approximation of laws and was intended to encourage the proper implementation of Article 119 by means of a series of measures to be taken on the national level, in order, in particular, to eliminate indirect forms of discrimination, but was unable to reduce the effectiveness of that article or modify its temporal effect.

61 Although Article 119 is expressly addressed to the Member States in that it imposes on them a duty to ensure, within a given period, and subsequently to maintain the application of the principle of equal pay, that duty assumed by the States does not exclude competence in this matter on the part of the Community.

62 On the contrary, the existence of competence on the part of the Community is shown by the fact that Article 119 sets out one of the 'social policy' objectives of the Treaty which form the subject of Title III, which itself appears in Part Three of the Treaty dealing with the 'Policy of the Community'.

63 In the absence of any express reference in Article 119 to the possible action to be taken by the Community for the purposes of implementing the social policy, it is appropriate to refer to the general scheme of the Treaty and to the courses of action for which it provided, such as those laid down in Articles 100, 155 and, where appropriate, 235.

64 As has been shown in the reply to the first question, no implementing provision, whether adopted by the institutions of the Community or by the national authorities, could adversely

affect the direct effect of Article 119.

65 The reply to the second question should therefore be that the application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty.

66 The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.

67 As indicated in reply to the first question, Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty.

68 Even in the areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be relieved by a combination of Community and national measures.

The temporal effect of this judgment

69 The Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect same into existence.

70 In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.

71 Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.

72 However, in the light of the conduct of several of the Member States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law.

73 The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.

74 In these circumstances, it is appropriate to determine that, as the general level at which pay

would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.

75 Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

(a) Costs

76 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

77 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Cour du travail, Brussels, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour du travail, Brussels, by judgment dated 23 April 1975 hereby rules:

1. The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

2. The application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.

3. Council Directive No 75/117 does not prejudice the direct effect of Article 119 and the period fixed by that Directive for compliance therewith does not affect the time-limits laid down by Article 119 of the EEC Treaty and the Accession Treaty.

4. Even in the areas in which Article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be achieved by a combination of Community and national provisions.

5. Except as regards those workers who have already brought legal proceedings or made an equivalent claim, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment.

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Pescatore Sørensen

Delivered in open court in Luxembourg on 8 April 1976.

A. Van Houtte
Registrar

R. Lecourt
President

7. *Cassis de Dijon*, mál nr. 120/78, ECR [1979] 649

Judgment of the Court of 20 February 1979

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hessisches Finanzgericht for a preliminary ruling in the action pending before that court between

REWE-ZENTRAL AG, having its registered office in Cologne,

and

BUNDESMONOPOLVERWALTUNG FÜR BRANNTWEIN (Federal Monopoly Administration for Spirits),

Case 120/78

JUDGMENT

Facts and Issues

The facts, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The principle activity of the limited liability company Rewe-Zentral AG (hereinafter referred to as Rewe), a central cooperative undertaking having its registered office in Cologne, is the importation of goods from other Member States of the Community. On 14 September 1976 it requested authorization from the Bundesmonopolverwaltung für Branntwein (Federal Monopoly Administration for Spirits) to import from France, for the purposes of marketing in the Federal Republic of Germany, certain potable spirits, including the liqueur "Cassis de Dijon", containing 15 to 20% by volume of alcohol.

By letter of 17 September 1976 the Bundesmonopolverwaltung informed Rewe that authorization to import was not necessary: by notice of 8 April 1976 (Bundesanzeiger No 74 of 15 April 1976 and No 79 of 27 April 1976) the Bundesmonopolverwaltung had granted with general effect the authorization required by Article 3 (1) of the Branntweinmonopolgesetz (Law of 8 April 1922 on the Monopoly in Spirits, as last amended by the Law of 2 May 1976) for the importation of spirits into the Federal Republic, and at all events the importation of liqueurs was not subject to authorization. However, it informed Rewe that the "Cassis de Dijon" which it intended to import could not be sold in the Federal Republic of Germany, since Article 100 (3) of the Branntweinmonopolgesetz provides that only potable spirits having a wine-spirit content of at least 32% may be marketed in that country. The exceptions to that rule are the subject-matter of the Verordnung über den Mindestweingeistgehalt von

Trinkbranntweinen (Regulation on the Minimum Wine-Spirit Content of Potable Spirits) of 28 February 1958 (Bundesanzeiger No 48 of 11 March 1958). "Cassis de Dijon", which contains from 15 to 20% wine-spirit by volume, is not covered by that regulation and, pursuant to Article 100 (3) of the Branntweinmonopolgesetz, the Branntweinmonopolverwaltung is not empowered to authorize derogations in individual cases.

Rewe brought an action against that decision before the Verwaltungsgericht Darmstadt; by order of 27 December 1976 that court referred the case to the Hessisches Finanzgericht. The Finanzgericht decided, by order of its Seventh Senate of 28 April 1978, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice has given a preliminary ruling on the following questions:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirit content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?

2. May the fixing of such a minimum wine-spirit content come within the concept of "discrimination regarding the conditions under which goods are procured and marketed … between nationals of Member States" contained in Article 37 of the EEC Treaty?

The order of the Hessisches Finanzgericht was registered at the Court on 22 May 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 22 June and 24 July 1978 by Rewe-Zentral AG, the plaintiff in the main action, on 27 July by the Commission of the European Communities, on 10 August by the Government of the Kingdom of Denmark and on 16 August 1978 by the Government of the Federal Republic of Germany.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Government of the Federal Republic of Germany and the Commission to reply to a question at the hearing.

…

Decision

1 By order of 28 April 1978, which was received at the Court on 22 May, the Hessisches Finanzgericht referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30 and 37 of the EEC Treaty, for the

purpose of assessing the compatibility with Community law of a provision of the German rules relating to the marketing of alcoholic beverages fixing a minimum alcoholic strength for various categories of alcoholic products.

2 It appears from the order making the reference that the plaintiff in the main action intends to import a consignment of "Cassis de Dijon" originating in France for the purpose of marketing it in the Federal Republic of Germany.

The plaintiff applied to the Bundesmonopolverwaltung (Federal Monopoly Administration for Spirits) for authorization to import the product in question and the monopoly administration informed it that because of its insufficient alcoholic strength the said product does not have the characteristics required in order to be marketed within the Federal Republic of Germany.

3 The monopoly administration's attitude is based on Article 100 of the Branntweinmonopolgesetz and on the rules drawn up by the monopoly administration pursuant to that provision, the effect of which is to fix the minimum alcohol content of specified categories of liqueurs and other potable spirits (Verordnung über den Mindestweingeistgehalt von Trinkbranntweinen of 28 February 1958, Bundesanzeiger No 48 of 11 March 1958).

Those provisions lay down that the marketing of fruit liqueurs, such as "Cassis de Dijon", is conditional upon a minimum alcohol content of 25%, whereas the alcohol content of the product in question, which is freely marketed as such in France, is between 15 and 20%.

4 The plaintiff takes the view that the fixing by the German rules of a minimum alcohol content leads to the result that well-known spirits products from other Member States of the Community cannot be sold in the Federal Republic of Germany and that the said provision therefore constitutes a restriction on the free movement of goods between Member States which exceeds the bounds of the trade rules reserved to the latter.

In its view it is a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty.

Since, furthermore, it is a measure adopted within the context of the management of the spirits monopoly, the plaintiff considers that there is also an infringement of Article 37, according to which the Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured or marketed exists between nationals of Member States.

5 In order to reach a decision on this dispute the Hessisches Finanzgericht has referred two questions to the Court, worded as follows:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirit content is below the fixed limit cannot be put into circulation in

the Federal Republic of Germany, also comes within this concept?

2. May the fixing of such a minimum wine-spirit content come within the concept of "discrimination regarding the conditions under which goods are procured and marketed … between nationals of Member States" contained in Article 37 of the EEC Treaty?

6 The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether the requirement of a minimum alcohol content may be covered either by the prohibition on all measures having an effect equivalent to quantitative restrictions in trade between Member States contained in Article 30 of the Treaty or by the prohibition on all discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States within the meaning of Article 37.

7 It should be noted in this connexion that Article 37 relates specifically to State monopolies of a commercial character.

That provision is therefore irrelevant with regard to national provisions which do not concern the exercise by a public monopoly of its specific function — namely, its exclusive right — but apply in a general manner to the production and marketing of alcoholic beverages, whether or not the latter are covered by the monopoly in question.

That being the case, the effect on intra-Community trade of the measure referred to by the national court must be examined solely in relation to the requirements under Article 30, as referred to by the first question.

8 In the absence of common rules relating to the production and marketing of alcohol — a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p. 2) not yet having received the Council's approval — it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

9 The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.

10 As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol

than more highly alcoholic beverages.

11 Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.

12 The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13 As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14 It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

15 Consequently, the first question should be answered to the effect that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

Costs

16 The costs incurred by the Government of the Kingdom of Denmark, the Government of the Federal Republic of Germany 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 action are concerned, in the nature of a step in the action before the Hessisches Finanzgericht, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hessisches Finanzgericht by order of 28 April 1978, hereby rules:

The concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 20 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

8. *Francovich*, mál nr. 6/90 og 9/90, ECR [1991] I-5357

Judgment of the Court of 19 November 1991

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Vicenza (Italy) (in Case C-6/90) and by the Pretura di Bassano del Grappa (Italy) (in Case C-9/90) for a preliminary ruling in the proceedings pending before those courts between

Andrea Francovich

and

Italian Republic

and between

Danila Bonifaci and Others

and

Italian Republic

Joined Cases C-6/90 and C-9/90,

Judgment

1 By orders of 9 July and 30 December 1989, which were received at the Court on 8 January and 15 January 1990 respectively, the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the third paragraph of Article 189 of the EEC Treaty and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 L 283, p. 23).

2 Those questions were raised in the course of proceedings brought by Andrea Francovich and by Danila Bonifaci and Others (hereinafter referred to as 'the plaintiffs') against the Italian Republic.

3 Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. In particular it provides for specific guarantees of payment of unpaid wage claims.

4 Under Article 11 the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983. The Italian Republic failed to fulfil that obligation, and its default was recorded by the Court in its judgment in Case 22/87 Commission v Italy ([1989] ECR 143).

5 Mr Francovich, a party to the main proceedings in Case C-6/90, had worked for CDN Elettronica SnC in Vicenza but had received only sporadic payments on account of his wages. He therefore brought proceedings before the Pretura di Vicenza, which ordered the defendant to pay approximately LIT 6 million. In attempting to enforce that judgment the bailiff attached to the Tribunale di Vicenza was obliged to submit a negative return. Mr Francovich then claimed to be entitled to obtain from the Italian State the guarantees provided for in Directive 80/987 or, in the alternative, compensation.

6 In Case C-9/90 Danila Bonifaci and 33 other employees brought proceedings before the Pretura di Bassano del Grappa, stating that they had been employed by Gaia Confezioni Srl, which was declared insolvent on 5 April 1985. When the employment relationships were discontinued, the plaintiffs were owed more than LIT 253 million, which was proved as a debt in the company's insolvency. More than five years after the insolvency they had been paid nothing, and the receiver had told them that even a partial distribution in their favour was entirely improbable. Consequently, the plaintiffs brought proceedings against the Italian Republic in which they claimed that, in view of its obligation to implement Directive 80/987 with effect from 23 October 1983, it should be ordered to pay them their arrears of wages, at least for the last three months, or in the alternative to pay compensation.

7 It was in those circumstances that the national courts referred the following questions, which are identical in both cases, to the Court for a preliminary ruling:

'(1) Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/897 - a failure confirmed by a judgment of the Court of Justice - entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided and in any event to claim reparation of the loss and damage sustained in relation to provisions to which that right does not apply?

(2) Are the combined provisions of Articles 3 and 4 of Council Directive 80/987 to be interpreted as meaning that where the State has not availed itself of the option of laying down limits under Article 4, the State itself is obliged to pay the claims of employees in accordance with Article 3?

(3) If the answer to Question 2 is in the negative, the Court is asked to state what the minimum guarantee is that the State must provide pursuant to Directive 80/987 to an entitled employee so as to ensure that the share of pay payable to that employee may be regarded as giving effect to the directive.'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the main

proceedings, 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.

9 The first question submitted by the national courts raises two issues, which should be considered separately. It concerns, first, the direct effect of the provisions of the directive which determine the rights of employees and, secondly, the existence and scope of State liability for damage resulting from breach of its obligations under Community law.

The direct effect of the provisions of the directive which determine the rights of employees

10 The first part of the first question submitted by the national courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the State in the national courts in the absence of implementing measures adopted within the prescribed period.

11 As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State (judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

12 It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a State can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period.

13 With regard first of all to the identity of the persons entitled to the guarantee, it is to be noted that, according to Article 1(1), the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1), the latter provision defining the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of 'employee' and 'employer'. Finally, Article 1(2) provides that the Member States may, by way of exception and under certain conditions, exclude claims by certain categories of employees listed in the annex to the directive.

14 Those provisions are sufficiently precise and unconditional to enable the national court to

determine whether or not a person should be regarded as a person intended to benefit under the directive. A national court need only verify whether the person concerned is an employed person under national law and whether he is excluded from the scope of the directive in accordance with Article 1(2) and Annex 1 (as to the necessary conditions for such exclusion, see the judgments in Case 22/87 Commission v Italy, cited above, paragraphs 18 to 23, and Case C-53/88 Commission v Greece [1990] ECR I-3917, paragraphs 11 to 26), and then ascertain whether one of the situations of insolvency provided for in Article 2 of the directive exists.

15 With regard to the content of the guarantee, Article 3 of the directive provides that measures must be taken to ensure the payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a date determined by the Member State, which may choose one of three possibilities: (a) the date of the onset of the employer's insolvency; (b) that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency; (c) that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.

16 Depending on the choice it makes, the Member State has the option, under Article 4(1) and (2), to restrict liability to periods of three months or eight weeks respectively, calculated in accordance with detailed rules laid down in that article. Finally, Article 4(3) provides that the Member States may set a ceiling on liability, in order to avoid the payment of sums going beyond the social objective of the directive. Where they exercise that option, the Member States must inform the Commission of the methods used to set the ceiling. In addition, Article 10 provides that the directive does not affect the option of Member States to take the measures necessary to avoid abuses and in particular to refuse or reduce liability in certain circumstances.

17 Article 3 of the directive thus leaves the Member State a discretion in determining the date from which payment of claims must be ensured. However, as is already implicit in the Court's case-law (see the judgments in Case 71/85 Netherlands v FNV [1986] ECR 3855 and Case 286/85 McDermott and Cotter v Minister for Social Welfare and Attorney General [1987] ECR 1453, paragraph 15), the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.

18 In this case, the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the Member States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required.

19 As the Commission and the plaintiffs have pointed out, it is possible to determine the minimum guarantee provided for by the directive by taking the date whose choice entails the least liability for the guarantee institution. That date is that of the onset of the employer's insolvency, since the two other dates, that of the notice of dismissal issued to the employee and that on which the

contract of employment or the employment relationship was discontinued, are, according to the conditions laid down in Article 3, necessarily subsequent to the onset of the insolvency and thus define a longer period in respect of which the payment of claims must be ensured.

20 The possibility under Article 4(2) of limiting the guarantee does not make it impossible to determine the minimum guarantee. It follows from the wording of that article that the Member States have the option of limiting the guarantees granted to employees to certain periods prior to the date referred to in Article 3. Those periods are fixed in relation to each of the three dates provided for in Article 3, so that it is always possible to determine to what extent the Member State could have reduced the guarantee provided for by the directive depending on the date which it would have chosen if it had transposed the directive.

21 As regards Article 4(3), according to which the Member States may set a ceiling on liability in order to avoid the payment of sums going beyond the social objective of the directive, and Article 10, which states that the directive does not affect the option of Member States to take the measures necessary to avoid abuses, it should be observed that a Member State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the directive (see, in relation to an analogous option concerning the prevention of abuse in fiscal matters, the judgment in Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53, paragraph 34).

22 It must therefore be held that the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee.

23 Finally, as regards the identity of the person liable to provide the guarantee, Article 5 of the directive provides that:

‘Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(d) the assets of the institutions shall be independent of the employers’ operating capital and be inaccessible to proceedings for insolvency;

(e) employers shall contribute to financing, unless it is fully covered by the public authorities;

(f) the institutions’ liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.’

24 It has been submitted that since the directive provides for the possibility that the guarantee institutions may be financed entirely by the public authorities, it is unacceptable that a Member State may thwart the effects of the directive by asserting that it could have required other persons to bear part or all of the financial burden resting upon it.

25 That argument cannot be upheld. It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system. Under Article 5, the

Member State has a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organize the guarantee system that the State may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the State takes on an obligation which in principle is not its own.

26 Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

27 The answer to the first part of the first question must therefore be that the provisions of Directive 80/987 which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.

Liability of the State for loss and damage resulting from breach of its obligations under Community law

28 In the second part of the first question the national court seeks to determine whether a Member State is obliged to make good loss and damage suffered by individuals as a result of the failure to transpose Directive 80/987.

29 The national court thus raises the issue of the existence and scope of a State's liability for loss and damage resulting from breach of its obligations under Community law.

30 That issue must be considered in the light of the general system of the Treaty and its fundamental principles.

(a) The existence of State liability as a matter of principle

31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 Humblet v Belgium [1960] ECR 559).

37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) *The conditions for State liability*

38 Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42 Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 60/75 Russo v AIMA [1976] ECR 45, Case 33/76 Rewe v Landwirstschaftskammer Saarland [1976] ECR 1989 and Case 158/80 Rewe v Hauptzollamt Kiel [1981] ECR 1805).

43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, inter alia the judgment in Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595).

44 In this case, the breach of Community law by a Member State by virtue of its failure to transpose Directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45 Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.

46 The answer to be given to the national court must therefore be that a Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987.

The second and third questions

47 In view of the reply to the first question referred by the national court, there is no need to rule on the second and third questions.

Costs

48 The costs incurred by the Italian Government, the United Kingdom and the Netherlands and German Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90), by orders of 9 July 1989 and 30 December 1989 respectively, hereby rules:

1. The provisions of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period;

2. A Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987/EEC.

Due	Slynn	Joliet	Schockweiler
Grévisse	Kapteyn	Mancini	
Moitinho de Almeida	Rodríguez Iglesias	Díez de Velasco	Zuleeg

Delivered in open court in Luxembourgon 19 November 1991.

J.-G. Giraud	O. Due
Registrar	President

OPINION 1/91 OF THE COURT
14 December 1991

Opinion of the Court

I

1 In this Opinion, the Court will confine its examination, in accordance with the Commission's request, to the compatibility with the EEC Treaty of the system of judicial supervision which it is proposed to set up under the agreement. This Opinion does not consider the other provisions of the agreement, in particular those dealing with the decision-making process and the allocation of responsibilities in the field of competition.

2 The agreement is to be concluded between, on the one hand, States which are members of the European Free Trade Association and, on the other, the European Community and its Member States. As far as the Community is concerned, the agreement will be concluded by the Council, after receiving the assent of the European Parliament, under Article 238 of the EEC Treaty.

3 The purpose of the agreement is to create a European Economic Area covering the territories of the Member States of the Community and those of the EFTA countries. According to the preamble to the agreement the Contracting Parties envisage the establishment of a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition, and provide for adequate means of enforcement, *inter alia* at the judicial level. According to Article 1 of the agreement, its aim is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition and respect for the same rules.

4 The rules which are to apply in relations between the States making up the EEA cover the free movement of goods, persons, services and capital, and competition. Essentially, the rules are those laid down in the corresponding provisions of the EEC and ECSC Treaties and in measures adopted pursuant thereto. As the Commission stated in its request for an opinion, the Contracting Parties intend to extend to the EEA future Community law relating to the fields covered by the agreement as the law comes into being, develops or alters.

II

5 The aim of homogeneity in the interpretation and application of the law in the EEA as specified in Article 1 of the agreement is to be secured through the use of provisions which are textually identical to the corresponding provisions of Community law and through the establishment of a system of courts.

6 The agreement provides for the setting up of an EEA Court, to which a Court of First Instance is to be attached. The jurisdiction of the EEA Court is defined in Article 96(1) of the agreement. It covers the settlement of disputes between the Contracting Parties, actions concerning the surveillance procedure regarding the EFTA States and, in the field of competition, appeals concerning decisions taken by the EFTA Surveillance Authority.

7 The system of courts also provides for the following mechanisms.

8 Article 6 of the agreement provides that, for the purposes of their implementation and application, the provisions of the agreement are to be interpreted in conformity with rulings of the Court of Justice on the corresponding provisions of the EEC Treaty, the ECSC Treaty and measures of Community secondary legislation which were given prior to the date of signature of the agreement.

9 Article 104(1) of the agreement provides that, when applying or interpreting the provisions of the agreement or provisions of the EEC and ECSC Treaties, as amended or supplemented, or of acts adopted in pursuance thereof, the Court of Justice, the EEA Court, the Court of First Instance of the European Communities, the EEA Court of First Instance and the Courts of the EFTA States are to pay due account to the principles laid down in decisions delivered by the other courts in order to ensure as uniform as possible an interpretation of the agreement.

10 Article 95 of the agreement provides that the EEA Court is to be composed of eight judges, including five from the Court of Justice. At the EEA Court's request, the EEA Council may allow it to establish chambers, each consisting of three or five judges. An appropriate balance of judges of the Court of Justice and EFTA judges, taking into account the nature of the cases, is to be laid down in the Statute of the EEA Court. According to Article 101, the EEA Court of First Instance is to be composed of five judges — three nominated by the EFTA States and two judges of the Court of First Instance of the European Communities.

11 Protocol 34, to which Article 104(2) of the agreement refers, contains provisions under which the EFTA States may authorize their courts and tribunals to ask the Court of Justice to express itself on the interpretation of a provision of the agreement.

12 Lastly, a note to Protocol 34 provides for a right for EFTA States to intervene in cases brought before the Court of Justice.

III

13 Before considering the questions raised by the Commission's request for an opinion it is appropriate to compare the aims and context of the agreement, on the one hand, with those of Community law, on the other.

14 The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties

stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

15 With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties.

16 In contrast, as far as the Community is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.

17 It follows *inter alia* from Articles 2, 8a and 102a of the EEC Treaty that that treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union. Article 1 of the Single European Act makes it clear moreover that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity.

18 It follows from the foregoing that the provisions of the EEC Treaty on free movement and competition, far from being an end in themselves, are only means for attaining those objectives.

19 The context in which the objective of the agreement is situated also differs from that in which the Community aims are pursued.

20 The EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up.

21 In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 *Van Gend en Loos* [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

22 It follows from those considerations that homogeneity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording.

23 It must therefore be considered whether the agreement provides for other means of guaranteeing that homogeneity.

24 Article 6 of the agreement pursues that objective by stipulating that the rules of the agreement must be interpreted in conformity with the case-law of the Court of Justice on the corresponding provisions of Community law.

25 However, for two reasons that interpretation mechanism will not enable the desired legal homogeneity to be achieved.

26 First, Article 6 is concerned only with rulings of the Court of Justice given prior to the date of signature of the agreement. Since the case-law will evolve, it will be difficult to distinguish the new case-law from the old and hence the past from the future.

27 Secondly, although Article 6 of the agreement does not clearly specify whether it refers to the Court's case-law as a whole, and in particular the case-law on the direct effect and primacy of Community law, it appears from Protocol 35 to the agreement that, without recognizing the principles of direct effect and primacy which that case-law necessarily entails, the Contracting Parties undertake merely to introduce into their respective legal orders a statutory provision to the effect that EEA rules are to prevail over contrary legislative provisions.

28 It follows that compliance with the case-law of the Court of Justice, as laid down by Article 6 of the agreement, does not extend to essential elements of that case-law which are irreconcilable with the characteristics of the agreement. Conse- quently, Article 6 as such cannot secure the objective of homogeneity of the law throughout the EEA, either as regards the past or for the future.

29 It follows from the foregoing considerations that the divergences which exist between the aims and context of the agreement, on the one hand, and the aims and context of Community law, on the other, stand in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA.

IV

30 It is in the light of the contradiction which has just been identified that it must be considered whether the proposed system of courts may undermine the autonomy of the Community legal order in pursuing its own particular objectives.

31 The interpretation of the expression 'Contracting Party' which the EEA Court will have to give in the exercise of its jurisdiction will be considered first, followed by the effect of the case-law of that court on the interpretation of Community law.

32 As far as the first point is concerned, it must be observed that the EEA Court has jurisdiction under Article 96(1)(a) of the agreement with regard to the settlement of disputes between the Contracting Parties and that, according to Article 117(1) of the agreement, the EEA Joint Committee or a Contracting Party may bring such a dispute before the EEA Court.

33 The expression 'Contracting Parties' is defined in Article 2(c) of the agreement. As far as the

Community and its Member States are concerned, it covers the Community and the Member States, or the Community, or the Member States, depending on the case. Which of the three possibilities is to be chosen is to be deduced in each case from the relevant provisions of the agreement and from the respective competences of the Community and the Member States as they follow from the EEC Treaty and the ECSC Treaty.

34 This means that, when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.

35 It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect.

36 Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law.

37 As for the second point, it must be observed *in limine* that international agreements concluded by means of the procedure set out in Article 228 of the Treaty are binding on the institutions of the Community and its Member States and that, as the Court of Justice has consistently held, the provisions of such agreements and the measures adopted by institutions set up by such agreements become an integral part of the Community legal order when they enter into force.

38 In this connection, it must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the EEC Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation. It also has jurisdiction to rule on the agreement in the event that Member States of the Community fail to fulfil their obligations under the agreement.

39 Where , however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.

40 An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.

41 However, the agreement at issue takes over an essential part of the rules — including the rules of secondary legislation — which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order.

42 Consequently, the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically- worded Community rules.

43 Furthermore, in the preamble to the agreement and in Article 1, the Contracting Parties express the intention of securing the uniform application of the provisions of the agreement throughout their territory. However, the objective of uniform application and equality of conditions of competition which is pursued in this way and reflected in Article 6 and Article 104(1) of the agreement necessarily covers the interpretation both of the provisions of the agreement and of the corresponding provisions of the Community legal order.

44 Although, under Article 6 of the agreement, the EEA Court is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the EEA Court will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date.

45 Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

46 It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.

V

47 The threat posed by the court system set up by the agreement to the autonomy of the Community legal order is not reduced by the fact that Articles 95 and 101 of the agreement seek to create organic links between the EEA Court and the Court of Justice by providing that judges from the Court of Justice are to sit on the EEA Court and in its chambers and that judges from the Community's Court of First Instance are to sit on the EEA Court of First Instance.

48 On the contrary, it is to be feared that the application of those provisions will accentuate the

general problems arising from the court system to be set up by the agreement.

49 In this connection, it should be borne in mind that the EEA Court is to ensure the sound operation of rules on free trade and competition under an international treaty which creates obligations only between the Contracting Parties.

50 In contrast, the Court of Justice has to secure observance of a particular legal order and to foster its development with a view to achieving the objectives set out in particular in Articles 2, 8a and 102a of the EEC Treaty and to attaining a European Union among the Member States, as is stated in the Solemn Declaration of Stuttgart of 19 June 1983 (section 2.5) referred to in the first recital in the preamble to the Single European Act. In that context, free trade and competition are merely means of achieving those objectives.

51 Consequently, depending on whether they are sitting on the Court of Justice or on the EEA Court, the judges of the Court of Justice who are members of the EEA Court will have to apply and interpret the same provisions but using different approaches, methods and concepts in order to take account of the nature of each treaty and of its particular objectives.

52 In those circumstances, it will be very difficult, if not impossible, for those judges, when sitting in the Court of Justice, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court.

53 However, since the judicial system set up by the agreement is in any event incompatible with the EEC Treaty it is unnecessary to give fuller consideration to this question or to the question whether the system is not liable to raise serious doubts as to the confidence which individuals are entitled to have in the ability of the Court of Justice to carry out its functions in complete independence.

VI

54 It is necessary to examine whether the machinery provided for in Article 104(2) of the agreement for the interpretation of its provisions is compatible with Community law.

55 Article 104(2) of the agreement states that provisions allowing EFTA States to allow their courts or tribunals to ask the Court of Justice to express itself on the interpretation of the agreement are laid down in Protocol 34.

56 Under Article 1 of Protocol 34, when a question of interpretation of provisions of the agreement which are identical in substance to the provisions of the Community Treaties arises in a case pending before a court or tribunal of an EFTA State, the court or tribunal may, if it considers this necessary, ask the Court of Justice to express itself on the question.

57 Article 2 of Protocol 34 provides that an EFTA State which intends to make use of that protocol is to notify the Depositary of the agreement and the Court of Justice to what extent and according to what modalities the protocol is to apply to its courts and tribunals.

58 Accordingly, this procedure is characterized by the fact that it leaves the EFTA States free to authorize or not to authorize their courts or tribunals to refer questions to the Court of Justice and does not make such a reference obligatory in the case of courts of last instance in those States. Furthermore, there is no guarantee that the answers given by the Court of Justice in such proceedings will be binding on the courts making the reference. This procedure is fundamentally different from that provided for in Article 177 of the EEC Treaty.

59 Admittedly, there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries.

60 Neither can any objection on a point of principle be made to the freedom which the EFTA States are given to authorize or not to authorize their courts and tribunals to ask the Court of Justice questions or to the fact that there is no obligation on the part of certain of those courts and tribunals to make a reference to the Court of Justice.

61 In contrast, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article.

62 It must further be observed that the interpretation of the agreement provided by the Court of Justice in response to questions put by courts and tribunals in EFTA States also has to be taken into account by courts in Member States of the Community when they have to rule on the application of the agreement. However, the fact that the answers are not binding on the EFTA courts may give rise to uncertainty about their legal value for courts in Member States of the Community.

63 Furthermore, the possibility cannot be ruled out that courts in the Member States will be led to consider that the non-binding effect of interpretations given by the Court of Justice under Protocol 34 also extends to judgments given by the Court of Justice under Article 177 of the EEC Treaty.

64 To that extent, the machinery in question will have an adverse impact on legal certainty, which is essential for the proper operation of the preliminary rulings procedure.

65 It follows from the above considerations that Article 104(2) of the agreement and Protocol 34 thereto are incompatible with Community law in so far as they do not guarantee that the answers which the Court of Justice may be called upon to give pursuant to that protocol will have a binding effect.

VII

66 It is necessary next to assess the right provided for EFTA States to intervene in cases pending

before the Court of Justice. It is provided in a note to Protocol 34 that Articles 20 and 37 of the Protocol on the Statute of the Court of Justice will have to be amended so as to authorize such a right of intervention.

67 It is sufficient to observe in that connection that those two articles appear in Title III of the Protocol on the Statute of the Court, the provisions of which, according to the second paragraph of Article 188 of the EEC Treaty, the Council may amend, acting unanimously at the request of the Court of Justice and after consulting the Commission and the European Parliament.

68 It follows that it is not necessary to amend the EEC Treaty, pursuant to Article 236 thereof, in order to give the EFTA countries the right to intervene in cases pending before the Court of Justice.

VIII

69 In its last question, the Commission asks whether Article 238 of the EEC Treaty, which deals with the conclusion by the Community of association agreements with a third State, a union of States or an international organization, authorizes the establishment of a system of courts as provided for in this agreement. The Commission stated in this connection that, in the event that the Court were to answer this question in the negative, Article 238 could be amended so as to permit such a system to be set up.

70 As already pointed out in paragraph 40, an international agreement providing for a system of courts, including a court with jurisdiction to interpret its provisions, is not in principle incompatible with Community law and may therefore have Article 238 of the EEC Treaty as its legal basis.

71 However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.

72 For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.

In conclusion,

THE COURT

gives the following opinion:

> The system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community.

Due President	Slynn President of Chamber	Joliet President of Chamber
Schockweiler President of Chamber	Grévisse President of Chamber	Kapteyn President of Chamber
Mancini Judge	Kakouris Judge	Moitinho de Almeida Judge

Rodríguez Iglesias
Judge

Díez de Velasco
Juge

Zuleeg
Judge

Murray
Juge

Luxembourg, 14 December 1991.

J.-G. Giraud
Registrar

III

Dómar EFTA-dómstólsins

1. *Restamark*, mál nr. E-1/94, EFTA Court Report [1994] 15

JUDGMENT OF THE COURT
16 December 1994

In Case E-1/94,

REFERENCE to the Court for an advisory opinion under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice* by the Tullilautakunta in the appeal against the decision of the Helsingin piiritullikamari by

Ravintoloitsijain Liiton Kustannus Oy Restamark

on the interpretation of Articles 11 and 16 of the EEA Agreement,

THE COURT,

composed of: Leif Sevón, President, Bjørn Haug, Thór Vilhjálmsson, Kurt Herndl and Sven Norberg (Rapporteur), Judges,

Registrar: Karin Hökborg,

after considering the written observations submitted on behalf of:

– Ravintoloitsijain Liiton Kustannus Oy Restamark (Restamark), by Mr. Juhani Hopsu, Restamark's company lawyer, assisted by Professor Kari Joutsamo, University of Turku,
– the Government of the Republic of Finland, by Ambassador Tom Grönberg, Director General for Legal Affairs of the Ministry for Foreign Affairs, acting as Agent,
– the Government of the Kingdom of Norway, by Mr. Didrik Tønseth, Assistant Director General of the Royal Ministry of Foreign Affairs, acting as Agent,
– the EFTA Surveillance Authority, by Mr. Erling G. Rikheim, of its Legal Service, acting as Agent,
– the Commission of the European Communities, by Mr. Richard Wainright, Principal Legal Adviser, and Mr. Anders Christian Jessen, of its Legal Service, acting as Agents,

* Language of the request for an advisory opinion: Finnish

having regard to the Report for the Hearing,

after hearing the oral observations of Restamark, the Finnish Government, represented by Ambassador Holger Rotkirch, acting as Agent, Mr. Niilo Jääskinen and Mr. Pentti Karhu, the Norwegian Government, the Government of the Kingdom of Sweden, represented by Ambassador Pernilla Lindh, Under-Secretary for Legal Affairs at the Trade Department of the Ministry for Foreign Affairs, acting as Agent, the EFTA Surveillance Authority, represented by Mr. Håkan Berglin, Director of its Legal Service, and Mr. Erling Rikheim, and the Commission at the hearing on 19 October 1994,

gives the following

Judgment

1 By order of 19 April 1994, which was received at the Court Registry on 27 April 1994, the Tullilautakunta (Tullnämnden, the Appeals Committee at the Finnish Board of Customs) referred two questions regarding the interpretation of Articles 11 and 16 EEA for an advisory opinion by the EFTA Court. The factual circumstances in the case are as follows.

2 On 10 January 1994 Restamark imported into Finland from Italy 120 bottles of Italian red wine and from Germany 18 bottles of Johnny Walker Red Label Whisky, 12 bottles of Ballantines Whisky and 30 bottles of Racke Rauchzart Whisky and placed the beverages in a bonded warehouse. In accordance with a recommendation by the Board of Customs, dated 30 December 1993, Restamark on 11 January 1994 applied for the consent of Oy Alko Ab to import the consignment. On 13 January 1994 Restamark asked for a transfer order to place the goods in free circulation.

3 However, by decision Dno: 2/390/94-11 of 14 January 1994 the Helsingin piiritullikamari (the Helsinki District Customs House) refused to transfer the goods from the custody of the Customs into free circulation, relying on Section 2, first subsection, and Section 27 of the Alkoholilaki (alkohollagen, the Alcohol Act, 459/68) and Section 14a of the Asetus alkoholijuomista (förordningen om alkoholdrycker, the Decree on Alcoholic Beverages, 644/86).

4 On 19 January 1994 Restamark lodged an appeal against the decision of the Helsinki District Customs House before the Tullilautakunta, seeking annulment of the decision and an order that the District Customs House should transfer the alcohol consignment into free circulation for commercial purposes to be sold to restaurants serving alcoholic beverages on the premises. After further correspondence with Restamark, Oy Alko Ab on 19 January informed the former that it needed further information and documents, including, *inter alia*, the names of the sellers, the price and the names of the restaurants in Finland buying the alcoholic beverages imported

by Restamark. On 21 January Restamark informed Oy Alko Ab that it considered certain of the requested information as business secrets and that it hoped that Oy Alko Ab would give its consent without this information.

5 The Tullilautakunta, considering that it was necessary to interpret the provisions of the EEA Agreement in order for it to reach a decision, in its order 17/613/94 of 19 April 1994 requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the Surveillance and Court Agreement) on the following questions:

"*1. Can it be considered,*

having regard, on the one hand, to the statutory monopoly of Oy Alko Ab (the Alcohol Company) to import alcoholic beverages but, on the other hand, also to the measures of authorization which the company has announced it is ready to institute in order to permit commercial import of alcohol on terms laid down by the company itself,

that the commercial import of alcohol from other Contracting States is not quantitatively restricted or hindered by a measure having equivalent effect contrary to Article 11 of the Agreement, if this administrative court of appeal confirms the decision of the competent customs authority not to permit the imported consignment of alcohol into free circulation without the permission of Oy Alko Ab, which permission is required by law?

2. Is the statutory monopoly referred to above contrary to Article 16 of the Agreement?

If so:
is this Article so unconditional and sufficiently precise as to have direct legal effect and should the import monopoly therefore be considered as having expired from 1.1.1994?"

6 Reference is made to the Report for the Hearing, which is annexed hereto, 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.

Admissibility

7 Under Article 34, second paragraph, of the Surveillance and Court Agreement "a court or tribunal" in an EFTA State may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give an advisory opinion.

8 Restamark, the Finnish Government, the Norwegian Government, the EFTA Surveillance Authority and the EC Commission all refer, in their argumentation before the Court concerning Article 34, second paragraph, of the Surveillance and Court Agreement, to the case law of the Court of Justice of the European Communities regarding Article 177, second paragraph, EC.

9 In the present case, the Finnish Government, the Norwegian Government and the EFTA Surveillance Authority are of the opinion that the request for an advisory opinion should be declared inadmissible on the ground that the Tullilautakunta cannot be regarded as a court or tribunal within the meaning of Article 34 of the Surveillance and Court Agreement. Restamark, on the other hand, concludes that the Tullilautakunta falls within the concept of court or tribunal. The EC Commission is of the opinion that bearing in mind the aim of the advisory opinion procedure, i.e. co-operation between the EFTA Court and the national courts in order to provide the latter with the necessary elements of EEA law to decide on cases before them, the Court should, where there is a genuine doubt whether the body asking the question is a court or tribunal, resolve in favour of considering it as a court or tribunal.

10 The following facts about the Finnish administrative system and the Finnish Customs Administration appear from the written and oral submissions by the Finnish Government or follow from Finnish law.

11 In Finland, review of administrative acts is entrusted not only to the administrative courts but also to superior administrative bodies as well as to certain special appeals bodies. Appeals to these special appeals bodies are governed by the same procedural rules and principles as those applicable in the administrative courts. Under Finnish law the handling of such appeals is a judicial function irrespective of whether it takes place in an administrative court or a special appeals body.

12 The Finnish system of review of administrative acts is connected with the Finnish administrative structure. The administrative authorities are hierarchically independent within a framework laid down by legislation. When dealing with matters which affect the rights or obligations of individuals even authorities subordinated to the Government and the ministries have an independent position. The superior authority has no power to interfere with a decision of the lower authority in individual cases, whether before, during or after taking the decision. A superior body can modify the decision of a lower authority only by means of the appeal system.

13 In the case in which the request for an advisory opinion has been made an appeal against a decision of a district customs house was lodged with the Board of Customs.

14 The Board of Customs is a Central Administrative Authority of the Finnish State. It may issue generally applicable norms concerning the district customs houses to the extent that such a right has been delegated to it. The Board of Customs is headed by a Director General assisted by a Board of Directors. At the Board of Customs appeals are dealt with by the Tullilautakunta.

15 The Tullilautakunta was established in 1991 by the Customs Administration Act (laki tullilaitoksesta, lag om tullverket, 228/1991), replacing the College of Directors of the Board of Customs as a first instance of appeal, thereby aiming at strengthening the judicial character of the appeals procedure. In addition to deciding appeals the Tullilautakunta may, upon request by anyone to whom it is important to obtain information on the interpretation of customs legislation, give advance rulings on the interpretation of certain aspects of that legislation.

16 As far as the composition of the Tullilautakunta is concerned the Government had proposed in its bill to Parliament on the new Customs Administration Act that the composition of the

Tullilautakunta should be laid down in a government decree. However, in its report 74/90 the Finance Committee of the Finnish Parliament did not find that compatible with what the Constitutional Committee of the Parliament had previously considered to be required in similar cases. At the initiative of the Finance Committee the Parliament therefore inserted provisions in the Act on the composition of the Tullilautakunta and, in view of the judicial functions to be carried out by the Tullilautakunta, on the qualifications of its members, which are thus regulated by law.

17 According to Section 4, second subsection, of the Customs Administration Act the Tullilautakunta consists of five members. The Director General of the Board of Customs is *ex officio* chairman of the Tullilautakunta. The other four members are appointed by the Government from among the officials of the Board of Customs for a term of three years. At least three of the members must have the university degree required for holding judicial office. The rules applicable to members of the judiciary apply to their right to remain in office as members of the Tullilautakunta. According to Section 5 of the Customs Administration Decree the Government also designates the vice-chairman of the Tullilautakunta. The officials who are presently members of the Tullilautakunta are all members of the Board of Directors of the Board of Customs.

18 Customs surveillance at the regional level is performed by the customs districts, which are led by district customs houses. From the Rules of Procedure of the Customs Administration, Section 1, third subsection, it follows that the customs districts are administratively organised under the Board of Customs but may neither take nor be given instructions on how to decide an individual case.

19 The Finnish customs legislation provides that each customs district and the Board of Customs shall have a "customs agent", appointed by the Director General from among the officials of the customs administration. The customs agents are under an obligation to act independently and may neither take nor be given instructions by others, including the Board of Customs. The State's right to appeal against a decision by a District Customs House or by the Tullilautakunta rests solely with the appropriate customs agent.

20 If a decision by a District Customs House is appealed against to the Tullilautakunta, the procedure followed in the Tullilautakunta and the procedural principles applied are, according to an express provision in Section 4, subsection 3, of the Customs Administration Act, those applied by the courts (laillinen oikeudenkäyntijärjestys, laga rättegångsordning). That provision was inserted into the Act by Parliament at the initiative of the Finance Committee. In appeal cases the Tullilautakunta thus applies the same procedure as that applied in the administrative courts.

21 If an appeal against a decision by a District Customs House is lodged by an individual or economic operator, the District Customs House submits a statement explaining its decision to the Tullilautakunta. In such cases the customs agent does in practice not lodge any defence.

22 According to Section 19 of the Rules of Procedure of the Board of Customs an appeal to the Tullilautakunta is prepared and presented for decision by an official of the appeals division of the Board of Customs. The official responsible for the preparation and presentation examines the facts of the case and the law and submits a proposal for a decision to the Tullilautakunta. If the official preparing the case has a dissenting opinion, he has the right to have his opinion included in the decision. The Tullilautakunta must apply rules of law only. The interests of the State must not influence it. If not appealed against, the decision of the Tullilautakunta is binding and enforceable.

23 A decision by the Tullilautakunta may be appealed against to the Supreme Administrative Court. In such cases the interests of the State are represented by the customs agent at the Board of Customs. The right to appeal on behalf of the State rests solely with him and he may not be instructed how to act. If an individual or economic operator appeals, the Supreme Administrative Court requests the Board of Customs to submit a statement on the matter and to seek a defence by the customs agent. The Tullilautakunta is not a party to proceedings before the Supreme Administrative Court. The prohibition under Finnish law against a person participating in the decision-making in the same matter at two different levels applies here as well as in cases before the Tullilautakunta.

24 The expression "court or tribunal" in Article 34, second paragraph, of the Surveillance and Court Agreement, must be given its own interpretation. In this interpretation it is not decisive how the body has been defined under national rules. The reasoning which has led the EC Court of Justice to its interpretations of the same expression in Article 177 EC is relevant in this context, although the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow that reasoning when interpreting the main part of that Agreement. It should, therefore, be considered whether the body requesting an advisory opinion has been established by law, has a permanent existence, exercises binding jurisdiction, is bound by rules of adversary procedure, applies the rule of law and is independent, as the EC Court of Justice has enumerated the criteria in a recent case.[1]

25 The purpose of Article 34 of the Surveillance and Court Agreement is to establish co-operation between the EFTA Court and the courts and tribunals in the EFTA States. It is intended as a means of ensuring a uniform interpretation of the EEA Agreement and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of the EEA Agreement. That purpose must also be taken into account in interpreting the expression "court or tribunal".

26 The Tullilautakunta is a permanent body which has been entrusted by law to exercise its functions. Its jurisdiction is compulsory. Its composition is defined in the relevant Act. It must

[1] Case C-393/92 *Municipality of Almelo and Others* v. *Energiebedrijf IJsselmij NV* [1994] ECR I-1477, ground 21.

apply the law. The procedure before the Tullilautakunta is the same as that before the administrative courts. Its decisions are binding and enforceable.

27 In the present proceedings only one party appeared before the Tullilautakunta. However, that frequently occurs in Finland as well as in Sweden in proceedings before administrative courts, including the Supreme Administrative Court. If the right to request an advisory opinion from the EFTA Court were subject to the procedure before the national court being adversarial, this would result in the administrative courts in Finland (and also in Sweden) being largely unable to refer a question to the EFTA Court. In most cases these are the very courts which are the competent judicial bodies for the application of EEA rules.

28 The fact that it is not the task of the Tullilautakunta but of the customs agent of the District Customs House in question to defend the interests of the State strengthens even further the reasons for considering the decisions of the Tullilautakunta to be of a judicial character since it is the task of the Tullilautakunta to decide cases impartially and according to law.

29 The Tullilautakunta appears to be closely linked to the central customs administration. However, on balance, the independence granted and assumed to be practised by the Tullilautakunta and the elements characteristic of judicial procedures prescribed for it lead to the conclusion that this body is, in fact and law, independent and impartial.

30 In this regard, and considering all the above aspects, it must be noted that the Tullilautakunta and its members are neither involved in the decisions of the district customs houses in individual cases, nor in the decision whether to appeal to the Supreme Administrative Court. They are thus, in other words, not involved in more than one instance of decision-making in the same case. From this and from its independent position both in relation to parties in disputes before it and to the district customs houses it follows that there cannot be said to be such an organizational link between the Tullilautakunta and the National Board of Customs as would preclude the Tullilautakunta from being considered as a court or tribunal in the sense of Article 34 of the Surveillance and Court Agreement.

31 In those circumstances, and bearing in mind that the advisory opinion procedure is a specially established means of co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide on the cases before them, the request for an advisory opinion from the Tullilautakunta is admissible.

Remarks on the interpretation of the EEA Agreement

32 When interpreting the EEA Agreement it must be borne in mind that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area. Accordingly, in the fourth recital of the Preamble to the EEA Agreement the Contracting Parties state the following:

> "CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and

achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;".

The fifteenth recital of the Preamble reads:

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

33 Further, in accordance with Article 6 EEA, without prejudice to future developments of case law, the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community, must, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement (2 May 1992).

34 In accordance with Article 3(2) of the Surveillance and Court Agreement, the EFTA Court and the EFTA Surveillance Authority, in the interpretation and application of the EEA Agreement, are to pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community in so far as they are identical in substance to the provisions of the EEA Agreement.

35 The EEA Agreement also contains in other places a number of elements aimed at achieving the homogeneity objective.

Material scope

36 Before dealing with the specific questions referred by the Tullilautakunta, two particular aspects relating to the material scope of application of the EEA Agreement have to be addressed: namely, the rules of origin, which set out the criteria for a product to be considered as originating within the area of the EEA, and the rules on product coverage, which determine whether a specific product falls within the scope of the Agreement.

37 As to the *rules of origin*, the application of Article 16 EEA is not limited to originating products. As regards Article 11 EEA, on the other hand, it follows from Article 8(2) EEA that this provision only applies to products originating in the Contracting Parties. It falls upon the Tullilautakunta, when deciding on the case, to determine whether the products in question fulfil the criteria of the relevant origin rules.

38 As concerns the *product coverage,* Article 8(3) EEA provides that the Agreement, unless otherwise specified, applies only to (a) products falling within Chapters 25 to 97 of the so-

called "Harmonized System" (HS), established in the International Convention on the Harmonized Commodity Description and Coding System of 1983, excluding the products listed in Protocol 2 EEA, and (b) products specified in Protocol 3 EEA, subject to the specific arrangements set out in that Protocol.

39 The questions referred by the Tullilautakunta regarding the interpretation of Articles 11 and 16 EEA concern import of whisky and wine. As whisky and wine fall within Chapter 22 of the HS, neither of them falls under Article 8(3)(a) EEA. Whisky is, however, listed in Table II of Protocol 3 EEA. According to Article 8(3)(b), it is thus a product to which the provisions of the Agreement, including Articles 11 and 16 EEA, are applicable.

40 Wine, falling under HS heading No 22.04, is, however, not listed in any of the tables to Protocol 3 EEA and is thus to this extent excluded from the general scope of the EEA Agreement.

41 When examining whether there are nevertheless certain provisions of the Agreement which apply to wine, it should first be noted that paragraph 2 of Protocol 8 EEA on State Monopolies lays down that Article 16 EEA also applies to wine. Thus Article 16 EEA covers both whisky and wine.

42 It may further be observed that, in relation to products other than those covered by Article 8(3) EEA, Article 18 EEA obliges the Contracting Parties, without prejudice to the specific arrangements governing trade in agricultural products, to ensure *inter alia* that the arrangements provided for in Article 23(b) (which refers to Protocol 47) regarding the abolition of technical barriers to trade in wine, are not compromised by "other technical barriers to trade".

43 The Court is of the view that it is not necessary to interpret Article 18 EEA in the present case.

The first question

44 By its *first question* the Tullilautakunta in essence seeks to ascertain whether a requirement to obtain an authorization from a statutory State monopoly in order to be allowed to import alcoholic beverages and to put them into free circulation for commercial purposes to be sold to restaurants constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA.

45 It appears from the documentation submitted that in order to obtain such an authorization or licence, the applicant must furnish the monopoly with information and documentation of an economic nature, including, *inter alia*, the names of the sellers supplying the products, the price and the names of the restaurants buying the alcoholic beverages imported by the applicant.

46 Under Article 11 EEA quantitative restrictions on imports and all measures having equivalent effect are prohibited between the Contracting Parties. That Article is identical in substance to Article 30 EC. Thus Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 11 EEA.

47 As to the relevant case law regarding Article 30 EC, the EC Court of Justice has consistently held (see, in particular, *Dassonville*[2]), that the prohibition of measures having an effect equivalent to quantitative restrictions, laid down in Article 30 EC, applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. The application of Article 30 EC is therefore not conditional upon proof that the measure in question actually restricts imports; it is sufficient that it potentially has an effect on trade.

48 The EC Court of Justice has also held (see, in particular, *France* v. *Commission*[3]), that the competition aspects of Article 3(g) EC, (cf. Article 1(1) and (2)(e) EEA), must be taken into account when interpreting Article 30 EC. As far as import restrictions are concerned, the EC Court of Justice held in the same case that exclusive import rights in the telecommunications terminal sector, which, *inter alia*, deprive traders of the opportunities of having their products purchased by consumers, are incompatible with Article 30 EC.

49 The obligation to obtain an import licence or permit from the importing Member State before importing goods has also been declared incompatible with Article 30 EC, even where licences were granted automatically. In *International Fruit*[4] the EC Court of Justice held that: "... apart from the exceptions for which provision is made by Community law itself [Articles 30 and 34(1)] preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure".

50 The Court holds that an obligation to obtain an authorization or licence from a statutory State monopoly in order to import alcoholic beverages and to put them into free circulation results in an impediment to intra-EEA trade and is capable of giving rise to delay and abuse on the part of the importing State. Such an obligation constitutes, even if the authorization or licence is granted automatically, a measure having an effect equivalent to a quantitative restriction within the meaning of Article 11 EEA.

51 Given the discriminatory nature of the measure in question, it cannot be justified by any of the "mandatory requirements" recognized by the EC Court of Justice in *Cassis de Dijon*[5] and in other cases

52 Under Article 13 EEA the provisions of Article 11 do not, however, preclude prohibitions or restrictions on imports, which are justified, *inter alia*, on grounds of the protection of health and life of humans, animals or plants. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties. Article 13 EEA is identical in substance to Article 36 EC. Thus Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 13 EEA.

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[2] Case 8/74 *Procureur du Roi* v. *Benoît and Gustave Dassonville* [1974] ECR 837, ground 5.
[3] Case C-202/88 *French Republic* v. *Commission of the European Communities* [1991] ECR I-1223.
[4] Joined Cases 51-54/71 *International Fruit Company NV and Others* v. *Produktschap voor Groenten en Fruit* [1971] ECR 1107, ground 9.
[5] Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

53 The Finnish Government argues that in its case law the EC Court of Justice has found that there are circumstances where restrictions on imports caused by prerogatives granted to a State monopoly are justified in order to achieve the objectives of Article 36 EC. It therefore submits that, in Finland as in other Nordic countries, the alcohol policy is part of the general health and social policy and that State control measures are used to minimize the harmful effects to health by restricting the consumption of alcoholic beverages. Restrictions concerning importation have also been used to implement health and social policy objectives by preventing the importation of products that are considered harmful. According to the Finnish Government this policy is in line with the 1984 Resolution on the Targets for Health for All by the WHO Regional Committee for Europe.

54 The Finnish Government also refers to a unilateral declaration included in the final act to the EEA Agreement, where the Governments of Finland, Iceland, Norway and Sweden recall that, without prejudice to the obligations arising under the Agreement, their alcohol monopolies are based on important health and social policy considerations.

55 In the view of the Norwegian Government, consideration must be given to whether a monopoly has been established mainly for trade policy reasons or for control purposes on grounds of, for instance, public health. A monopoly which only carries out functions in keeping with national alcohol policy may be more likely to be considered as justified under Article 13. The Contracting Parties to the EEA Agreement must have a certain discretion in determining which measures they wish to employ for the purpose of their national alcohol policy.

56 The EC Court of Justice has consistently held (e.g. in *Bauhuis* v. *Netherlands*[6]) that Article 36 EC must be interpreted strictly, as it constitutes a derogation from the basic rule that all obstacles to the free movement of goods between the Member States must be eliminated. It follows from Article 6 EEA that this also applies to Article 13 EEA.

57 The first sentence of Article 13 provides that the protection of health and life of humans is specifically recognised as a possible ground for derogating from Article 11 EEA. There is no reason to doubt that there are social and health considerations behind the Finnish alcohol policy and that the decision to adopt a State monopoly system was strongly motivated by those concerns.

58 However, according to the second sentence of Article 13 EEA, prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties. The principle of proportionality, which underlies the second sentence of Article 13 EEA, requires that the power of the Contracting Parties to prohibit imports from other Contracting Parties should be restricted to that which is necessary to attain the legitimate aim of protecting health.

59 It must therefore be ascertained whether a requirement to obtain an authorization or licence from a statutory State monopoly in order to import alcoholic beverages and to put them into free circulation constitutes a measure which is proportionate in relation to the objective

[6] Case 46/76 *W. J. G. Bauhuis* v. *The Netherlands State* [1977] ECR 5.

pursued. In other words could such a result be achieved by means of less restrictive measures, or is the measure necessary and hence justified under Article 13 EEA?

60 The EC Court of Justice, when interpreting Article 36 EC (e.g. *Denkavit*[7] and *van Bennekom*[8]), has consistently held that a Government relying on that Article bears the burden of proving that the contentious measures are justified. It follows from Article 6 EEA that this also applies to Article 13 EEA. There is no reason to question the explanation of the Finnish Government that the import monopoly of Oy Alko Ab forms part of the alcohol policy and thus of the general health and social policy aimed at minimizing harmful effects to health by restricting the consumption of alcoholic beverages. However, no convincing evidence has been submitted that such an objective necessitates all imports of alcoholic beverages into Finland being entrusted solely to a statutory monopoly, which in Finland presently also holds the exclusive rights to manufacture, resell to consumers and export alcoholic beverages, or that the objective cannot be as effectively achieved by measures which are less restrictive of intra-EEA trade.

61 The answer to the *first question* must therefore be that Article 11 EEA must be interpreted as precluding a national measure which confers on a statutory State monopoly the exclusive right to import alcoholic beverages falling within the product coverage of the EEA Agreement and originating in the Contracting Parties, or the application to intra-EEA trade of national provisions which require the authorization of the statutory State monopoly for the importation and putting into free circulation of such products, even if such an authorization is granted automatically. Neither can such measures be justified under Article 13 EEA merely because they form part of an alcohol policy aimed at minimizing the harmful effects to health of consumption of alcoholic beverages, since this objective can be achieved by measures which are less restrictive of the free movement of goods.

The first part of the second question

62 By the *first part of the second question* the Tullilautakunta seeks to ascertain whether Article 16 EEA should be interpreted as precluding from 1 January 1994 the existence of a national measure which confers the exclusive right to import alcoholic beverages into Finland on a statutory State monopoly.

63 Under Article 16(1) EEA, the Contracting Parties must ensure that any State monopoly of a commercial character is adjusted so that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of EC Member States and EFTA States. This obligation must, by Article 16(2), apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly, supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions likewise apply to monopolies delegated by the State to others.

[7] Case 251/78 *Firma Denkavit Futtermittel GmbH* v. *Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* [1979] ECR 3369.
[8] Case 227/82 *Criminal proceedings against Leendert van Bennekom* [1983] ECR 3883.

64 Article 16 EEA is identical in substance to Article 37(1) EC. Thus Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 16 EEA.

65 Without requiring the abolition of State monopolies of a commercial character, Article 16 EEA prescribes in mandatory terms that such monopolies must be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of EC Member States and EFTA States.

66 In *Manghera*[9] the EC Court of Justice held that Article 37(1) EC aims at ensuring compliance with the fundamental rule of the free movement of goods, in particular by the abolition of quantitative restrictions and measures having equivalent effect. The EC Court of Justice stated that this objective would not be attained if, in a Member State where a commercial monopoly exists, the free movement of goods from other Member States similar to those with which the national monopoly is concerned were not ensured. The EC Court of Justice therefore concluded that the exclusive right to import manufactured products of the monopoly in question constituted, in respect of Community exporters, a discrimination prohibited by Article 37(1). Consequently, every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right of import from other Member States.

67 With reference to *Manghera*, the Finnish Government agrees that Article 37(1) EC is to be interpreted as meaning that exclusive rights to import are prohibited. However, it submits that, although under the Alcohol Act Oy Alko Ab is granted the exclusive right to import alcoholic beverages, the company has, in practice, made importation possible for individuals. In such cases the monopoly is only formally the importer of the goods.

68 According to the Norwegian Government, a traditional import monopoly which determines which goods are to be imported into the country controls the flow of goods in a way which is contrary to the principle of the free movement of goods and is discriminatory. However, an import monopoly which cannot refuse to handle an import order should, in the view of the Norwegian Government, not be considered discriminatory.

69 The EFTA Surveillance Authority, with reference to *Manghera,* maintains that Article 16 EEA must be interpreted so as to prohibit the maintenance of a State monopoly with exclusive import rights.

70 The EC Commission, also referring to *Manghera* (and *Commission* v. *Hellenic Republic*[10]), is of the opinion that a State monopoly enjoying an exclusive right to import certain goods determines in a discretionary way supply of and demand for those products and consequently their price on the domestic market. An exclusive right to import certain goods, therefore, according to the EC Commission, constitutes discrimination, not only in relation to exporters based in other Member States but also in relation to users based in the Member State concerned.

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[9] Case 59/75 *Pubblico Ministero* v. *Flavia Manghera and Others* [1976] ECR 91.
[10] Case C-347/88 *Commission of the European Communities* v. *Hellenic Republic* [1990] ECR I-4747.

71 The Court finds that a statutory State monopoly that enjoys exclusive rights to all imports of certain goods into the State, thereby also holds the discretionary right to determine the supply of those products on the domestic market and may consequently also determine their price. Such an exclusive right of import of certain goods, therefore, discriminates both against exporters in other Contracting Parties and consumers based in the Contracting Party concerned and is thus contrary to Article 16 EEA. This assessment is not mitigated by the fact that an authorization for imports in the name of the monopoly can be granted in individual cases to other economic operators.

72 The Finnish Government considers, with reference to the transitional period allowed under Article 37 EC, the complexity of the issue and the important social and economic considerations involved, that a reasonable period of adjustment should be allowed.

73 Article 16 EEA does not, unlike Article 37 EC, contain any provisions regarding a transitional period during which the required adjustments are to take place. Certain transitional periods for monopolies (salt in Austria and fertilizers in Iceland) are instead laid down separately in Protocol 8 EEA. From this it follows that any adjustments of State monopolies which were required in order to comply with Article 16 EEA should, except for the cases specifically mentioned in Protocol 8 EEA, have taken place by the time of entry into force of the EEA Agreement, i.e. 1 January 1994.

74 The answer to the *first part of the second question* is therefore that Article 16 EEA must be interpreted as meaning that, as from 1 January 1994, every State monopoly of a commercial character not covered by Protocol 8 EEA must be adjusted so as to eliminate the exclusive right to import the goods the subject of the monopoly into a Contracting Party from other Contracting Parties.

The second part of the second question

75 In the *second part of its second question* the Tullilautakunta asks whether Article 16 EEA is so unconditional and sufficiently precise as to have direct legal effect. Section 1 of the Finnish Act implementing the EEA Agreement states that the Agreement, its Protocols and Annexes as well as the acts referred to in the Annexes are part of Finnish law. Section 2(1) of the same Act states that a Finnish Act or Decree must not be applied if it is contrary to an unconditional and sufficiently precise provision of the Agreement.

76 Before examining the second part of the second question it is important to look at the legal framework within which this question has arisen.

77 Protocol 35 EEA on the Implementation of EEA Rules stipulates that the EFTA States are under an obligation to ensure, if necessary by a separate statutory provision, that in cases of conflict between implemented EEA rules and other statutory provisions the implemented EEA rules prevail. It is inherent in the nature of such a provision that individuals and economic operators in cases of conflict between implemented EEA rules and national statutory provisions must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective

national legal order, if they are unconditional and sufficiently precise. A national court which, in such circumstances, considers that it is necessary to enable it to give judgment to know whether an implemented provision of the EEA Agreement is unconditional and sufficiently precise, must consequently be entitled to ask the EFTA Court for an opinion thereon under Article 34 of the Surveillance and Court Agreement.

78 While the Court cannot express itself on the interpretation of Finnish law, a matter which in this procedure of judicial cooperation is entirely for the national court, it is clear that the Tullilautakunta in the present case wishes to know whether Article 16 EEA fulfils the implicit criteria of Protocol 35 of being unconditional and sufficiently precise.

79 As already concluded above, Article 16 EEA is identical in substance to Article 37(1) EC. In the context of EC law the latter Article has been considered to be unconditional and sufficiently precise since the end of the transitional period. In *Manghera*[11] the EC Court of Justice stated that the prohibition of discrimination between nationals of EC Member States regarding the conditions under which goods are procured and marketed constitutes an obligation with a very precise objective and that this obligation is no longer subject to any condition. The Court of Justice thus held that Article 37(1) was capable of being relied on by nationals of Member States before national courts.

80 In comparing Article 16 EEA with Article 37(1) EC, it is clear that the two Articles lay down the same precise obligation as to the prohibition of discrimination regarding the conditions under which goods are procured and marketed and that Article 16, like Article 37(1) after the end of the transitional period, does not make this obligation subject to any condition. In view of the homogeneity objective referred to above (ground 32) and in order to ensure equal treatment of individuals throughout the EEA, Article 16 must also be interpreted as fulfilling the criteria of being unconditional and sufficiently precise.

81 The answer to the *second part of the second question* of the Tullilautakunta is therefore that Article 16 EEA must be interpreted as fulfilling the implicit criteria in Protocol 35 EEA of being unconditional and sufficiently precise.

Costs

82 The costs incurred by the Finnish, Norwegian and Swedish Governments, 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 party to the main proceedings is concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

[11] Case 59/75 *Pubblico Ministero* v. *Flavia Manghera and Others* [1976] ECR 91.

THE COURT,

in answer to the questions referred to it by the Tullilautakunta, by order of 19 April 1994, hereby gives the following Advisory Opinion:

1. Article 11 EEA must be interpreted as precluding a national measure which confers on a statutory State monopoly the exclusive right to import alcoholic beverages falling within the product coverage of the EEA Agreement and originating in the Contracting Parties, or the application to intra-EEA trade of national provisions which require the authorization of the statutory State monopoly for the importation and putting into free circulation of such products, even if such an authorization is granted automatically. Neither can such measures be justified under Article 13 EEA merely because they form part of an alcohol policy aimed at minimizing the harmful effects to health of consumption of alcoholic beverages, since this objective can be achieved by measures which are less restrictive of the free movement of goods.

2. Article 16 EEA must be interpreted as meaning that, as from 1 January 1994, every State monopoly of a commercial character not covered by Protocol 8 EEA must be adjusted so as to eliminate the exclusive right to import the goods the subject of the monopoly into a Contracting Party from other Contracting Parties.

3. Article 16 EEA must be interpreted as fulfilling the implicit criteria in Protocol 35 EEA of being unconditional and sufficiently precise.

Leif Sevón Bjørn Haug Thór Vilhjálmsson

Kurt Herndl Sven Norberg

Delivered in open court in Geneva on 16 December 1994.

Karin Hökborg
Registrar

Leif Sevón
President

2. *Erla María Sveinbjörnsdóttir*, mál nr. E-9/97, EFTA Court Report [1998] 95

RÁÐGEFANDI ÁLIT
10. desember 1998

(Tilskipun ráðsins 89/987/EBE – Landsréttur ekki réttilega lagaður að ákvæðum tilskipunar – Skaðabótaábyrgð EFTA-ríkis)

Mál E-9/97

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

Erla María Sveinbjörnsdóttir

gegn

íslenska ríkinu

varðandi túlkun 6. gr. EES-samningsins og tilskipunar ráðsins 80/987/EBE, eins og tilskipuninni var breytt með tilskipun ráðsins 87/164/EBE. Vísað er til tilskipunarinnar í 24. tl. XVIII. viðauka við EES-samninginn.

DÓMSTÓLLINN,

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

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, Erlu Maríu Sveinbjörnsdóttur. Í fyrirsvari er Stefán Geir Þórisson hrl., Lögmenn Klapparstíg;

– Stefndu, ríkisstjórn Íslands. Í fyrirsvari er Árni Vilhjálmsson hrl., A&P Lögmenn og honum til aðstoðar sem ráðgjafi er Martin Eyjólfsson, lögfræðingur í utanríkisráðuneytinu;

– Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Jan Bugge-Mahrt, aðstoðardeildarstjóri í konunglega utanríkisráðuneytinu;

– Ríkisstjórn Svíþjóðar. Í fyrirsvari sem umboðsmaður er Erik Brattgård, deildarstjóri í utanríkisráðuneytinu;

– Ríkisstjórn Stóra-Bretlands og Norður Írlands ("ríkisstjórn Bretlands"). Í fyrirsvari sem umboðsmaður er Dawn Cooper, lagadeild fjármálaráðuneytisins;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Håkon Berglin, deildarstjóri lagadeildar Eftirlitsstofnunar EFTA og honum til aðstoðar sem ráðgjafar eru Bjarnveig Eiríksdóttir og Anne-Lise H. Rolland, lögfræðingar í deildinni;

– Framkvæmdastjórn Evrópubandalaganna ("framkvæmdastjórnin"). Í fyrirsvari sem umboðsmenn eru Peter Jan Kuijper og Dimitrios Gouloussis, lögfræðilegir ráðgjafar hjá lagadeild;

með tilliti til skýrslu framsögumanns og munnlegs málflutnings stefnanda, stefnda, ríkisstjórnar Noregs, ríkisstjórnar Svíþjóðar, í fyrirsvari Anders Kruse, deildarstjóri í utanríkisráðuneytinu, Eftirlitsstofnunar EFTA og framkvæmdastjórnarinnar þann 17. september 1998,

látið uppi svohljóðandi

Ráðgefandi álit

Málsatvik og meðferð málsins

1 Með úrskurði frá 5. nóvember 1997 og beiðni dagsettri 12. nóvember 1997, sem skráð var hjá dómstólnum 18. nóvember 1997, óskaði Héraðsdómur Reykjavíkur, Íslandi, eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Erlu Maríu Sveinbjörnsdóttur, stefnanda, og íslenska ríkisins, stefnda.

2 Stefnandi málsins fyrir héraðsdómi, Erla María Sveinbjörnsdóttir, hafði starfað um langt árabil á vélaverkstæði er henni var sagt upp störfum með uppsagnarbréfi dags. 29. desember 1994 og skyldi uppsögnin taka gildi 1. janúar 1995. Uppsagnarfrestur var 6 mánuðir og var vinnuframlags hennar ekki óskað í uppsagnarfrestinum. Stefnandi fékk greidd laun til 12. mars 1995. Þann 22. mars 1995 var vélaverkstæðið tekið til gjaldþrotaskipta.

3 Stefnandi lýsti kröfu sinni í þrotabúið og krafðist jafnframt greiðslu frá Ábyrgðasjóði launa. Krafðist stefnandi launa á uppsagnarfresti, ógreiddrar hækkunar á launin, orlofs frá 1. maí 1994

út uppsagnarfrestinn til 30. júní 1995, orlofsuppbótar og desemberuppbótar, samtals kr. 743.844. Báðum kröfum stefnanda var hafnað.

4 Kröfu stefnanda á hendur þrotabúinu var hafnað á þeim forsendum að stefnandi væri systir eiganda 40% hlutafjár í vélaverkstæðinu og væri því ekki unnt að viðurkenna kröfuna sem forgangskröfu í búið. Því til stuðnings var vísað til 112. gr., sbr. 3. gr., laga nr. 21/1991 um gjaldþrotaskipti (hér eftir "lög nr. 21/1991" eða "gjaldþrotaskiptalög"). Samkvæmt 112. gr. gjaldþrotaskiptalaga njóta kröfur um ógreidd laun og kröfur svipaðs eðlis að jafnaði forgangsréttar, en þeir sem eru "nákomnir" þrotamanni njóta ekki þess réttar fyrir kröfum sínum. Orðið "nákomnir" er skilgreint í 3. gr. gjaldþrotaskiptalaga og tekur m.a. til manns og félags, sem maður honum nákominn á verulegan hlut í. Þá segir að nákomnir séu þeir sem eru "skyldir í beinan legg eða fyrsta lið til hliðar".

5 Kröfu stefnanda á hendur Ábyrgðasjóði launa var hafnað á þeim forsendum að krafan hefði ekki verið viðurkennd sem forgangskrafa í þrotabúið. Þá var vísað til 1. mgr. 5. gr. og 6. gr. laga nr. 53/1993 um ábyrgðasjóð launa vegna gjaldþrota (hér eftir "lög nr. 53/1993" eða "lög um ábyrgðasjóð launa"). Samkvæmt 1. mgr. 5. gr. laganna tekur ábyrgð sjóðsins til tilgreindra krafna "sem viðurkenndar hafa verið sem forgangskröfur semkvæmt gjaldþrotaskiptalögum". Ákvæði 6. gr. kemur þó í veg fyrir að tilteknir launþegar geti krafið sjóðinn um greiðslu krafna, m.a. þeir sem átt hafa 5% hlutafjár eða meira í gjaldþrota hlutafélagi og maki þess sem svo er ástatt um "svo og skyldmenni hans í beinan legg og maki skyldmennis í beinan legg".

6 Stefnandi höfðaði þá skaðabótamál á hendur ríkinu með stefnu birtri 12. mars 1997. Í stefnunni byggði stefnandi á því að íslenska ríkið bæri skaðabótaábyrgð á því að hafa ekki lagað löggjöf landsins réttilega að EES-samningnum, þ.e. að hafa ekki lagað löggjöf landsins (1. mgr. 5. gr. og 6. gr. laga nr. 53/1993 og 3. mgr. 112. gr. laga nr. 21/1991, sbr. 3. gr. sömu laga) réttilega að þeirri gerð sem vísað er til í 24. tl. XVIII. viðauka við EES-samninginn.

7 Héraðsdómur Reykjavíkur taldi túlkun á ákvæðum EES-samningsins nauðsynlega áður en niðurstaða fengist í málinu. Með vísan til þess og til 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls (hér eftir "samningur um eftirlitsstofnun og dómstól") óskaði dómstóllinn eftir ráðgefandi áliti um eftirfarandi spurningar:

> *1. Ber að skýra gerð þá sem er að finna í 24. tl. í viðauka XVIII við Samninginn um Evrópska efnahagssvæðið (tilskipun ráðsins nr. 80/987/EBE frá 20. október 1980, eins og henni var breytt með tilskipun ráðsins 87/164/EBE frá 2. mars 1987), einkum 2. mgr. 1. gr. og 10. gr. hennar, á þann veg að samkvæmt henni megi með landslögum útiloka launþega, vegna skyldleika við eiganda sem á 40% í gjaldþrota hlutafélagi, frá því að fá greidd laun frá ábyrgðarsjóði launa á vegum ríkisins þegar launþeginn á ógoldna launakröfu á hendur þrotabúinu. Um er að ræða skyldleika í fyrsta lið til hliðar, þ.e.a.s. systkini?*
>
> 2. *Ef svarið við spurningu nr. 1 er á þá leið, að launþegann megi ekki útiloka frá því að fá laun sín greidd, varðar það ríkið skaðabótaábyrgð gagnvart launþeganum að hafa ekki, samfara aðild sinni að Samningnum um Evrópska efnahagssvæðið, breytt landslögum á þann veg að launþeginn ætti samkvæmt þeim lögbundinn rétt til launagreiðslnanna?*

8 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur álitsins krefjast.

Löggjöf

Reglur EES-samningsins

9 Í 24. tl. XVIII. viðauka við EES-samninginn er vísað til tilskipunar ráðsins 80/987/EBE frá 20. október 1980 um samræmingu á lögum aðildarríkjanna um vernd til handa launþegum verði vinnuveitandi gjaldþrota, eins og henni var breytt með tilskipun ráðsins 87/164/EBE, (hér eftir "tilskipunin").

10 1. gr. tilskipunarinnar er svohljóðandi:

> "1. Tilskipun þessi gildir um kröfur launþega á hendur vinnuveitendum sem eru gjaldþrota í skilningi 1. mgr. 2. gr., í tengslum við ráðningarsamninga og ráðningarsamkomulag.
>
> 2. Aðildarríkjunum er heimilt að undanþiggja kröfur tiltekinna hópa frá gildissviði tilskipunar þessarar vegna ráðningarsamnings eða ráðningarsamkomulags af sérstökum toga eða vegna annars konar trygginga sem veita launþegunum sambærilega vernd og kveðið er á um í tilskipun þessari.
>
> Í viðauka eru taldir upp þeir hópar launþega sem getið er um í undanfarandi undirgrein.
>
> 3. Tilskipun þessi gildir ekki um Grænland. Þessi undantekning skal tekin til endurskoðunar verði breytingar á atvinnuháttum þar."

11 Í 24. tl. XVIII. viðauka við EES-samninginn, þar sem vísað er til tilskipunarinnar, er m.a. mælt fyrir um eftirfarandi aðlögun með tilliti til EES-samningsins:

> "a) Eftirfarandi bætist við I. þátt viðaukans:
>
> …
>
> H. ÍSLAND
>
> 1. Stjórnarmenn gjaldþrota félags eftir að fjárhagsstaða félagsins varð mjög slæm.
>
> 2. Þeir sem hafa átt 5% eða meira af fjármagni gjaldþrota hlutafélags.
>
> 3. Framkvæmdastjóri gjaldþrota félags eða aðrir sem vegna starfa sinna fyrir félagið höfðu þá yfirsýn yfir fjárhag þess að þeim mátti vera ljóst að gjaldþrot vofði

yfir þegar teknanna var aflað.

4. Maki einstaklings sem er í þeirri aðstöðu sem tilgreind er í 1. – 3. lið svo og ættingi einstaklings og ættingi maka í beinan legg.[1]"

12 10. gr. tilskipunarinnar er svohljóðandi:

"Tilskipun þessi hefur ekki áhrif á rétt aðildarríkja:

a) til þess að gera nauðsynlegar ráðstafanir til að koma í veg fyrir misnotkun;

b) til að hafna þeirri greiðsluábyrgð, sem getið er um í 3. gr. eða þeirri greiðsluskyldu, sem getið er um í 7. gr., eða lækka hana komi í ljós að skuldabindingin sé óréttmæt vegna sérstakra tengsla milli launþegans og vinnuveitandans og sameiginlegra hagsmuna sem leiðir til þess að þeir gera með sér leynilegt samkomulag."

Íslensk löggjöf

13 Ákvæði 1. mgr. 5. gr. laga nr. 53/1993 eru svohljóðandi:

"Ábyrgð sjóðsins tekur til eftirfarandi krafna í bú vinnuveitand sem viðurkenndar hafa verið sem forgangskröfur samkvæmt gjaldþrotaskiptalögum:

a. kröfu launþega um vinnulaun fyrir síðustu þrjá starfsmánuði hans hjá vinnuveitanda, þar með talinn hluti launa sem haldið var eftir af vinnuveitanda skv. VIII. kafla laga nr. 86/1988,
b. kröfu launþega um orlofslaun sem koma áttu til útborgunar á síðustu þremur starfsmánuðum hans hjá vinnuveitanda,
c. kröfu viðurkennds lífeyrissjóðs um vangoldin lífeyrissjóðsiðgjöld sem fallið hafa í gjalddaga á síðustu 18 mánuðum fyrir frestdag að uppfylltum skilyrðum III. kafla laga þessara; ábyrgðin takmarkast þó við lágmark 4. gr. laga nr. 55/1980,
d. bóta vegna launamissis í allt að þrjá mánuði vegna riftunar eða uppsagnar vinnusamnings, enda skal sá sem krefst bóta samkvæmt þessum lið sýna fram á með vottorði vinnumiðlunar að hann hafi leitað eftir annarri atvinnu þann tíma sem bóta er krafist,
e. bóta til launþega sem vinnuveitanda ber að greiða vegna tjóns af völdum vinnuslyss eða til þess sem tilkall á til bóta vegna dauðsfalls launþega, enda fylgi bótakröfunni forgangsréttur í bú vinnuveitandans,
f. vaxta skv. 5. gr. vaxtalaga, nr. 25/1987, af kröfum samkvæmt stafliðum a- e frá gjalddaga þeirra til þess dags er krafan fæst greidd úr ábyrgðasjóði,

[1] Opinber texti. Enskur texti er svohljóðandi: "4. The spouse of a person in a situation specified in clauses 1 to 3 as well a his/her direct relative and direct relative´s spouse."

g. skiptatryggingar sem launþegar eða lífeyrissjóður hafa greitt. Sama gildir um óhjákvæmilegan kostnað sem launþegi eða sá sem krefst bóta skv. e- lið hefur orðið að greiða vegna nauðsynlegra ráðstafana til innheimtu kröfu sinnar, þó að hámarki samkvæmt ákvörðun sjóðstjórnar."

14 Ákvæði 1. mgr. 6. gr. laga nr. 53/1993 eru svohljóðandi:

"Eftirtaldir launþegar geta þó ekki krafið sjóðinn um greiðslu krafna skv. a-d- liðum 1. mgr. 5. gr.:

a. Þeir sem sæti áttu í stjórn gjaldþrota félags eftir að fjárhag þess tók verulega að halla. Þetta á þó ekki við um þá sem sæti eiga í varastjórn félags nema þeir hafi gegnt stjórnarstörfum á umræddu tímabili.
b. Þeir sem átt hafa 5% hlutafjár eða meira í gjaldþrota hlutafélagi.
c. Forstjóri, framkvæmdastjóri og þeir aðrir sem vegna starfa sinna hjá hinum gjaldþrota vinnuveitanda áttu að hafa þá yfirsýn yfir fjárhag fyrirtækisins að þeim mátti ekki dyljast að gjaldþrot þess væri yfirvofandi á þeim tíma sem unnið var fyrir vinnulaununum.
d. Maki þess sem ástatt er um sem segir í a-c-liðum, svo og skyldmenni hans í beinan legg og maki skyldmennis í beinan legg. (...)"

15 Samkvæmt 1. mgr. 112. gr. gjaldþrotaskiptalaga eru launakröfur og skyldar kröfur að jafnaði forgangskröfur í þrotabú. Frá þeirri meginreglu er þó eftirfarandi undantekning í 3. mgr. 112. gr.:

"Hvorki njóta þeir sem eru nákomnir þrotamanni réttar skv. 1.-3. tölul. 1. mgr. fyrir kröfum sínum né þeir sem hafa átt sæti í stjórn eða haft með höndum framkvæmdastjórn félags eða stofnunar sem er til gjaldþrotaskipta."

16 Hugtakið "nákomnir" í 112. gr. er skilgreint í 3. gr. gjaldþrotaskiptalaga, sem er svohljóðandi:

"Orðið nákomnir er í lögum þessum notað um þá sem eftirfarandi tengsl standa milli:

1. hjón og þá sem búa í óvígðri sambúð,
2. þá sem eru skyldir í beinan legg eða fyrsta lið til hliðar, en með skyldleika er í þessu sambandi einnig átt við tengsl sem skapast við ættleiðingu eða fóstur,
3. þá sem tengjast með hjúskap eða óvígðri sambúð með sama hætti og um ræðir í 2. tölul.,
4. mann og félag eða stofnun sem hann eða maður honum nákominn á verulegan hluta í,
5. tvö félög eða stofnanir ef annað þeirra eða maður nákominn öðru þeirra á verulegan hluta í hinu,
6. menn, félög og stofnanir sem eru í sambærilegum tengslum og um ræðir í 1.-5. tölul."

Fyrri spurningin

17 Samkvæmt 1. mgr. 1. gr. tilskipunarinnar er það meginregla að allir launþegar eiga rétt á greiðslu frá ábyrgðasjóði launa verði vinnuveitandi gjaldþrota. Tilskipunin heimilar tvær undanþágur frá meginreglunni og koma þær fram í 2. mgr. 1. gr. annars vegar og í 10. gr. hins vegar. Með fyrri spurningunni leitast Héraðsdómur Reykjavíkur við að ákvarða umfang undanþáganna með því að spyrja um hvort túlka beri tilskipunina svo að hún heimili almenna reglu í íslenskum lögum sem útilokar systkini eiganda 40% hlutafjár í gjaldþrota félagi, sem þau eru launþegar hjá, frá því að fá greiðslur frá sjóðnum.

18 Dómstóllinn bendir á að kröfur stefnanda taka til tímabilsins frá 1. maí 1994 til 30. júní 1995. Dómstóllinn telur rétt að vekja athygli á að samkvæmt tilskipuninni skulu aðildarríkin gera nauðsynlegar ráðstafanir til að tryggja greiðslur á óinnheimtum kröfum launþega fyrir tiltekin tímabil sem ákvæði eru um í 3. og 4. gr. tilskipunarinnar. Stjórnvöld í ríkjunum hafa val um þá dagsetningu sem ábyrgðin miðast við innan ramma ákvæða 2. mgr. 3. gr. og miðað við þau tímamörk sem ákveðin eru í 2. mgr. 4. gr. Vernd launþega samkvæmt tilskipuninni er lágmarksvernd sem er takmörkuð við ábyrgð á launum fyrir þá dagsetningu sem stjórnvöld velja. Tilskipunin hefur þó ekki áhrif á rétt aðildarríkjanna til að beita eða koma á lögum og stjórnsýslufyrirmælum sem eru launþegum hagstæðari, sbr. 9. gr. tilskipunarinnar, þ.m.t. að tryggja ábyrgð á kröfum umfram tiltekið tímabil. Ákveði samningsaðili að tryggja ábyrgð á kröfum umfram það sem tilskipunin krefst er það undir ríkinu komið að ákveða gildissvið þeirrar ábyrgðar bæði að því er lýtur að tíma og þeim hópum launþega sem verndin tekur til. Þar sem það er ekki í valdi dómstólsins að gefa álit á skýringu innlendra laga á það sem hér á eftir fer aðeins við um þau tímabil sem skilgreind eru í 3. og 4. gr. tilskipunarinnar.

Ákvæði 2. mgr. 1. gr. tilskipunarinnar og aðlögunin í 24. tl. XVIII. viðauka við EES-samninginn

19 Eins og fram kemur hér að framan mælir 2. mgr. 1. gr. fyrir um þá undantekningu að aðildarríkjunum sé heimilt að undanþiggja kröfur tiltekinna hópa frá gildissviði tilskipunarinnar vegna ráðningarsamnings eða ráðningarsamkomulags af sérstökum toga eða vegna annars konar trygginga sem veita launþegunum sambærilega vernd og kveðið er á um í tilskipuninni.

20 Samkvæmt 2. málslið 2. mgr. 1. gr. tilskipunarinnar skulu þeir hópar launþega sem getið er um í 1. málslið 2. mgr. 1. gr. taldir upp í viðauka. Með 24. tl. XVIII. viðauka við EES-samninginn hefur viðaukinn við tilskipunina verið aðlagaður með tilliti til EES-samningsins og eru þar taldar þær undanþágur sem eiga við um Ísland.

21 Fyrsta spurningin sem kemur til álita er hvort samningsaðili að EES-samningnum geti eingöngu borið fyrir sig 2. mgr. 1. gr. tilskipunarinnar ef viðeigandi upptalning hefur verið gerð í viðaukanum. Ríkisstjórn Noregs heldur því fram að upptalningin í viðaukanum sé ekki tæmandi og að samningsaðili megi útiloka kröfur frá ákveðnum hópum launþega, að því tilskyldu að skilyrðum 1. málsliðs 2. mgr. 1. gr. tilskipunarinnar sé fullnægt. Á hinn bóginn halda bæði Eftirlitsstofnun EFTA og framkvæmdastjórnin því fram að upptalningin í

viðaukanum sé tæmandi.

22 Dómstóllinn telur að það leiði bæði af því markmiði tilskipunarinnar að mæla fyrir um lágmarksvernd allra launþega og því að um sérstaka undanþáguheimild er að ræða í 2. mgr. 1. gr. tilskipunarinnar, að ákvæðið verði ekki skýrt rúmt með þeim hætti sem ríkisstjórn Noregs heldur fram. Það leiðir af orðalagi tilskipunarinnar að samningsaðilum er einungis heimilt að undanþiggja kröfur tiltekinna hópa samkvæmt 2. mgr. 1. gr. hennar með því að telja þá upp í viðauka við tilskipunina. Þá styður það þessa túlkun að viðaukinn yrði lítils virði ef samningsaðilar gætu að vild útilokað hópa launþega sem ekki eru taldir þar.

23 Þegar gengið er út frá framangreindu er nauðsynlegt að líta á umfang þeirra undanþága sem eiga við um Ísland og sem koma fram í viðaukanum. Samkvæmt lið H.2. í viðaukanum má undanþiggja frá gildissviði tilskipunarinnar kröfur þeirra "sem hafa átt 5% eða meira af fjármagni gjaldþrota hlutafélags". Samkvæmt lið H.4. tekur undanþágan til eftirfarandi hóps: "Maki einstaklings sem er í þeirri aðstöðu sem tilgreind er í 1. – 3. lið svo og ættingi einstaklings og ættingi maka í beinan legg". Álitaefnið er því, hvort hugtakið "ættingi í beinan legg" í lið H.4. verði túlkað svo að það taki til systur einstaklings sem liður H.2. tekur til.

24 *Stefnandi*, *Eftirlitsstofnun EFTA* og *framkvæmdastjórnin* halda því fram að skýra verði hugtakið sem notað er í upptalningunni fyrir Ísland svo að það taki ekki til systkina. *Stefndi* telur að systkini falli undir undanþáguna. Rök byggja í báðum tilvikum á orðalagi undanþágunnar og á markmiði Íslands með upptalningunni.

25 Að því er lýtur að orðalagi undanþágunnar tekur dómstóllinn fram að samningaviðræður fóru fram á ensku og var endanlegur texti samþykktur á ensku. Orðalag það sem valið var, "direct relative", er ekki nákvæmt en með rúmri túlkun má skilja það svo að það taki einnig til systkina.

26 Dómstóllinn telur einnig rétt að nefna að við þýðingu textans úr ensku á önnur tungumál, sem öll hafa sama vægi, er breytilegt hversu nákvæmt orðaval er og hversu yfirgripsmikil hugtök eru notuð. Meirihluti annarra tungumálaútgáfa nota almenn hugtök sem svara til hugtakanna nánir eða nákomnir ættingjar ("direct relatives", "close relatives") sem túlka má svo að taki einnig til systkina. Í útgáfum á öðrum tungumálum (á íslensku, finnsku, frönsku þýsku, grísku og spænsku) eru sértækari og þrengri hugtök notuð, sem taka aðeins til ættingja í beinan legg, upp á við eða niður á við.

27 Þýðing textans á grísku sýnir hvernig slíkur merkingarmunur getur komið upp. Við munnlegan flutning málsins kom það fram að í grísku útgáfunni er notað hugtak sem svarar til enska hugtaksins "direct relative". Í grísku lagamáli er hugtakið þó túlkað sem niðjar eða áar. Fyrir tilstilli grísks lagamáls öðlast bókstafsþýðing hins upprunalega enska texta því sértækari og mögulega þrengri merkingu en samningsaðilar gerðu e.t.v. ráð fyrir.

28 Þegar munur er á útgáfum á hinum ýmsu tungumálum, sem öll hafa sama vægi, er eðlilegt við túlkun að ganga út frá því að sú skýring skuli valin sem styðst við sem flestar tungumálaútgáfur. Þetta hefði í för með sér að ákvæðið hefði sama inntak í sem flestum aðildarríkjum. Þegar ákvæði sem gilda í öllum aðildarríkjunum eru túlkuð verður að telja þetta eðlilega leið. Í máli því sem hér er til umfjöllunar reynir hins vegar ekki á túlkun ákvæðis sem

gildir almennt heldur undanþáguákvæði sem eingöngu á við um Ísland og gátu íslensk stjórnvöld valið þær undanþágur sem beitt yrði í landslögum. Þegar svo stendur á verður að telja að gefa eigi samkomulagi aðilanna um undanþágu fyrir Ísland meira vægi.

29 Dómstóllinn tekur fram að undantekningar þær sem nú eru í lögum um ábyrgðasjóð launa og gjaldþrotaskiptalögum hafa verið í íslenskum lögum frá árinu 1985. Ekkert bendir til þess að það hafi verið ætlun íslenskra stjórnvalda að víkja frá þeim undantekningum þegar EES-samningurinn var lögtekinn. Það verður því að ganga út frá því að markmiðið hafi verið að viðhalda þeim undantekningum sem giltu í íslenskri löggjöf. Slíkt væri og innan þess svigrúms sem samningsaðilar geta nýtt sér.

30 Hins vegar verður að líta til þess að orðalag það sem valið var á ensku, "direct relative" er ekki skýrt og að íslenska útgáfan, sem hefur sama vægi og aðrar tungumálaútgáfur, notar orðin "ættingi í beinan legg" sem vísar skýrlega til þröngs hóps ættingja í beinan legg, upp á við og niður á við, en ekki til systkina.

31 Dómstóllinn vísar til þess að sé íslenska undanþágan túlkuð svo að hún taki ekki til systkina, leiðir það til þeirrar niðurstöðu að Ísland hafi óskað eftir undanþágu í viðaukanum sem er ekki nægilega rúm til að ná yfir þær undantekningar sem heimilar voru samkvæmt íslenskum lögum. Þótt þetta gæti virst ólíklegt er sú skýring hugsanleg að aðilum hafi yfirsést það við gerð EES-samningsins að um tvenns konar undatekningar væri að ræða – undantekningar þær sem greinir í lögum um ábyrgðasjóð launa og þær undantekningar sem greinir í gjaldþrotaskiptalögum. Liður H í viðaukanum svarar til 1. mgr. 6. gr. laganna um ábyrgðasjóð launa og var einungis vísað til laga nr. 53/1993 um ábyrgðasjóð launa, en ekki til laga nr. 21/1991 um gjaldþrotaskipti þegar Ísland tilkynnti aðlögun landsréttar að tilskipuninni til Eftirlitsstofnunar EFTA.

32 Að öllu þessu athuguðu telur dómstóllinn að orðalagið "direct relative" / "ættingi í beinan legg" í lið H.4. í 24. tl. XVIII. viðauka verði að túlka svo að það taki aðeins til ættingja í beinan legg, upp á við og niður á við. Af því leiðir að undanþágan nær ekki til systkina.

33 Til áréttingar tekur dómstóllinn það fram að ríkisstjórn Íslands hefur við flutning málsins fyrir EFTA-dómstólnum einnig byggt á því að hafna megi kröfu stefnanda á hendur Ábyrgðasjóði launa á grundvelli liðar H.3. í 24. tl. XVIII. viðauka. Þar sem spurningar þær sem beint hefur verið til dómstólsins og málsatvik sem rakin eru varða aðeins túlkun tilskipunarinnar með hliðsjón af skyldleika stefnanda og hluthafa í fyrirtækinu telur dómstóllinn ekki ástæðu til að láta uppi álit um túlkun á þessum lið í viðaukanum.

Ákvæði 10. gr. tilskipunarinnar

34 Samkvæmt 10. gr. tilskipunarinnar hefur tilskipunin ekki áhrif á rétt aðildarríkja til að gera nauðsynlegar ráðstafanir til að koma í veg fyrir misnotkun (a liður 10. gr.), eða til að hafna þeirri greiðsluábyrgð sem mælt er fyrir um í tilskipuninni, eða lækka hana, komi í ljós að skuldbindingin sé óréttmæt vegna sérstakra tengsla milli launþegans og vinnuveitandans og sameiginlegra hagsmuna sem leiðir til þess að þeir gera með sér leynilegt samkomulag (b liður 10. gr.). Í máli því sem hér er fjallað um hefur verið vísað til beggja ákvæðanna sem grundvallar fyrir þeirri reglu íslenskra laga að systkini eiganda verulegs hlutafjár í gjaldþrota

fyrirtæki eigi ekki rétt á greiðslu frá ábyrgðasjóði launa.

Ákvæði a liðar 10. gr.

35 Í málinu E-1/95, Samuelsson [1994-1995] EFTA Court Report[2] 145, lið 31 og áfram, komst dómstóllinn að þeirri niðurstöðu að heimild aðildarríkja til að gera nauðsynlegar ráðstafanir til að koma í veg fyrir misnotkun yrði ekki túlkuð svo að ákvæðið heimilaði almennt hvers konar ráðstafanir sem gætu með einhverjum hætti stuðlað að því að koma í veg fyrir misnotkun. Var sérstaklega vísað til félagslegs markmiðs tilskipunarinnar og þess að um undantekningarákvæði væri að ræða. Það verður því að túlka a lið 10. gr. þröngt, eins og önnur ákvæði sem heimila ríkjum að grípa til ráðstafana sem víkja frá meginreglum tilskipunar einstaklingum í óhag og þess verður að krefjast að allar ráðstafanir sem gripið er til á grundvelli ákvæðisins hafi þýðingu fyrir það markmið sem að er stefnt og að hófs sé gætt. Þetta kemur einnig fram í orðalagi a liðs 10. gr. þar sem segir að ráðstafanirnar verði að vera "nauðsynlegar ... til að koma í veg fyrir misnotkun". Það ríki sem ber fyrir sig undanþáguna verður því að sýna fram á að þessum skilyrðum sé fullnægt.

36 Sú fullyrðing að það sé nauðsynlegt til að koma í veg fyrir misnotkun að útiloka frá greiðslu frá ábyrgðasjóði launa þá launþega sem eru skyldmenni eiganda verulegs hlutafjár í gjaldþrota fyrirtæki, án tillits til aðstæðna í hverju máli, hefur ekki verið studd sannfærandi gögnum eða rökum. Þá hefur ekki verið sýnt fram á að þessu markmiði megi ekki ná að sama marki með ráðstöfunum sem hafa minni áhrif á þau réttindi sem tilskipunin veitir og miða að vernd launþega.

37 Af framangreindu leiðir að túlka verður a lið 10. gr. tilskipunarinnar svo að hún heimili ekki ráðstafanir til að koma í veg fyrir misnotkun sem felast í því að lög útiloki almennt systkini eiganda verulegs hlutafjár í gjaldþrota fyrirtæki, sem þau eru launþegar hjá, frá greiðslum frá ábyrgðasjóði launa.

Ákvæði b liðar 10. gr.

38 Dómstóllinn telur að rök þau sem greind eru hér að framan um a lið 10. gr. tilskipunarinnar eigi með sama hætti við um b lið 10. gr. Hið félagslega markmið tilskipunarinnar og það að b liður 10. gr. er undantekningarákvæði leiðir til þess að túlka verður b lið 10. gr. þröngt.

39 Eins og bent hefur verið á, einkum af ríkisstjórn Bretlands, fela ákvæði b liðar 10. gr. í sér sjálfstæða heimild til frávika og er greinin óháð ákvæðum 2. mgr. 1. gr. tilskipunarinnar. Það að launþegi sé í aðstöðu sem hefði mátt sæta undanþágu samkvæmt 2. mgr. 1. gr. kemur ekki í veg fyrir beitingu b liðar 10. gr. ef skilyrðum síðargreinds ákvæðis er fullnægt.

40 Það verður þó að hafa í huga að b liður 10. gr. mælir fyrir um forsendur sem verður öllum að vera fullnægt til þess að hafna megi greiðsluábyrgð samkvæmt ákvæðinu. Ein þeirra forsendna felst í "sérstök[um] tengsl[um] milli launþega og vinnuveitanda", í annan stað er gert ráð fyrir "sameiginleg[um] hagsmun[um] sem leiðir til þess að þeir gera með sér leynilegt samkomulag". Í þriðja lagi er gert ráð fyrir því að það "komi í ljós að skuldbindingin sé

[2] Skýrsla EFTA-dómstólsins 1. janúar 1994-30. júní 1995.

ólögmæt" vegna hinna sérstöku tengsla eða sameiginlegu hagsmuna sem leiða til samráðs. Fallast verður á það með *stefnanda*, *Eftirlitsstofnun EFTA* og *framkvæmdastjórninni* að vegna þess að um forsendur er að ræða sem verður öllum að vera fullnægt, verði ekki litið svo á að b liður 10. gr. geti verið grundvöllur almennrar reglu sem útilokar systkini eiganda verulegs hlutafjár í gjaldþrota fyrirtæki, sem þau eru launþegar hjá, frá greiðslum frá ábyrgðasjóði launa. Hvað sem öðru líður verður ríki sem leyfir slík frávik að sýna fram á að ráðstöfunin sé réttlætanleg.

41 Sú fullyrðing að það sé nauðsynlegt til að ná þeim markmiðum sem koma fram í b lið 10. gr. að útiloka almennt frá greiðslu frá ábyrgðasjóði launa tiltekna launþega á grundvelli tengsla við eiganda verulegs hlutafjár í hinu gjaldþrota fyrirtæki, án tillits til aðstæðna í hverju máli, hefur ekki verið studd sannfærandi gögnum eða rökum.

42 Af framangreindu leiðir að túlka verður b lið 10. gr. tilskipunarinnar svo að hún komi í veg fyrir að beitt sé ákvæðum innlendra laga sem fela í sér að systkini eiganda verulegs hlutafjár í gjaldþrota fyrirtæki, sem þau eru launþegar hjá, eigi almennt ekki rétt á greiðslu frá ábyrgðasjóði launa.

Síðari spurningin,

43 Með síðari spurningunni ber Héraðsdómur Reykjavíkur upp það álitaefni hvort EFTA-ríkin hafi með því að samþykkja EES-samninginn skuldbundið sig til að sjá til þess að einstaklingar og aðilar í atvinnurekstri sem orðið hafa fyrir tjóni vegna ófullnægjandi aðlögunar landsréttar að ákvæðum tilskipunar geti fengið tjón sitt bætt.

Verður skaðabótaábyrgð ríkisins leidd af almennum meginreglum?

44 *Ríkisstjórn Íslands*, *ríkisstjórn Noregs*, *ríkisstjórn Svíþjóðar* og *framkvæmdastjórnin* halda því fram að EES-samningurinn skyldi EFTA-ríkin ekki til að bæta tjón sem einstaklingar verða fyrir vegna þess að landsréttur er ekki réttilega lagaður að EES-samningnum. Þau lagarök sem aðilarnir vísa til þessu til stuðnings eru með ýmsu móti en þau má draga saman á eftirfarandi hátt. Hvorki EES-samningurinn né Rómarsamningurinn geyma ákvæði sem mæla fyrir um skaðabótaábyrgð ríkisins. Í rétti bandalagsins (EB-rétti) hefur meginreglunni um skaðabótaábyrgð ríkisins verið komið á í dómum dómstóls EB. Þar sem dómaframkvæmd dómstóls EB byggist að miklu leyti á sérstökum einkennum á réttarkerfi bandalagsins sem ekki er fyrir að fara í rétti efnahagssvæðisins (EES-rétti) verður dómaframkvæmdin ekki talin eiga við um EES-samninginn með stoð í 6. gr. EES-samningsins. EES-samningurinn er frábrugðinn Rómarsamningnum í mörgum atriðum sem hér skipta máli og má þar nefna að í EES-samningnum er ekki gert ráð fyrir framsali löggjafarvalds eða beinum réttaráhrifum og forgangi ákvæða EES-samningsins gagnvart landsrétti.

45 *Stefnandi* og *Eftirlitsstofnun EFTA* halda því hins vegar fram að þær skuldbindingar sem EFTA-ríkin hafa gengist undir samkvæmt EES-samningnum feli í sér skyldu til að bæta tjón sem einstaklingar verða fyrir vegna ófullnægjandi aðlögunar landsréttar að EES-rétti. Vísað er til framkvæmdar dómstóls EB þar sem meginreglan um skaðabótaábyrgð samkvæmt bandalagsrétti kemur fram. Þá er vísað til þess markmiðs EES-samningsins að skapa einsleitt efnahagssvæði, til þess hlutverks sem viðurkennt er að einstaklingar muni gegna með því að

beita þeim réttindum sem þeir öðlast með samningnum, m.a. fyrir tilstilli dómstóla, og til þess markmiðs að tryggja jafnræði gagnvart einstaklingum og aðilum í atvinnurekstri. Eftirlitsstofnun EFTA heldur því einnig fram að meginreglan um skaðabótaábyrgð ríkisins byggist ekki á framsali á löggjafarvaldi sem færi gegn uppbyggingu EES-samningsins.

46 *Dómstóllinn* vísar fyrst til þess að í EES-samningnum er ekkert tiltekið ákvæði sem leggur grunninn að skaðabótaábyrgð ríkisins vegna þess að landsréttur sé ekki réttilega lagaður að samningnum.

47 Þar sem ekkert slíkt ákvæði er í EES-samningnum kemur til álita hvort skylda ríkisins verði leidd af yfirlýstum tilgangi EES-samningsins og uppbyggingu hans. Markmiðið með EES-samningnum er, eins og fram kemur í 1. mgr. 1. gr. samningsins, að stuðla að stöðugri og jafnri eflingu viðskipta- og efnahagstengsla samningsaðila við sömu samkeppnisskilyrði og eftir sömu reglum með það fyrir augum að mynda einsleitt Evrópskt efnahagssvæði.

48 Gildissvið EES-samningsins kemur fram í 2. mgr. 1. gr. hans, þar sem segir að til þess að ná þeim markmiðum sem að er stefnt skuli samstarfið fela í sér, í samræmi við ákvæði samningsins, sex svið sem þar eru talin: frjálsa vöruflutninga, frjálsa fólksflutninga, frjálsa þjónustustarfsemi, frjálsa fjármagnsflutninga, kerfi sem tryggi að samkeppni raskist ekki og nánari samvinnu á öðrum tilteknum sviðum.

49 Eins og fram kemur í 1. mgr. 1. gr. EES-samningsins er eitt meginmarkmið hans að mynda einsleitt Evrópskt efnahagssvæði. Þetta einsleitnimarkmið kemur einnig fram í fjórða og fimmtánda lið aðfaraorða EES-samningsins.

50 Í fjórða lið aðfaraorðanna kemur fram yfirlýsing samningsaðila:

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

51 Í fimmtánda lið segir:

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

52 Til að markmiðinu um einsleitni verði náð er mælt fyrir um tvö grundvallaratriði.

53 Í fyrsta lagi skulu efnisákvæði EES-samningsins á þeim sviðum sem samvinnan nær til að mestu leyti vera samhljóða samsvarandi ákvæðum Rómarsamningsins og Stofnsáttmála Kola- og stálbandalagsins. Efnisreglur þessar skulu verða gildandi reglur í þeim EFTA-ríkjum sem aðild eiga að EES-samningnum er ríkin taka þær upp í landsrétt sinn.

54 Í öðru lagi er með EES-samningnum komið á margbrotnu kerfi sem tryggja á einsleita túlkun og beitingu þeirra efnisreglna sem teknar hafa verið upp í landsrétt.

55 Samkvæmt 108. gr. EES-samningsins er sjálfstæðri eftirlitsstofnun komið á fót og skal hún stöðugt fylgjast með framkvæmd og beitingu efnisreglna samningsins í EFTA-ríkjunum sem eru aðilar að samningnum og bregðast við brotum ríkjanna á skyldum þeirra til að framfylgja samningnum. Dómstóll (EFTA-dómstóllinn) er stofnaður til þess að fjalla um eftirlitskerfið og leysa deilumál, m.a. milli EFTA-ríkjanna.

56 Ýmis ákvæði EES-samningsins sjálfs og samnings um stofnun eftirlitsstofnunar og dómstóls, sem EFTA-ríkin gerðu með sér í samræmi við ákvæði 108. gr. EES-samningsins, stuðla einnig að samræmdri og einsleitri túlkun og beitingu efnisreglnanna. Ákvæði 6. gr. EES-samningsins mæla fyrir um að efnislega samhljóða ákvæði skuli túlka í samræmi við dóma dómstóls EB sem máli skipta og kveðnir voru upp fyrir undirritunardag samningsins. Þá skal samkvæmt 3. gr. samningsins um eftirlitsstofnun og dómstól taka tilhlýðilegt tillit til þeirra dóma sem máli skipta og kveðnir hafa verið upp eftir undirritunardag EES-samningsins. Samkvæmt ákvæðum 105. gr. og 106. gr. skal sameiginlega EES-nefndin stöðugt hafa til skoðunar þróun dómsúrlausna dómstóls EB og EFTA-dómstólsins og kerfi skal komið upp til að skiptast á upplýsingum um dóma EFTA-dómstólsins, dómstóls EB og dómstóls EB á fyrsta dómstigi. Framkvæmdastjórn Evrópubandalaganna og Eftirlitsstofnun EFTA skulu vinna saman, skiptast á upplýsingum og ráðum um eftirlitsstefnu og einstök mál.

57 Annað mikilvægt markmið EES-samningsins er að tryggja einstaklingum og aðilum í atvinnurekstri jafnræði og jöfn samkeppnisskilyrði og raunhæfa leið til að fylgja þeim réttindum eftir. Hér má enn vísa til fjórða og fimmtánda liðs í aðfaraorðum EES-samningsins (sjá lið 50 og 51 hér að framan) og sérstaklega til áttunda liðs aðfaraorðanna, þar sem segir:

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

58 Dómstóllinn tekur mið af því að ákvæðum EES-samningsins er í ríkum mæli ætlað að vera til hagsbóta einstaklingum og aðilum í atvinnurekstri á öllu Evrópska efnahagssvæðinu. Því veltur framkvæmd samningsins á því að einstaklingar og lögaðilar, sem tryggð eru þessi réttindi, geti byggt á þeim.

59 Með vísan til þess sem að framan greinir telur dómstóllinn að EES-samningurinn sé þjóðréttarsamningur sem er sérstaks eðlis (*sui generis*) og sem felur í sér sérstakt og sjálfstætt réttarkerfi. EES-samningurinn kemur ekki á fót tollabandalagi heldur þróuðu fríverslunarsvæði, sjá dóm í máli E-2/97 *Maglite* [1997] EFTA Court Report 127. Samruni sá sem EES-samningurinn mælir fyrir um gengur ekki eins langt og er ekki eins víðfemur eins og samruni sá sem Rómarsamningurinn stefnir að. Hins vegar ganga markmið EES-samningsins lengra og gildissvið hans er víðtækara en venjulegt er um þjóðréttarsamninga.

60 Dómstóllinn telur að markmiðið um einsleitni og það markmið að koma á og tryggja rétt einstaklinga og aðila í atvinnurekstri til jafnræðis og jafnra tækifæra komi svo skýrt fram í

samningnum, að EFTA-ríkjunum, sem aðild eiga að samningnum, hljóti að bera skylda til að sjá til þess að það tjón fáist bætt sem hlýst af því að landsréttur er ekki réttilega lagaður að tilskipunum.

61 Ákvæði 3. gr. EES-samningsins rennir frekari stoðum undir þá skyldu samningsaðila að sjá til þess að tjón fáist bætt. Samkvæmt 3. gr. skulu samningsaðilar gera allar viðeigandi ráðstafanir, hvort sem er almennar eða sérstakar, til að tryggja að staðið verði við þær skuldbindingar sem af samningnum leiðir, sjá dóm frá 30. apríl 1998 í máli E-7/97 *Eftirlitsstofnun EFTA* gegn *Noregi*, sem enn er óbirtur. Að því er lýtur að aðlögun landsréttar að tilskipunum sem eru hluti EES-samningsins felur þetta í sér að samningsaðilum ber skylda til að bæta það tjón sem hlýst að því að löggjöf er ekki réttilega löguð að tilskipunum.

62 Það leiðir af því sem að framan greinir að það er meginregla EES-samningsins að samningsaðilum ber skylda til að sjá til þess að það tjón fáist bætt sem einstaklingar verða fyrir vegna vanefnda ríkisins á skuldbindingum sínum samkvæmt EES-samningnum og sem viðkomandi EFTA-ríki ber ábyrgð á.

63 Það leiðir af 7. gr. EES-samningsins og bókun 35 við hann að EES-samningurinn felur ekki í sér framsal löggjafarvalds. Meginreglan um skaðabótaábyrgð ríkisins er hins vegar hluti EES-samningsins og er því eðlilegt að lög sem lögfesta meginmál samningsins séu skýrð svo að meginreglan um skaðabótaábyrgð ríkisins felist einnig í þeim.

Skilyrði bótaábyrgðar

64 Þótt reglan um skaðabótaábyrgð ríkisins felist þannig í EES-samningnum fara skilyrði bótaréttar sem leiðir af reglunni eftir eðli þeirrar vanrækslu ríkisins á skuldbindingum sínum sem rekja má tjónið til.

65 Í því tilviki að landsréttur sé ekki réttilega lagaður að ákvæðum tilskipunar, eins og krafist er í 7. gr. EES-samningsins, leiðir það af þessu ákvæði, til þess að það nái tilgangi sínum, að krefjast má skaðabóta að þremur skilyrðum uppfylltum.

66 Í fyrsta lagi verður það að felast í tilskipuninni að einstaklingar öðlist tiltekin réttindi og ákvæði tilskipunarinnar verða að bera með sér hver þau réttindi eru. Í öðru lagi verður að vera um nægilega alvarlega vanrækslu á skuldbindingum ríkisins að ræða. Í þriðja lagi verður að vera orsakasamband milli vanrækslu ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verður fyrir.

67 Að því er lýtur að því máli sem hér er til umfjöllunar verður að byggja á því að markmið tilskipunar ráðsins 80/987/EBE, eins og henni hefur verið breytt, sé að veita launþegum rétt á ábyrgð á ógreiddum launakröfum. Af sambærilegum ástæðum og þeim sem greinir í framkvæmd dómstóls EB, verður umfang og innihald þess réttar afmarkað á grundvelli ákvæða tilskipunarinnar, sjá til samanburðar dóm í sameinuðum málum C-6/90 og C-9/90, *Francovich o.fl.* [1991] ECR[3] I-5357, lið 10 o.áfr. Fyrsta skilyrðinu virðist því vera fullnægt.

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

68 Við mat á öðru skilyrðinu, hvort um nægilega alvarlega vanrækslu sé að ræða, skiptir mestu máli hvort samningsaðilinn með bersýnilegum og alvarlegum hætti leit fram hjá þeim takmörkunum sem eru á svigrúmi ríkisins til mats við ákvarðanatöku.

69 Þau atriði sem dómstóll sá sem fjallar um málið getur metið eru m.a. hversu skýrt og nákvæmt það ákvæði er sem farið er gegn, hversu mikið mat ákvæðið eftirlætur innlendum stjórnvöldum og hvort um er að ræða vísvitandi brot á samningsskuldbindingum sem leiddi til tjóns eða brot sem ekki var framið af ásetningi. Þá verður litið til þess hvort lögvilla var afsakanleg eða óafsakanleg, hvort afstaða EES-stofnunar eða stofnunar Evrópubandalaganna kunni að hafa stuðlað að vanrækslunni og hvort innleidd eru lög eða framkvæmd, eða þeim viðhaldið, sem eru andstæð EES-samningnum.

Málskostnaður

70 Ríkisstjórn Noregs, ríkisstjórn Svíþjóðar, ríkisstjórn Bretlands, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem hafa skilað greinargerðum til dómstólsins, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Með vísan til framangreindra forsendna lætur

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins með úrskurði frá 5. nóvember 1997 og beiðni dagsettri 12. nóvember 1997:

1. Gerð þá sem er að finna í 24. tl. í viðauka XVIII við Samninginn um Evrópska efnahagssvæðið (tilskipun ráðsins 80/987/EBE frá 20. október 1980 um samræmingu á lögum aðildarríkjanna um vernd til handa launþegum verði vinnuveitandi gjaldþrota) verður að skýra á þann veg að það sé andstætt henni að á Íslandi séu í gildi lagaákvæði sem útiloka launþega sem er systkini eiganda 40% hlutar í gjaldþrota fyrirtæki sem launþeginn vann hjá frá þeirri greiðsluábyrgð sem mælt er fyrir um í 3. gr. tilskipunarinnar vegna þessa skyldleika.

2. Aðilum EES-samningsins ber skylda til að sjá til þess að það tjón fáist bætt sem einstaklingur verður fyrir vegna þess að landsréttur er ekki réttilega lagaður að ákvæðum tilskipunar sem er hluti EES-samninsins.

Bjørn Haug Þór Vilhjálmsson Carl Baudenbacher

Kveðið upp í heyranda hljóði í Lúxemborg 10. desember 1998.

Gunnar Selvik
dómritari

Bjørn Haug
forseti

3. *Hörður Einarsson*, mál nr. E-1/01, EFTA Court Report [2002] 1

DÓMUR DÓMSTÓLSINS
22. febrúar 2002*

(Mismunandi virðisaukaskattur á bækur – 14. gr. EES-samningsins – Vörur í samkeppni – Óbein vernd innlendrar framleiðslu)

Mál E-1/01
BEIÐNI um ráðgefandi álit EFTA-dómstólsins samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Héraðsdómi Reykjavíkur í máli sem þar er rekið,

Hörður Einarsson

gegn

íslenska ríkinu

varðandi túlkun 4., 10. og 14. gr. EES-samningsins.

DÓMSTÓLLINN,

skipaður dómurunum Þór Vilhjálmssyni, forseta, Carl Baudenbacher og Per Tresselt (framsögumanni),

dómritari: Lucien Dedichen

hefur, með tilliti til skriflegra greinargerða frá:

– stefnanda, Herði Einarssyni hæstaréttarlögmanni, er flytur mál sitt sjálfur;.

– stefnda, íslenska ríkinu. Í fyrirsvari sem umboðsmaður er Skarphéðinn Þórisson, ríkislögmaður, og honum til aðstoðar er Einar Karl Hallvarðsson, hæstaréttarlögmaður á skrifstofu ríkislögmanns,

– ríkisstjórn Liechtenstein. Í fyrirsvari sem umboðsmaður er Christoph Büchel, yfirmaður samræmingarsviðs fyrir EES samninginn,

* Beiðni um ráðgefandi álit er á íslensku.

– ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Helge Seland, aðstoðarráðuneytisstjóri í norska utanríkisráðuneytinu,

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði,

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Richard Lyal, lögfræðingur hjá lagadeild,

með tilliti til skýrslu framsögumanns og munnlegs málflutnings stefnanda, sem flytur mál sitt sjálfur, svo og fulltrúa stefnda, ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna hinn 25. október 2001,

kveðið upp svofelldan

DÓM:

I Málsatvik og meðferð máls

1 Með beiðni dagsettri 4. janúar 2001, sem skráð var í málaskrá dómstólsins 11. sama mánaðar, beindi Héraðsdómur Reykjavíkur nokkrum spurningum til dómstólsins til öflunar ráðgefandi álits varðandi 4., 10. og 14. gr. EESsamningsins, svo að Héraðsdómur gæti metið hvernig tilhögun mismunandi virðisaukaskattsálagningar á bækur samkvæmt íslenskum lögum, annars vegar á bækur á íslensku og hins vegar á bækur á erlendum tungumálum, samræmdist þeim ákvæðum.

2 Spurningar þessar komu upp í máli sem rekið er milli Harðar Einarssonar og íslenska ríkisins um kröfu hins fyrrnefnda til endurgreiðslu á mismun milli virðisaukaskatts greidds á bækur á erlendum tungumálum og virðisaukaskatts þess sem á hefði verið lagður ef bækur þessar hefðu verið á íslensku.

3 Þau landslög sem deilt er um fyrir Héraðsdómi Reykjavíkur eru hin íslensku lög nr. 50/1988 um virðisaukaskatt.

4 Ákvæði 1. gr. laga um virðisaukaskatt mæla svo fyrir að virðisaukaskattur skuli greiddur í ríkissjóð af viðskiptum innanlands á öllum stigum, svo og af innflutningi vöru og þjónustu, eins og nánar er ákveðið í lögunum. Í 2. gr. segir að skyldan til að greiða ríkissjóði virðisaukaskatt nái að meginstefnu til allrar vöru, nýrrar sem notaðrar.

5 Ákvæði 1. mgr. 14. gr. virðisaukaskattslaga mæla svo fyrir að virðisaukaskattur skuli almennt vera 24,5%. Í 2. mgr. segir að virðisaukaskattur á tiltekna vöru og þjónustu skuli þó vera lægri, þ.e. 14%. Af sölu bóka sem ritaðar eru eða þýddar á íslensku skal greiða hið lægra hlutfall.

6 Í núverandi mynd er 14. gr. virðisaukaskattslaga þannig:

"Virðisaukaskattur skal vera 24,5%, og rennur hann í ríkissjóð.

Þrátt fyrir ákvæði 1. mgr. skal virðisaukaskattur af sölu á eftirtalinni vöru og þjónustu vera 14%:

1. ...
2. Útleiga hótel- og gistiherbergja og önnur gistiþjónusta.
3. ...
4. Afnotagjöld útvarpsstöðva.
5. Sala tímarita, dagblaða og landsmála- og héraðsfréttablaða.
6. Sala bóka á íslenskri tungu, jafnt frumsaminna sem þýddra.
7. Sala á heitu vatni, rafmagni og olíu til hitunar húsa og laugarvatns.
8. Sala á matvörum og öðrum vörum til manneldis samkvæmt nánari afmörkun í reglugerð, þó ekki sala á sælgæti og drykkjarvörum og fleiri vörum sem flokkast undir tollskrárnúmer sem talin eru upp í viðauka við lög þessi, né sala á áfengum drykkjum og ógerilsneyddri mjólk. Sala veitingahúsa, mötuneyta og annarra hliðstæðra aðila á tilreiddum mat og þjónustu er þó skattskyld skv. 1. mgr. þessarar greinar.
9. Aðgangur að vegamannvirkjum."

7 Frá því er lög um virðisaukaskatt voru fyrst sett hafa allmargar breytingar verið gerðar hvað snertir álagningu hans á sölu bóka á íslensku. Með samþykkt laga nr. 119/1989 um breytingu á lögum um virðisaukaskatt voru allar bækur á íslensku undanþegnar virðisaukaskatti að fullu, eins og þegar var orðin raunin um annað prentað mál á íslensku.

8 Núgildandi stig virðisaukaskatts á bækur var ákveðið með lögum nr. 111/1992. Þannig er virðisaukaskattur á sölu allra bóka á íslensku, frumsaminna og þýddra, 14%. Á bækur á erlendum tungumálum er áfram lagður hinn almenni virðisaukaskattur, 24,5%.

9 Stefnandi, Hörður Einarsson, hefur alloft keypt bækur erlendis frá til eigin nota. Þær hafa verið sendar honum í pósti, og hefur þá virðisaukaskatturinn fallið í gjalddaga við móttöku þeirra. Skatturinn hefur numið 24,5%, í samræmi við 1. mgr. 14. gr. virðisaukaskattslaga.

10 Mál það sem til meðferðar er fyrir Héraðsdómi Reykjavíkur lýtur að virðisaukaskatti, sem lagður er á bækur fluttar inn frá Bretlandi og Þýskalandi. Við innflutning bókanna, og samkvæmt tveimur tollskýrslum dagsettum 26. júlí 1999 og einni dagsettri 11. ágúst 1999, greiddi stefnandi virðisaukaskatt alls að fjárhæð 3.735 ísl. kr., er nam 24,5% af kaupverði þeirra.

11 Í bréfi til fjármálaráðherra dagsettu 21. maí 1999 mótmælti stefnandi því að mismunandi virðisaukaskattur væri lagður á bækur á erlendum tungumálum og bækur á íslensku. Í bréfi dagsettu 16. júlí 1999 tilkynnti ráðuneytið stefnanda að það féllist ekki á mótmæli hans.

12 Stefnandi lagði þá fram kæru hjá tollstjóranum í Reykjavík og síðan hjá ríkistollanefnd. Kærunum var hafnað á báðum stjórnsýslustigum. Ríkistollanefnd kvað upp úrskurð sinn 22. desember 1999.

13 Stefnandi höfðaði þá mál gegn íslenska ríkinu fyrir Héraðsdómi Reykjavíkur. Þar hefur stefnandi dregið í efa að hið íslenska kerfi virðisaukaskatts á bækur samrýmist EES-samningnum.

14 Með úrskurði upp kveðnum 27. nóvember 2000 ákvað Héraðsdómur Reykjavíkur að senda EFTA-dómstólnum beiðni um ráðgefandi álit. Eftirfarandi spurningar voru lagðar fram:

> *1. Er það samrýmanlegt EES-rétti, sérstaklega 14. grein og 10. grein EES-samningsins, eða eftir atvikum 4. gr. að samkvæmt íslenskum lögum um virðisaukaskatt sé lagður hærri virðisaukaskattur á bækur á erlendum tungumálum (24,5%) heldur en á bækur á íslensku (14%), og svo háttar til, að bækur á íslensku eru almennt gefnar út á Íslandi, en bækur á öðrum tungumálum eru almennt gefnar út utan Íslands, þar á meðal í öðrum EES-ríkjum?*
>
> *2. Sérstaklega er um það spurt, (a) hvort skýra beri 14. gr. EESsamningsins svo, að bækur á íslensku og bækur á öðrum tungumálum teljist vera sams konar framleiðsluvörur í merkingu ákvæðisins, eða (b) hvort mismunandi skattlagning bóka eftir tungumáli með framangreindum hætti sé til þess fallin að veita innlendri bókaútgáfu óbeina vernd.*
>
> *3. Réttlætir það framangreindan mismun á gjaldstigi virðisaukaskatts, ef með hinu lægra gjaldstigi á bækur á íslensku vakir fyrir stjórnvöldum að treysta íslenska tungu?*
>
> *4. Er vald íslenska ríkisins til álagningar virðisaukaskatts því til fyrirstöðu að reglum EES-réttar, sérstaklega 14. grein og 10. grein EESsamningsins, verði beitt í málinu?*
>
> *5. Ef svarið við spurningunum hér að framan felur það í sér að reglur um virðisaukaskatt af bókum séu ósamrýmanlegar EES-samningnum, er spurt hvort samningurinn eða aðrar reglur sem af honum leiða hafa að geyma ákvæði sem mæla fyrir um það hvaða reglum skuli beitt þegar ósamræmi er milli reglna landsréttar og reglna sem leiða af EESsamningnum.*

15 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur dómsins krefjast.

II Álit dómstólsins

Fjórða spurning.

16 Með fjórðu spurningu sinni, sem dómstóllinn telur að fyrst verði að taka afstöðu til, óskar Héraðsdómur Reykjavíkur svars við því hvort vald aðildarríkis EES til álagningar á virðisaukaskatti komi í veg fyrir að EES-reglum verði beitt.

17 Dómstóllinn telur að almennt taki EES-samningurinn ekki til skattakerfa aðildarríkjanna. EES-réttur skerðir ekki frelsi aðildarríkis til að koma á skattakerfi sem gerir greinarmun á framleiðsluvörum á grundvelli málefnalegra viðmiða (sjá mál E-6/98 *Noreg* gegn

Eftirlitsstofnun EFTA [1999] skýrsla EFTAdómstólsins 74, 34. lið). Á hinn bóginn er slíkur greinarmunur aðeins samrýmanlegur EES-rétti ef þau markmið, sem með honum er stefnt að, eru sjálf samrýmanleg kröfum EES-samningsins, og ef viðkomandi reglur eru þannig að þær stýri hjá allri beinni og óbeinni mismunun gagnvart framleiðsluvörum sem fluttar eru inn frá öðrum EES-ríkjum og hvers kyns vernd í þágu innlendrar samkeppnisvöru (sjá mál C-213/96 *Outokumpu* [1998] ECR I-1777, 30. lið).

18 Svarið við fjórðu spurningu er því að vald EES-ríkis til álagningar virðisaukaskatts kemur ekki í veg fyrir að EES-reglum sé beitt.

Fyrsta og önnur spurning

19 Í fyrstu og annarri spurningu sinni er Héraðsdómur Reykjavíkur í raun að spyrjast fyrir um hvort 4., 10. og 14. gr. EES-samningsins komi í veg fyrir að EES-ríki leggi virðisaukaskatt á bækur á sinni eigin þjóðtungu, sem lægri er en virðisaukaskattur á bækur á öðrum tungumálum.

20 Fyrsta spurningin varðar bæði 10. og 14. gr. EES-samningsins. Það leiðir af dómaframkvæmd dómstóls Evrópubandalaganna að ákvæði samningsins um Evrópubandalagið sem samsvara fyrrgreindum ákvæðum EES-samningsins, útiloka hvert annað (sjá t.d. mál C-28/96 *Fazenda Pública* gegn *Fricarnes* [1997] ECR I-4939). Sama verður að gilda um 10. og 14. gr. EES-samningsins. Gjald sem er liður í almennri ríkisbundinni gjaldtökutilhögun, lagt á með kerfisbundnum hætti og samkvæmt málefnalegum viðmiðum á vöruflokka án tillits til uppruna þeirra, fellur undir 14. gr. EES-samningsins (sjá mál C-90/94 *Haahr Petroleum* gegn *Åbenrå Havn o. fl.* [1997] ECR I-4085, í 20. lið). Af þessu leiðir að hin umdeildu ákvæði virðisaukaskattslaga verður að meta á forsendum 14. gr. EES-samningsins.

21 Í 14. gr. EES-samningsins segir:

> "Einstökum samningsaðilum er óheimilt að leggja hvers kyns beinan eða óbeinan skatt innanlands á framleiðsluvörur annarra samningsaðila umfram það sem beint eða óbeint er lagt á sams konar innlendar framleiðsluvörur.
>
> Samningsaðila er einnig óheimilt að leggja á framleiðsluvörur annarra samningsaðila innlendan skatt sem er til þess fallinn að vernda óbeint aðrar framleiðsluvörur."

22 Hinn almenni tilgangur 14. gr. EES-samningsins er að tryggja frjálsa vöruflutninga við eðlilegar samkeppnisaðstæður milli ríkja á hinu Evrópska efnahagssvæði, með því að koma í veg fyrir alla vernd sem kynni að stafa af skattlagningu innanlands sem felur í sér mismunun gagnvart framleiðsluvörum annarra aðildarríkja, og að tryggja að innlend skattlagning hafi engin áhrif hvað snertir samkeppni milli innlendrar og innfluttrar framleiðslu (sjá mál C-166/98, *Socridis* gegn *Receveur Principal des Douanes* [1999] ECR I-3791, í 16. lið).

23 Dómstóllinn telur rétt að huga fyrst að því hvort hið umdeilda ákvæði virðisaukaskattslaga fari í bága við 2. mgr. 14. gr. EES-samningsins.

24 Eins og dómstóll Evrópubandalaganna tók fram í dómi sínum í máli 184/85

Framkvæmdastjórnin gegn *Ítalíu* [1987] ECR 2013, í 11. lið, er hann fjallaði um hliðstætt ákvæði í samningnum um Evrópubandalagið, þá er hlutverk þess að ná til óbeinnar skattaverndar af öllu tagi þegar um er að ræða framleiðsluvörur sem ekki eru sams konar í skilningi 1. mgr. 14. gr., en eru samt í samkeppni sín á milli, þótt svo sé aðeins að hluta, óbeint eða hugsanlega.

25 Þegar ákvarða skal hvort framleiðsluvörur séu í samkeppni þannig að í bága fari við bann það sem kveðið er á um í 2. mgr. 14. gr., tekur dómstóllinn fram að ekki er umdeilt, að margir þeirra sem læsir eru á íslensku eru einnig læsir á önnur tungumál. Að minnsta kosti fyrir suma lesendahópa geta bækur á mismunandi tungumálum komið hver í annarrar stað. Þessi athugasemd á almennt við, en þó sérstaklega um bækur á ákveðnum sérsviðum.

26 Enn fremur eru til mikilvægir flokkar bóka þar sem lesefni kann að vera lítilvægur þáttur í samanburði við annað innihald, svo sem myndir, myndir listræns eðlis, kort og töflur. Slíkar bækur á erlendri tungu geta jafnvel haft notagildi og verið til gagns fólki sem ekki er læst á þá tungu.

27 Niðurstaða dómstólsins er því sú að bækur á íslensku og bækur á erlendum tungum eru að minnsta kosti að hluta til í samkeppni.

28 Fyrst svo er verður að taka til athugunar hvort skattareglur á borð við þær sem deilt er um í aðalmálinu veiti innlendri framleiðsluvöru óbeina vernd í skilningi 2. mgr. 14. gr. EES-samningsins.

29 Í hinni umdeildu reglu landslaga, sem mælir fyrir um lægra þrep virðisaukaskatts á bækur á íslensku, er ekki gerður greinarmunur á bókum framleiddum á Íslandi og bókum framleiddum erlendis. Hún gildir jafnt um allar bækur sem ritaðar eru á íslensku eða þýddar á þá tungu, hvar sem þær kunna að hafa verið búnar til og útgefnar, og hvert sem ríkisfang eða aðsetur framleiðanda og útgefanda er.

30 Einnig verður að geta þess að almenn stefna efnahagslegrar hnattvæðingar og tækniþróun gera það sífellt erfiðara að ákvarða hvort vara sé að öllu leyti innlend. Útgefendur framleiða iðulega bækur fyrir mismunandi markaði á mismunandi tungumálum. Það eitt að þýða texta bókar á aðra tungu kann að fela í sér fremur lítilvægt framlag til hinnar endanlegu afurðar. Hinn erlendi hluti kann að verðmæti til að vera jafn mikill, eða jafnvel meiri, en hinn innlendi hluti. Að þessu marki myndu öll verndaráhrif af mismunandi virðisaukaskatti einnig koma til góða erlendum útgefendum, framleiðendum og öðrum rétthöfum hins upphaflega efnis.

31 Dómstóllinn tekur fram, að í skjölum, sem honum hafa borist frá Héraðsdómi Reykjavíkur og í greinargerðum og málflutningi aðilanna kemur fram að flestar bækur á íslensku, sem hinn lægri virðisaukaskattur er lagður á, eru framleiddar á Íslandi, og að bækur á erlendum málum sem hinn hærri og almenni virðisaukaskattur er lagður á eru aðallega innfluttar.

32 Af málatilbúnaði varnaraðila er svo að sjá að helsti tilgangur hinnar umdeildu virðisaukaskattsreglu sé að stuðla að lægra verði á bókum á íslensku til stuðnings innlendri bókaframleiðslu, með því að gera bækur á íslensku auðkeyptari og samkeppnisfærari, og bæta þannig möguleika markaðarins til að halda uppi bókmenningu á íslensku máli. Þetta bendir til

þess að reglunni sé ætlað að hafa verndaráhrif, og staðfestir að hún samræmist ekki 2. mgr. 14. gr. EESsamningsins (sjá mál C-105/91 *Framkvæmdastjórnin* gegn *Grikklandi* [1992] ECR I-5871, í 22. lið).

33 Stefndi hefur haldið því fram að bækur á íslensku séu talsvert dýrari en bækur á öðrum tungumálum og hafi hinn mismunandi virðisaukaskattur því lítil verðáhrif og því í raun engin verndaráhrif. Þessu til stuðnings hefur stefndi vísað til dómsins í máli 356/85 *Framkvæmdastjórnin* gegn *Belgíu* [1987] ECR 3299.

34 Dómstóllinn telur að mismunur á virðisaukaskatti sem nemur 10,5 af hundraði sé líklegur til að hafa áhrif á samkeppnisstöðu bóka á íslensku gagnvart bókum á öðrum tungum. Líta verður til hinna ýmsu geira, sem bókamarkaðurinn skiptist í. Óbein vernd innan eins markaðsgeira nægir til þess að bannið í 2. mgr. 14. gr. EES-samningsins eigi við.

35 Að ofangreindu athuguðu og á grundvelli fyrirliggjandi upplýsinga telur dómstólinn að mismunandi virðisaukaskattur á bækur gefi til kynna að fyrir hendi séu verndaráhrif í skilningi 2. mgr. 14. gr. EES-samningsins, þegar sá virðisaukaskattur, sem lagður er á bækur á þjóðtungunni er lægri en sá sem lagður er á bækur á erlendum tungumálum.

36 Niðurstaða dómstólsins er því sú að regla í landslögum EES-ríkis, sem mælir svo fyrir að virðisaukaskattur á bækur á tungu þess ríkis sé lægri en á bækur á erlendum tungum, sé andstæð 2. mgr. 14. gr. EES-samningsins.

37 Vegna þessarar niðurstöðu er ekki nauðsynlegt að taka til athugunar hvort sú skattalega meðferð, sem er hagstæð bókum á íslensku, brjóti í bága við 1. mgr. 14. gr. EES-samningsins.

38 Enn fremur er ekki heldur þörf á að athuga hvort regla í landslögum af því tagi sem deilt er um í aðalmálinu fari gegn hinu almenna banni við mismunun á grundvelli ríkisfangs, sem kveðið er á um í 4. gr. EES-samningsins, því að það ákvæði á einungis sjálfstætt við aðstæður þar sem EES-réttur gildir en engin ákvæði EES-samningsins banna mismunun sérstaklega (sjá mál E-1/00 *Íslandsbanki-FBA*, dómur 14. júlí 2000 sem ekki hefur enn verið útgefinn, í 35. og 36. lið).

Þriðja spurning

39 Í þriðju spurningu sinni spyr Héraðsdómur Reykjavíkur í raun hvort réttlæta megi hina hagstæðari skattameðferð á bókum á íslensku með þeim almannahagsmunum sem felast í að styrkja stöðu þjóðtungunnar.

40 Stefndi og ríkisstjórn Noregs hafa haldið því fram, að í EES-rétti sé fyrir hendi grundvöllur fyrir efnislegri réttlætingu á mismunandi virðisaukaskattsálagningu Íslendinga á bækur. Tilgangurinn er að efla og vernda íslenska tungu, sem er óaðskiljanlegur hluti íslenskrar menningararfleifðar og veigamikill þáttur í sjálfsmynd Íslendinga. Því hefur verið haldið fram að þetta markmið heimili frávik frá 14. gr. EES-samningsins.

41 Dómstóllinn er því sammála að stuðningur við þjóðtunguna geti verið afar mikilvægt

menningarlegt markmið. Hins vegar verður dómstóllinn að kanna hvort það markmið getur samkvæmt EES-rétti réttlætt innlenda skattareglu sem að öðrum kosti myndi falla undir bannreglu 14. gr. EES-samningsins.

42 Vísað hefur verið til 13. gr. samningsins sem hugsanlegan lagagrundvöll slíkrar réttlætingar. Þeirri röksemd verður þó að hafna. Dómurinn bendir á, að í EESrétti gilda strangari reglur um frjálsa vöruflutninga en um innlenda skattlagningu. Það leiðir af orðalagi og tilgangi 13. gr. samningsins að hún getur aðeins réttlætt frávik frá 11. og 12. gr. hans, sem fjalla um magntakmarkanir á inn- og útflutningi og ráðstafanir sem hafa samsvarandi áhrif.

43 Ennfremur hefur verið vísað til að 3. mgr. 6. gr. samningsins um Evrópusambandið kunni að vera grundvöllur að slíku fráviki, þar sem tungumál hafa afgerandi þýðingu við að halda uppi þjóðernisvitund í hverju ríki. Dómstóllinn tekur fram, að ekkert hliðstætt ákvæði er í EES-samningnum. Þar sem samningurinn um Evrópusambandið var gerður á undan EES-samningnum verður að ætla að sá munur sé með vilja gerður. Dómstóllinn getur því ekki byggtúrlausn þessa máls á reglu hliðstæðri 3. mgr. 6. gr. samningsins um Evrópusambandið.

44 Í þessu sambandi hefur einnig verið vitnað til Sameiginlegrar yfirlýsingar um samstarf í menningarmálum, sem fylgir lokagerð EES-samningsins. Í henni segir að samningsaðilar geri sér ljóst að tilkoma fjórfrelsisins muni hafa veruleg áhrif á menningarsviðinu. Samningsaðilar lýsa því yfir þeim ásetningi sínum að efla og auka samvinnu sína á sviði menningarmála til að stuðla að auknum skilningi milli ólíkra menningarsvæða í Evrópu og varðveita og efla þá menningarlegu arfleifð þjóða og svæða sem auðgar evrópska menningu með fjölbreytileik sínum. Dómstóllinn fær ekki séð að þessi orð geti verið sérstakur grundvöllur fyrir ríkisbundnum frávikum frá hinum mikilvægu ákvæðum 14. gr. EESsamningsins.

45 Að lokum, hefur verið nefnt að fyrirætlanir þær, sem fram koma í hinni sameiginlegu yfirlýsingu, séu hliðstæðar þeim markmiðum sem kveðið er á um í 4. mgr. 151. gr. samningsins um Evrópubandalagið, og dómstóllinn geti því í þessu máli byggt á reglu hliðstæðri því ákvæði samningsins, sem fellt var inn í hann með Amsterdamsamningnum. Dómstóllinn telur ekki samræmast réttilegri meðferð dómsvalds að leitast við að færa út gildissvið EES-samningsins á þeim grundvelli.

46 Með vísan til ofangreindra forsendna verður að svara þriðju spurningunni þannig, að ákvæði í landslögum EES-ríkis sem mælir svo fyrir, að bækur á tungumáli þess beri lægri virðisaukaskatt en bækur á erlendum tungumálum, verði ekki réttlætt með vísan til þeirra almannahagsmuna að styrkja stöðu þjóðtungunnar.

Fimmta spurning

47 Í fimmtu spurningu sinni er Héraðsdómur Reykjavíkur í raun að leita svars við því hvort ákvæði í meginmáli EES-samningsins skuli, samkvæmt EES-rétti, gilda framar ósamrýmanlegu ákvæði í landslögum.

48 Dómstóllinn tekur fram í upphafi, að í málum samkvæmt 34. gr. samnings EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls er það ekki hlutverk EFTA-dómstólsins að dæma um

skýringu ákvæða í landslögum (sjá mál E-1/94 *Restamark* [1994-1995] skýrsla EFTA-dómstólsins 15, í 78. lið).

49 Dómstóllinn minnir fyrst á álit sitt í máli E-9/97, *Erla María Sveinbjörnsdóttir* [1998], skýrsla EFTA-dómstólsins 95, í 58. og 59. lið, um réttindi einstaklinga og atvinnufyrirtækja sem EES-samningurinn gerir ráð fyrir. Þau sjónarmið sem lágu til grundvallar áliti dómstólsins í því máli eiga einnig við þegar athuguð eru álitaefni þessa máls.

50 Dómstóllinn tekur fram að meginmál EES-samningsins, þar á meðal 14. gr. hans, hefur verið tekið upp í íslensk lög með lögum *nr. 2/1993 um Evrópska efnahagssvæðið* (hér eftir nefnd "EES-lögin"). Samkvæmt 3. gr. íslensku EES-laganna skal skýra lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja. Er ríkisstjórnin lagði frumvarp til laganna fyrir Alþingi var því lýst yfir að ákvæði þetta hefði að geyma sérstaka lögskýringarreglu, og myndi hún takmarkast af ákvæðum íslensku stjórnarskrárinnar.

51 Bókun 35 með EES-samningnum er til leiðsagnar um hvernig beri að leysa úr ósamræmi milli reglna EES-réttar og reglna landsréttar. Með samþykkt þeirrar bókunar hafa EES-ríkin skuldbundið sig til að setja, ef nauðsyn krefur, lagaákvæði þess efnis að EES-reglur gildi ef til árekstra kemur milli EES-reglna sem settar hafa verið í landslög og annarra reglna landslaga. Að skilningi dómstólsins hefur 3. gr. EES-laganna verið sett til að uppfylla þá skuldbindingu. Í rekstri þessa máls fyrir dóminum hefur stefnandi borið brigður á að 3. gr. EESlaga sé fullnægjandi að þessu leyti. Í samræmi við það sem fram var tekið í 48. lið hér að ofan kemur það í hlut dómstóls aðildarríkisins að fjalla um það ákvæði og túlka það.

52 Í inngangi að bókun 35 með EES-samningnum kemur skýrt fram að í samningnum er ekki gerð krafa til þess að aðildarríki framselji löggjafarvald til stofnana EES, og að ná verði fram einsleitni innan EES með þeirri málsmeðferð, sem gildir í hverju landi um sig. Af inngangínum og af orðalagi bókunar 35 leiðir að skuldbindingin sem gengist hefur verið undir með bókuninni lýtur aðeins að EES-reglum sem lögfestar hafa verið í landsrétti. Eins og þegar hefur verið getið, hefur meginmál EES-samningsins verið tekið upp í landslög. Meginmáli samningsins hefur því verið "komið til framkvæmda" í skilningi bókunar 35.

53 Skuldbinding sú, sem gengist er undir með bókun 35, getur þó ekki náð til allra ákvæða meginmáls samningsins. Hún varðar aðeins þau ákvæði sem þannig eru úr garði gerð að þau geti stofnað til réttinda sem einstaklingar og atvinnufyrirtæki geta reist á dómkröfur innanlands. Eins og dómstóllinn hefur áður talið, er um slíkt að ræða þegar viðkomandi ákvæði er óskilyrt og nægilega nákvæmt (sjá *Restamark*, áður vísað til, 77. liður).

54 Ákvæði 14. gr. EES-samningsins eru sama efnis og 90. gr. samningsins um Evrópubandalagið. Síðarnefnda greinin hefur verið talin óskilyrt og nægilega nákvæm (sjá mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205). Með hliðsjón af markmiðinu um einsleitni og til að tryggja sömu meðferð einstaklinga á öllu evrópska efnahagssvæðinu verður að telja 14. gr. EESsamningsins uppfylla þá kröfu að vera óskilyrt og nægilega nákvæm.

55 Fimmtu spurningu verður því að svara þannig, að þegar ákvæði landslaga samrýmist ekki 14. gr. EES-samningsins og sú grein hefur verið innleidd í landslög, er upp komin staða sem

skuldbinding EFTA-ríkjanna í bókun 35 gildir um, en hún er reist á þeirri forsendu, að EES-regla, sem innleidd hefur verið í landsrétt, skuli hafa forgang.

III Málskostnaður

56 Ríkisstjórn Liechtenstein, ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem lagt hafa greinargerðir sínar fram fyrir dómstólinn, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Á ofangreindum forsendum telur

DÓMSTÓLLINN

að spurningum þeim, sem Héraðsdómur Reykjavíkur beindi til hans með úrskurði upp kveðnum 27. nóvember 2000, beri að svara með eftirfarandi ráðgefandi áliti:

1. Vald EES-ríkis til að leggja á virðisaukaskatt útilokar ekki beitingu EES-reglna.

2. Ákvæði í landslögum EES-ríkis, sem kveður á um að bækur á tungumáli þess beri lægri virðisaukaskatt en bækur á erlendum málum, samrýmist ekki 14. gr. EES-samningsins.

3. Slíkt ákvæði í landslögum verður ekki réttlætt með tilvísun til þeirra almannahagsmuna að bæta stöðu þjóðtungunnar.

4. Þegar ákvæði landslaga samrýmist ekki 14. gr. EES-samningsins og sú grein hefur verið innleidd í landslög, er upp komin sú staða sem skuldbinding EFTA-ríkjanna samkvæmt bókun 35 við EES-samninginn gildir um, en hún er reist á þeirri forsendu, að EES-regla, sem innleidd hefur verið í landslög, skuli hafa forgang.

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyranda hljóði í Lúxemborg 22. febrúar 2002.

Lucien Dedichen
Dómritari

Þór Vilhjálmsson
Dómsforseti

4. *Karl K. Karlsson*, mál nr. E-4/01, EFTA Court Report [2002] 240

DÓMUR DÓMSTÓLSINS
30. maí 2002*

(Ríkiseinkasala á áfengi – Brot á 16. gr. EES-samningsins – Skaðabótaábyrgð ríkisins vegna brota á EES-samningnum – Skilyrði bótaábyrgðar)

Mál E-4/01

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

Karl K. Karlsson hf.

gegn

íslenska ríkinu

varðandi skýringu EES-samningsins, einkum 11. og 16. gr.

DÓMSTÓLLINN,

skipaður dómurunum Þór Vilhjálmssyni, forseta, Carl Baudenbacher og Per Tresselt (framsögumanni),

Dómritari: Lucien Dedichen

hefur, með tilliti til skriflegra greinargerða frá:

– stefnanda, Karli K. Karlssyni hf. Í fyrirsvari sem umboðsmaður er Stefán Geir Þórisson, hæstaréttarlögmaður;

* Beiðni um ráðgefandi álit er á íslensku.

– stefnda, íslenska ríkinu. Í fyrirsvari sem umboðsmaður er Skarphéðinn Þórisson, ríkislögmaður, og honum til aðstoðar er Einar Karl Hallvarðsson, hæstaréttarlögmaður á skrifstofu ríkislögmanns;

– ríkisstjórn Noregs. Í fyrirsvari sem umboðsmenn eru Thomas Nordby, lögmaður á skrifstofu ríkislögmanns og Frode Elgesem, lögmaður, skrifstofu ríkislögmanns;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Lena Ström, lögfræðingur hjá lagadeild;

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings umboðsmanns stefnanda Stefáns Geirs Þórissonar; umboðsmanns stefnda Skarphéðins Þórissonar; umboðsmanna Norsku ríkisstjórnarinnar Thomas Nordby, og Frode Elgesem; umboðsmanna Eftirlitsstofnunar EFTA Peter Dyrberg, deildarstjóra á lögfræði og framkvæmdasviði og Dóru Sif Tynes; og umboðsmanns Framkvæmdastjórnarinnar Lena Ström, þann 5. desember 2001,

kveðið upp svofelldan

Dóm

I Málsatvik og meðferð málsins

1 Með beiðni dags. 6. apríl 2001, sem skráð var í málaskrá dómstólsins 12. apríl 2001, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Karls K. Karlssonar hf. (stefnanda) og íslenska ríkisins (stefnda).

2 Ágreiningurinn fyrir Héraðsdómi Reykjavíkur varðar það hvort einkaréttur ríkisins á innflutningi og heildsölu áfengis, sem var við lýði á Íslandi til 1. desember 1995, var ósamrýmanlegur EES-samningnum, og ef svo er, hvort aðili sem hindraður var í að flytja inn áfengi eigi rétt til skaðabóta úr hendi ríkisins vegna þess fjártjóns sem hann varð fyrir vegna einkaréttarins.

3 Íslenska löggjöfin sem um er deilt fyrir Héraðsdómi Reykjavíkur eru *Áfengislög nr. 82/1969* og *lög nr. 63/1969 um verslun með áfengi og tóbak.*

4 Þegar EES-samningurinn gekk í gildi 1. janúar 1994 var í áfengislögunum mælt svo fyrir að aðeins íslenska ríkinu skyldi vera heimilt að flytja inn áfengi og að Áfengis- og tóbaksverslun ríkisins skyldi annast innflutning og heildsöludreifingu áfengis. Með gildistöku laga nr. 94/1995, um breyting á áfengislögum, og laga nr. 95/1995 um breyting á lögum um verslun með áfengi og tóbak, þann 1. janúar 1995, var einkaréttur ríkisins á innflutningi og

heildsöludreifingu áfengis afnuminn og kveðið á um aukið frelsi í þeim efnum. Áfengislög nr. 75/1998 hafa nú komið í stað eldri áfengislaga.

5 Fram kemur í beiðni um ráðgefandi álit, að áður en EES-samningurinn gekk í gildi hafi stefnandi, Karl K. Karlsson hf., gert ráðstafanir til að hefja innflutning og heildsöludreifingu áfengis og hafi haft á Íslandi umboð fyrir fjölda áfengistegunda, þar á meðal hinn franska líkjör Cointreau.

6 Ennfremur kemur fram í beiðninni um ráðgefandi álit, að frá 1. janúar 1994, þegar EES-samningurinn gekk í gildi, til 1. desember 1995, þegar einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var afnuminn, hafi stefnanda verið óheimilt að flytja inn til Íslands þær áfengistegundir sem hann hafði umboð fyrir og að dreifa þessum vörum til smásöluaðila. Stefnandi telur að vegna þessa banns hafi hann orðið fyrir talsverðu fjártjóni.

7 Stefnandi höfðaði mál gegn stefnda fyrir Héraðsdómi Reykjavíkur til að fá viðurkenningardóm um skaðabótaskyldu stefnda vegna þess fjártjóns sem stefnandi hefur orðið fyrir sökum þess að honum var óheimilt að flytja til landsins og dreifa í heildsölu franska líkjörnum Cointreau. Við meðferð málsins hefur stefnandi dregið í efa að einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis, sem var við lýði á Íslandi til 1. desember 1995, hafi verið samrýmanlegur EES-samningnum. Stefnandi hefur ennfremur haldið því fram að hann eigi á grundvelli EES-samningsins rétt til skaðabóta vegna fjártjóns sem hann varð fyrir vegna einkaréttarins.

8 Þann 6. apríl 2001 lagði Héraðsdómur Reykjavíkur fram beiðni um ráðgefandi álit EFTA-dómstólsins varðandi þessar spurningar:

> *1. Ber að skýra ákvæði EES-samningsins, einkum 11. og 16. gr., þannig að íslenska ríkinu hafi frá gildistöku samningsins 1. janúar 1994 verið skylt að afnema einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis?*
>
> *2. Sé svarið við ofangreindri spurningu jákvætt, er spurt, hvort íslenska ríkið sé skaðabótaskylt gagnvart lögaðila, sem við gildistöku samningsins hafði aflað sér einkasölumboðs fyrir tiltekna áfengistegund, að því tilskildu að hann hafi orðið fyrir fjártjóni vegna þess að ekki var heimilaður innflutningur og heildsöludreifing áfengistegundarinnar, fyrr en tæpum tveimur árum eftir gildistöku EES-samningsins, að fullnægðum bótaskilyrðum samkvæmt dómafordæmum EFTA-dómstólsins og Evrópudómstólsins?*
>
> *3. Sé svarið við spurningum 1 og 2 jákvætt, er spurt, hvort fullnægt sé bótaskilyrðum samkvæmt dómafordæmum ofangreindra dómstóla?*

9 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur dómsins krefjast.

II Álit dómstólsins

Spurningar tækar til efnismeðferðar

10 Ríkisstjórn Noregs heldur því fram að vísa eigi fyrstu spurningunni frá þar sem dómstóllinn sem beðið hafi um ráðgefandi álit hafi ekki fullnægt skyldu sinni samkvæmt 3. mgr. 96. gr. starfsreglna fyrir EFTA-dómstólinn, að því leyti að ekki sé að finna nægilegar upplýsingar um málsatvik í beiðninni frá Héraðsdómi Reykjavíkur.

11 Í því skyni að láta í té álit um skýringu EES-réttar sem komi að gagni fyrir dómstólinn sem beðið hefur um álit er nauðsynlegt að beiðnin hafi að geyma, a. m. k., lýsingu á málsatvikum sem spurningarnar eru byggðar á. Upplýsingarnar eiga ekki aðeins að gera EFTA-dómstólnum kleift að svara dómstólnum sem beðið hefur um álit, heldur einnig að veita ríkisstjórnum samningsaðila EES-samningsins og öðrum sem áhuga hafa, tækifæri til að leggja fram athugasemdir samkvæmt 20. gr. stofnsamþykktar EFTA-dómstólsins og 97. gr. starfsreglna hans. Það er skylda EFTA-dómstólsins að standa vörð um þennan rétt og hafa í huga að aðeins beiðnin er aðgengileg þeim aðilum sem kynnu að vilja láta sig málið varða (sjá m.a. sameinuð mál C-51/96 og C-191/97 *Deliège* [2000] ECR I-2549, liðir 30 og 31).

12 Ljóst er af skriflegum greinargerðum sem lagðar hafa verið fram fyrir dóminn af hálfu ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna að upplýsingarnar sem fram koma í beiðninni um ráðgefandi álit hafa verið nægilegar til að þessir aðilar gætu tekið afstöðu til allra þriggja spurninganna sem Héraðsdómur Reykjavíkur hefur lagt fyrir EFTA-dómstólinn. Spurningarnar eru efnislega tækar og dómstólnum ber að svara þeim.

Fyrsta spurning

13 Í fyrstu spurningunni leitar Héraðsdómur Reykjavíkur svara við því hvort einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis, af því tagi sem við lýði var á Íslandi til 1. desember 1995, hafi verið ósamrýmanlegur 11. og 16. gr. EES-samningsins frá gildistöku hans 1. janúar 1994.

14 Dómstóllinn bendir fyrst á að framleiðsluvara sú sem um ræðir í aðalmálinu, Cointreau, fellur undir efnissvið EES-samningsins. Þetta leiðir af 3. mgr. 8. gr. hans, sbr. og 1. gr. bókunar 3 við samninginn, sem mælir svo fyrir að ákvæði samningsins skuli taka til framleiðsluvara sem taldar eru upp í töflu I og II. Líkjörar sem innihalda meira en 5% af viðbættum sykri eru taldir upp undir númeri 22.08 í töflu I í samræmdu vörulýsingar- og vörumerkjaskránni.

15 Fyrsta spurningin lýtur bæði að 11. og 16. gr. EES. Dómstóllinn bendir á að reglur sem varða tilvist og starfsemi einkasölu verður að meta á grundvelli 16. gr. EES, sem tekur sérstaklega til framkvæmdar einkaréttarins af hálfu einkasölu (sjá m.a. mál E-1/97 *Gundersen* gegn *Oslo kommune* [1997] Skýrsla EFTA-dómstólsins 108, lið 17; og mál C-189/95 *Franzén* [1997] ECR I-5909 (hér eftir "*Franzén*"), lið 35). Þær reglur landsréttar sem fjallað er um í málinu varða þá aðstöðu að einkarétti ríkisins á innflutningi og heildsöludreifingu áfengis var

viðhaldið eftir gildistöku EES-samningsins. Þessar reglur verður því að meta í ljósi 16. gr. EES.

16 Ákvæði 16. gr. EES hljóðar svo:

> 1. Samningsaðilar skulu tryggja breytingar á ríkiseinkasölum í viðskiptum þannig að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja EB og EFTA ríkja hvað snertir skilyrði til aðdrátta og markaðssetningar vara.
>
> 2. Ákvæði þessarar greinar gilda um allar stofnanir sem þar til bær yfirvöld samningsaðilanna nota samkvæmt lögum eða í reynd, beint eða óbeint, til að hafa eftirlit með, ráða eða hafa umtalsverð áhrif á inn- eða útflutning milli samningsaðila. Þessi ákvæði gilda einnig um einkasölur sem ríki hefur fengið öðrum í hendur.

17 Markmið 16. gr. er að gera EES-ríkjum kleift að viðhalda vissum ríkiseinkasölum í viðskiptum vegna almannhags þannig að samræmist stofnun og framkvæmd hins sameiginlega EES-markaðar. Með ákvæðinu er stefnt að afnámi hindrana á frjálsum vöruflutningum, að því marki sem slíkar hindranir eru ekki innbyggðar í sjálfa einkasöluna (sjá *Franzén*, lið 39).

18 Þegar EES-samningurinn gekk í gildi 1. janúar 1994 mæltu hinar íslensku reglur, sem um er fjallað í málinu, svo fyrir að íslenska ríkið hefði einkarétt á innflutningi og heildsöludreifingu áfengis. Einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var ekki afnuminn fyrr en 1. desember 1995.

Einkaréttur á innflutningi

19 Dómstóllinn hefur áður komist að þeirri niðurstöðu að lögmætur einkaréttur ríkisins á öllum innflutningi tiltekinna vara hafi það í för með sér að ríkið hafi í hendi sér að ákvarða framboð þeirra vara á innanlandsmarkaði og geti þar með einnig ráðið verði þeirra (sjá mál E-1/94 *Restamark* [1994-1995] Skýrsla EFTA-dómstólsins 15 (hér eftir, "*Restamark*"), lið 71). Það leiðir af dómaframkvæmd bæði EFTA-dómstólsins og dómstóls Evrópubandalaganna að 16. gr. ber að skýra þannig að frá og með gildistöku EES-samningsins bar að breyta ríkiseinkasölum í viðskiptum með því að afnema einkarétt á innflutningi frá öðrum EES-ríkjum (sjá *Restamark*, lið 74; og mál 59/75 *Publico Ministereo* v *Manghera* [1976] ECR 91 (hér eftir "*Manghera")*, lið 13). Þess vegna var það andstætt 16. gr. EES að viðhalda einkarétti ríkisins á innflutningi á áfengi eftir 1. janúar 1994.

Einkaréttur á heildsöludreifingu

20 Að því er varðar hinn umdeilda einkarétt á heildsöludreifingu bendir dómstóllinn á að 16. gr. EES gerir ráð fyrir að skipulag og starfræksla slíkar einkasölu verði að vera með þeim hætti að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja Evrópska efnahagssvæðisins hvað snertir skilyrði til aðdrátta og markaðssetningar vara, þannig að viðskipti með vörur frá öðrum EES-ríkjum, njóti ekki lakari stöðu að lögum eða í reynd, í samanburði við innlenda framleiðslu (sjá um þetta, *Franzén*, lið 40). Ekki er unnt að líta svo á að einkaréttur á

heildsöludreifingu sé eftir eðli sínu ósamrýmanlegur 16. gr. EES. Verið getur að einkaréttur á heildsöludreifingu sé ekki andstæður 16. gr. EES ef viðskipti með vörur frá öðrum EES-ríkjum búa ekki við lakari skilyrði, að lögum eða í reynd, í samanburði við viðskipti með innlendar framleiðsluvörur.

21 Það er hlutverk Héraðsdóms Reykjavíkur að meta skipulag og framkvæmd einkaréttar til heildsöludreifingar. Ef dómstóllinn kemst að þeirri niðurstöðu að einkarétturinn hafi verið framkvæmdur þannig að vörur fluttar inn frá öðrum EES-ríkjum hafi sætt lakari viðskiptakjörum en innlendar vörur, verður að líta svo á að einkaréttur íslensku ríkiseinkasölunnar til heildsöludreifingar hafi verið andstæður 16. gr. EES.

22 Reglur landsréttar sem ekki varða beint framkvæmd einkaréttar á heildsöludreifingu, þótt þær geti skipt máli fyrir hann, verður Héraðsdómur Reykjavíkur að meta á grundvelli 11. gr. EES (sjá um þetta, *Franzén*, lið 36). Við það mat verður að taka mið af dómi í máli E-6/96 *Wilhelmsen* v *Oslo kommune* [1997] Skýrsla EFTA-dómstólsins 56, lið 51. Af þeim dómi leiðir að meginspurningin er hvort einkaréttur á heildsöludreifingu takmarkar í ríkara mæli möguleika til að koma á markað framleiðsluvörum frá öðrum EES-ríkjum en innlendum framleiðsluvörum.

23 Með vísan til framangreinds verður svarið við fyrstu spurningunni, að viðhald einkaréttar á innflutningi áfengis eftir 1. janúar 1994 sé ósamrýmanlegt 16. gr. EES-samningsins.

Önnur spurning

24 Í annarri spurningunni leitar Héraðsdómur Reykjavíkur í raun svars við því hvort EES-ríki geti samkvæmt EES-samningnum verið skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hafi orðið fyrir vegna þessa að einkarétti á innflutningi áfengis var viðhaldið, að því gefnu að skilyrðum skaðabótaskyldu sé fullnægt.

25 Í máli E-9/97 *Erla María Sveinbjörnsdóttir* [1998] Skýrsla EFTA-dómstólsins 95 (hér eftir "*Erla María Sveinbjörnsdóttir*"), komst EFTA-dómstóllinn að þeirri niðurstöðu að EES-samningurinn væri þjóðréttarsamningur sérstaks eðlis sem fæli í sér sérstakt og sjálfstætt réttarkerfi. Samruni sá sem samningurinn mæli fyrir um gangi ekki jafn langt og sé ekki eins víðfeðmur og sá samruni sem samningurinn um Evrópubandalagið stefni að. Hins vegar gangi markmið EES-samningsins lengra og gildissvið hans sé víðtækara en venjulegt sé um þjóðréttarsamninga (sjá *Erla María Sveinbjörnsdóttir*, lið 59). Í því máli komst EFTA-dómstóllinn að þeirri niðurstöðu að það sé meginregla samkvæmt EES-samningnum að EES-ríki beri skylda til að sjá til þess að það tjón fáist bætt sem einstaklingar verða fyrir vegna vanefnda á skuldbindingum samkvæmt EES-samningnum og sem viðkomandi ríki beri ábyrgð á. EES-samningurinn feli ekki í sér framsal löggjafarvalds, en meginreglan um skaðabótaábyrgð ríkisins sé hins vegar hluti EES-samningsins (sjá *Erla María Sveinbjörnsdóttir*, liðir 62 og 63). Á þetta er bent í dómi dómstóls Evrópubandalaganna í máli C-140/97 *Rechberger o.fl.* [1999] ECR I-3499, lið 39.

26 Ríkisstjórn Noregs hefur haldið því fram að meginreglan um skaðabótaábyrgð ríkisins í bandalagsrétti, eins og hún hefur verið mótuð í dómaframkvæmd dómstóls

Evrópubandalaganna verði ekki skilin frá meginreglunni um bein réttaráhrif. Meginreglurnar um bein réttaráhrif og skaðabótaábyrgð ríkisins séu hluti af hinu yfirþjóðlega eðli bandalagsréttarins, sem ekki sé til staðar í EES-samningnum. Ríkisstjórn Noregs heldur því fram "að það væri ósamrýmanlegt framkomnum skoðunum dómstóls Evrópubandalaganna og EFTA-dómstólsins að mæla fyrir um meginreglu um skaðabótaábyrgð ríkisins sem í raun sé svipuð meginreglunni um bein réttaráhrif".

27 Þessi röksemdafærsla fær ekki staðist. Það er rétt, eins og bent er á af hálfu ríkisstjórnar Noregs, að reglan um skaðabótaábyrgð ríkisins samkvæmt bandalagsrétti er talin vera nauðsynleg viðbót við regluna um bein réttaráhrif ákvæða bandalagsréttar (sjá sameinuð mál C-46/93 og C-48/93 *Brasserie du Pêcheur og Factortame* [1996] ECR I-1029 (hér eftir, "*Brasserie du Pêcheur*"), lið 22). Þó getur ekki falist í þessu að meginreglan um skaðabótaábyrgð ríkisins, sem byggð er á EES-samningnum sjálfum, sé á nokkurn hátt háð því að viðurkennd sé afleidd meginregla um bein réttaráhrif EES-reglna.

28 Það leiðir af 7. gr. EES og bókun 35 við EES-samninginn að EES-réttur felur ekki í sér framsal löggjafarvalds. Af því leiðir að EES-réttur gerir ekki kröfu til þess að einstaklingar og aðilar í atvinnurekstri geti byggt beinan rétt fyrir dómstólum aðildarríkis á ákvæðum EES-réttar sem ekki hafa verið innleidd í landsrétt. Um leið leiðir það af þeim almennu markmiðum EES-samningsins, að koma á fót öflugum og einsleitum markaði, þar sem ítrekuð áhersla er lögð á möguleika einstaklinga til að leita réttar síns fyrir dómstólum og til að fá fullnægt réttindum sínum samkvæmt samningnum, sem og af meginreglunni um virka framkvæmd þjóðaréttar, að dómstólar aðildarríkja hljóta við skýringu landsréttar að taka mið af EES-réttinum í heild, hvort sem ákvæði hans hafa verið lögfest eða ekki.

29 Þótt ekki sé miðað við að EES-reglur hafi bein réttaráhrif útilokar það ekki skyldu ríkisins til að bæta það tjón sem einstaklingar og aðilar í atvinnurekstri verða fyrir vegna vanefnda á skuldbindingum sínum samkvæmt EES-samningnum og sem viðkomandi EFTA-ríki ber ábyrgð á.

30 Af þessu leiðir að sú niðurstaða að meginreglan um skaðabótaábyrgð ríkisins sé hluti EES-samningsins er, eðli málsins samkvæmt, frábrugðin þróuninni í dómaframkvæmd dómstóls Evrópubandalaganna að því er varðar regluna um skaðabótaábyrgð ríkisins samkvæmt bandalagsrétti. Beiting þessara reglna og gildissvið þeirra þarf þess vegna heldur ekki að vera að öllu leyti hið sama.

31 Stefndi, með stuðningi ríkisstjórnar Noregs, heldur því fram að reglan um skaðabótaábyrgð ríkisins samkvæmt EES-samningnum eigi aðeins við ranga lögfestingu tilskipana. Hann heldur því fram að EES-samningurinn geri ekki kröfu til þess að EES-ríki sé skaðabótaskylt vegna brota á ákvæðum í meginmáli EES-samningsins.

32 Þessari röksemd verður að hafna. EES-ríki getur orðið skaðabótaskylt vegna brota á skuldbindingum samkvæmt EES-rétti að þremur skilyrðum uppfylltum: Í fyrsta lagi verður að felast í reglunni sem brotin er að einstaklingar öðlist tiltekin réttindi; í öðru lagi verður að vera um nægilega alvarlega vanrækslu á skuldbindingum ríkisins að ræða, og í þriðja lagi verður að vera orsakasamband milli vanrækslu ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verður fyrir (sjá *Erla María Sveinbjörnsdóttir*, lið 66). Þessi þrjú skilyrði verða að vera

uppfyllt hvort sem tjón það sem krafist er bóta fyrir er að rekja til athafnaleysis að hálfu EES-ríkis eða til setningar laga eða almennra stjórnsýslufyrirmæla sem andstæð eru EES-rétti (sjá til samanburðar mál C-424/97 *Haim* [2000] ECR I-5213 (hér eftir, "*Haim*"), lið 37). Samkvæmt EES-samningnum getur EFTA-ríki, að meginstefnu til, verið skaðabótaskylt samkvæmt EES-samningnum, hvort sem um er að ræða brot á skuldbindingum sem leiða af afleiddri löggjöf eða skuldbindingar samkvæmt meginmáli EES-samningsins.

33 Að því gefnu að ríki sé skaðabótaskylt samkvæmt EES-samningnum og þar sem skilyrði skaðabótaskyldu eru uppfyllt, verður að ákvarða bætur vegna tjóns í samræmi við skaðabótareglur landsréttar. Skilyrði fyrir skaðabótum samkvæmt landsrétti við þessar aðstæður mega ekki vera strangari en þau sem gilda um hliðstæðar innlendar kröfur og mega ekki vera sett þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur (sjá til hliðsjónar *Haim*, lið 33).

34 Svarið við annarri spurningunni verður því það, að EES-ríki verður skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hefur orðið fyrir vegna þess að einkarétti ríkisins á innflutningi var viðhaldið, að því gefnu að skilyrði fyrir skaðabótaskyldu séu uppfyllt. Þar sem þessi skilyrði eru uppfyllt, ber að ákvarða bætur á grundvelli skaðabótareglna landsréttar. Reglur um skaðabætur sem mælt er fyrir um í landsrétti mega ekki fela í sér lakari réttarstöðu en gildir um hliðstæðar innlendar kröfur og mega ekki vera settar þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur.

Þriðja spurning

35 Í þriðju spurningunni spyr Héraðsdómur Reykjavíkur hvort skilyrði fyrir skaðabótaskyldu ríkisins séu uppfyllt í fyrirliggjandi máli.

36 Það kemur, að meginstefnu til, í hlut dómstóls aðildarríkis að meta staðreyndir málsins og ákvarða hvort skilyrðin fyrir skaðabótaskyldu ríkisins eru uppfyllt. EFTA-dómstóllinn getur samt sem áður sett fram almenn atriði og sjónarmið sem dómstóll aðildarríkis tekur mið af við þetta mat (sjá um þetta mál C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493 (hér eftir "*Stockholm Lindöpark*"), lið 38).

Fyrsta skilyrðið

37 Hvað snertir fyrsta skilyrðið fyrir skaðabótaskyldu ríkisins, um að reglan sem brotin mæli svo fyrir að einstaklingar öðlist tiltekin réttindi, hefur dómstóllinn áður komist að þeirri niðurstöðu að svo sé þegar reglan sem um ræðir er nægilega skýr og óskilyrt (sjá *Restamark*, lið 77). Dómstóllinn hefur einnig talið að þessu skilyrði sé fullnægt að því er 16. gr. EES varðar. Ákvæði 16. gr. EES leggur á herðar EES-ríki þá skyldu að breyta lögmæltum einkarétti þannig að enginn greinarmunur sé gerður á milli ríkisborgara EES-ríkjanna hvað snertir skilyrði til aðdrátta og markaðssetningar vara. Ákvæði 16. gr. hefur að geyma skuldbindingu sem hefur skýrt markmið og hún er ekki háð neinum skilyrðum (sjá *Restamark*, liðir 79 og 80, og *Manghera*, liðir 15 og 16). Þar sem ákvæði 16. gr. hefur verið lögfest á Íslandi mælir ákvæðið fyrir um rétt til handa einstaklingum sem þeir geta sótt fyrir dómstólum landsins.

Annað skilyrðið

38 Að því er varðar skilyrðið um að brotið verði að vera nægilega alvarlegt, hefur dómstóllinn áður komist að þeirri niðurstöðu að þetta sé háð því hvort samningsaðilinn með bersýnilegum og alvarlegum hætti leit fram hjá þeim takmörkunum sem eru á svigrúmi ríkisins til mats við ákvarðanatöku. Við mat á því hvort þetta skilyrði er uppfyllt, verður dómstóll sem fjallar um skaðabótakröfuna, að taka mið af öllum þeim þáttum sem einkenna þær aðstæður sem fyrir liggja. Þessir þættir varða m.a. það hversu skýrt og nákvæmt það ákvæði er sem farið er gegn, hversu mikið mat ákvæðið eftirlætur innlendum stjórnvöldum og hvort um er að ræða vísvitandi brot á samningsskuldbindingum sem leiddi til tjóns eða brot sem ekki var framið af ásetningi og þess hvort lögvilla var afsakanleg eða óafsakanleg (sjá *Erla María Sveinbjörnsdóttir*, liðir 68 og 69).

39 Það er ljóst af dómi EFTA-dómstólsins í *Restamark*, að Ísland, með því að viðhalda einkarétti ríkisins á innflutningi á áfengi, braut gegn 16. gr. EES frá og með þeim degi er EES-samningurinn gekk í gildi 1. janúar 1994. Sá dómur var kveðinn upp 16. desember 1994 og var í aðalatriðum byggður á dómaframkvæmd dómstóls Evrópubandalaganna fyrir gildistöku EES-samningsins, einkum dóminum í *Manghera*. Einkaréttur ríkisins á innflutningi áfengis var aftur á móti ekki afnuminn fyrr en 1. desember 1995, eða því sem næst tveimur árum eftir að EES-samningurinn gekk í gildi.

40 Á hinn bóginn er sú niðurstaða að EES-regla hafi verið brotin ekki ákvarðandi. Sú staðreynd að EES-regla hafi ekki verið virt þarf ekki að þýða að brot sé nægilega alvarlegt (sjá *Stockholm Lindöpark*, lið 41). Brot er aftur á móti nægilega alvarlegt ef það heldur áfram þrátt fyrir skýra dómaframkvæmd, sem skýrlega má af ráða að hegðun sú sem um ræðir fól í sér brot (sjá til hliðsjónar *Brasserie du Pêcheur*, lið 57).

41 Stefnandi, með stuðningi Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna, hefur bent á að við gildistöku EES-samningsins hafði það verið ljóst lengi af dómaframkvæmd dómstóls Evrópubandalaganna, einkum af dóminum í *Manghera*, að einkaréttur aðila í viðskiptum til innflutnings hafi verið ósamrýmanlegur þeim ákvæðum samningsins um Evrópubandalagið sem samsvara 16. gr. EES. Af þessum ástæðum er því haldið fram að þeirra hálfu að einkaréttur til innflutnings á áfengi til Íslands eftir gildistöku EES-samningsins hafi verið nægilega alvarlegt brot á EES-rétti.

42 Dómstóllinn bendir á að í *Manghera*, hafi dómstóll Evrópubandalaganna komist að þeirri niðurstöðu að ríkiseinkasölum í viðskiptum bæri að breyta þannig að afnuminn sé einkaréttur á innflutningi. Þótt ekki væri í málinu fjallað um áfengiseinkasölur sé ljóst af dóminum í *Manghera* að einkaréttur á innflutningi á áfengi felur í sér brot á þeim ákvæðum samningsins um Evrópubandalagið sem samsvara 16. gr. EES. Þess vegna gat íslenska ríkið ekki verið í neinum vafa um að því bar að breyta löggjöf sinni þannig að afnuminn yrði einkaréttur á innflutningi áfengis frá og með gildistöku EES-samningsins. Íslenska ríkinu hefði átt að vera kunnugt um þennan dóm og þýðingu hans fyrir skýringu EES-samningsins bæði meðan á samningaviðræðum fyrir EES-samninginn stóð og þegar hann var undirritaður 2. maí 1992.

43 Hin sameiginlega yfirlýsing ríkisstjórna Finnlands, Íslands, Noregs og Svíþjóðar varðandi áfengiseinkasölur, sem fylgir lokagerð samningsins, þar sem ríkin lýsa því yfir að "áfengiseinkasölur ríkjanna [séu] grundvallaðar á mikilvægum sjónarmiðum er varða stefnu þeirra í heilbrigðis- og félagsmálum" getur ekki breytt þessari niðurstöðu. Yfirlýsingin er gerð "með fyrirvara um skuldbindingar sem leiðir af samningnum" Jafnvel á grundvelli almenns þjóðaréttar felur hún ekki í sér formlegan fyrirvara um undanþágu frá samningsskuldbindingum. Hin mikilvægu sjónarmið varðandi heilbrigðis- og félagsmál sem vísað er til skipta ekki máli varðandi einkarétt á innflutningi.

44 Íslenska ríkið, með stuðningi ríkisstjórnar Noregs, hefur haldið því fram að þegar eftir gildistöku samningsins hafi verið gerðar ráðstafanir til að breyta hinni umdeildu löggjöf til að samræma hana EES-samningnum. Því er haldið fram að brot á EES-rétti hafi ekki verið nægilega alvarlegt til að skapa grundvöll að skaðabótaskyldu þar sem tíminn sem notaður var til að afnema einkarétt á innflutningi hafi ekki verið óhæfilega langur.

45 Dómstóllinn bendir á að almennt þegar dómur EFTA-dómstólsins eða dómstóla Evrópubandalaganna hafi orðið til að skýra réttarstöðu á grundvelli EES-samningsins sem áður var talinn óljós, verði að ætla EES-ríki hæfilegan tíma til að aðlaga löggjöf sína án þess að til skaðabótaskyldu stofnist (sjá um þetta, mál *Haim*, lið 46, *et al.*). Eins og fram hefur komið var það ljóst löngu fyrir gildistöku EES-samningsins að ekki yrði heimilt að viðhalda einkarétti á innflutningi. Dómstóllinn telur, að íslenska ríkinu, sem tekið hafði þátt í samningaviðræðunum fyrir EES-samninginn og samningu hans og síðan undirritað hann og fullgilt hafi verið í bestri aðstöðu til að meta hvaða lagabreytingar gera yrði til að fullnægja skuldbindingum samkvæmt samningnum áður enn hann gengi í gildi 1. janúar 1994. Íslenska ríkið virðist hafa haft nægilegan tíma frá því samningurinn var undirritaður og þar til hann tók gildi til að gera nauðsynlegar breytingar á innlendri löggjöf og þar með koma í veg fyrir brot á þeirri skyldu sinni að afnema einkarétt á innflutningi áfengis.

46 Á grundvelli þessara sjónarmiða er það niðurstaða dómstólsins að viðhald einkaréttar á innflutning áfengis á Íslandi eftir gildistöku EES-samningsins feli í sér nægilega alvarlegt brot til að leiða til skaðabótaskyldu, að því gefnu að önnur bótaskilyrði séu uppfyllt.

Þriðja skilyrðið

47 Að því er snertir skilyrðið um að vera þurfi beint orsakasamband milli vanefnda á skuldbindingum ríkisins og þess tjóns sem aðili hefur orðið fyrir, bendir dómstóllinn á að það er hlutverk dómstóls aðildarríkis að meta hvort svo sé (sjá, *m.a*, mál C-5/94 *The Queen* gegn *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, lið 30).

48 Svarið við þriðju spurningunni verður því það að mat á því hvort skilyrðum skaðabótaskyldu sé fullnægt eigi að meginstefnu til undir Héraðsdóm Reykjavíkur. Við það mat ber að taka mið af eftirfarandi atriðum: (1) Ákvæði 16. gr. er ætlað að veita einstaklingum beinan rétt; (2) brotið gegn 16. gr. er nægilega alvarlegt til að hafa í för með sér skaðabótaskyldu, (3) það kemur í hlut dómstóls aðildarríkis að meta hvort beint orsakasamband er milli vanefnda á skuldbindingum samkvæmt 16. gr. EES og tjóns sem orðið hefur.

III Málskostnaður

49 Ríkisstjórn Noregs, ríkisstjórn Svíþjóðar, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem hafa skilað greinargerðum til dómstólsins, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Á þessum forsendum lætur

DÓMSTÓLLINN,

í té svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins með úrskurði frá 6. apríl 2001:

1. Viðhald einkaréttar ríkisins á innflutningi áfengis eftir 1. janúar 1994 er ósamrýmanlegt 16. gr. EES-samningsins.

2. EES-ríki verður skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hefur orðið fyrir vegna þess að einkarétti ríkisins á innflutningi var viðhaldið, að því gefnu að skilyrði fyrir skaðabótaskyldu séu uppfyllt. Þar sem þessi skilyrði eru uppfyllt, ber að ákvarða bætur á grundvelli skaðabótareglna landsréttar. Reglur um skaðabætur sem mælt er fyrir um í landsrétti mega ekki fela í sér lakari réttarstöðu en gildir um hliðstæðar innlendar kröfur og mega ekki vera settar þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur.

3. Mat á því hvort skilyrðum skaðabótaskyldu ríkisins sé fullnægt á að meginstefnu til undir Héraðsdóm Reykjavíkur. Við það mat ber að taka mið af eftirfarandi atriðum: (1) Ákvæði 16. gr. er ætlað að veita einstaklingum beinan rétt; (2) brotið gegn 16. gr. er nægilega alvarlegt til að hafa í för með sér skaðabótaskyldu; (3) það kemur í hlut dómstóls aðildarríkis að meta hvort beint orsakasamband er milli vanefnda á skuldbindingum samkvæmt 16. gr. EES og tjóns sem orðið hefur.

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyranda hljóði í Lúxemborg 30. maí 2002.

Lucien Dedichen
Dómritari

Þór Vilhjálmsson
forseti

5. *Criminal Proceedings against A*, mál nr. E-1/07 EFTA Court Report [2007] 246

JUDGMENT OF THE COURT
3 October 2007

(Lawyers' freedom to provide services – Council Directive 77/249/EEC – Article 7 EEA – Protocol 35 EEA – principles of primacy and direct effect – conforming interpretation)

In Case E-1/07,

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 *Fürstliches Landgericht* (Princely Court of Justice), Liechtenstein, in criminal proceedings against

A

concerning the interpretation of the rules on the freedom to provide services in the European Economic Area (EEA), and in particular Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services,

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– The Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

– the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, acting as Agent;

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* Language of the Request: German.

– the Kingdom of Norway, represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs) and Ivar Alvik, senior adviser, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority (ESA), represented by Lorna Young, Officer, and Per Andreas Bjørgan, Senior Officer, Legal and Executive Affairs, acting as Agents; and

– the Commission of the European Communities (the Commission), represented by Hans Christian Stovlbaek and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Republic of Iceland, represented by its Agent Martin Eyjolfsson, the Principality of Liechtenstein, represented by its Agent Dr Andrea Entner-Koch, the Kingdom of Norway, represented by its Agent Pål Wennerås, ESA, represented by its Agent Lorna Young and the Commission, represented by its Agent Nicola Yerrell, at the hearing on 26 June 2007,

gives the following

Judgment

I Facts and procedure

1 By a letter dated 31 January 2007, registered at the Court on 7 February 2007, *Fürstliches Landgericht* submitted two questions for an Advisory Opinion in a criminal case pending before it against A (hereinafter the "Defendant").

2 The Defendant was charged on 19 December 2006 with a series of criminal offences in breach of the Liechtenstein Criminal Code (*Liechtensteinisches Strafgesetzbuch*), namely the inflicting of bodily harm to another person (a German national resident in Austria, hereinafter the "victim"), causing damage to his property, permanent removal of his property and suppression of documents that belonged to him.

3 The victim requested to be associated with the criminal proceedings as a private intervener (*Privatbeteiligter)*, claiming damages to the sum of 500.00 EUR. This request was made on his behalf by an Austrian lawyer practising from Austria and registered with the Committee of the Vorarlberg Bar as a "Rechtsanwalt". The lawyer was listed in neither the register of Liechtenstein lawyers, nor the register of European lawyers established in Liechtenstein. Moreover, he has not taken an aptitude test pursuant to Article 54 et seq. of the Liechtenstein Lawyers Act (*Liechtensteinisches Rechtsanwaltsgesetz*).

4 Since the Austrian lawyer had neither taken an aptitude test nor appointed a local lawyer to act in conjunction with him before *Fürstliches Landgericht*, that court has to make a decision

whether or not to require him under Article 57a of the Liechtenstein Lawyers Act to appoint a local lawyer to act in conjunction with him.

5 Fürstliches Landgericht referred the following questions to the Court:

1. *Is a provision such as that of Article 57a of the Liechtenstein Lawyers Act (Rechtsanwaltsgesetz), according to which, in proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, the European lawyer providing services must call in a local lawyer to act in conjunction with pursuant to Article 49 of the Liechtenstein Lawyers Act, compatible with the provisions of the EEA Agreement relating to the freedom to provide services (Article 36(1) of the EEA Agreement), and in particular with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and specifically with the second indent of Article 5 thereof?*

2. *In case the EFTA Court answers the first question in the negative: may a provision of national law such as that of Article 57a of the Liechtenstein Lawyers Act which fails appropriately to transpose into national law a directive adopted in pursuance of Article 7 litra b of the EEA Agreement, such as the directive mentioned in Question 1, nevertheless be applied in a State which is a Contracting Party to the EEA Agreement?*

II Legal background

National Law

6 According to Section 32 of the Liechtenstein Code of Criminal Procedure (*Liechtensteinische Strafprozessordnung*), any person who sustains damage to his rights, owing to a crime or an offence that must compulsorily be prosecuted, may associate himself with the criminal proceedings as a private intervener by virtue of his claims under private law. Under Section 34 of the Code of Criminal Procedure, a private intervener may either conduct his own case or use an agent. The Code of Criminal Procedure does not include provisions to the effect that only lawyers can act as agents for a private intervener.

7 Article 55 of the Liechtenstein Lawyers Act lays down the basic principle that EEA nationals who are entitled to act professionally as lawyers in their State of origin are temporarily permitted to practice their profession in Liechtenstein on a cross-border basis. However, Article 57a of the Liechtenstein Lawyers Act requires a European lawyer providing services in Liechtenstein to act in conjunction with a local lawyer under certain circumstances. That provision reads as follows:

> *In proceedings in which the party is represented by a lawyer, or a defending counsel must be engaged, the European lawyer providing services shall act in conjunction with a local lawyer pursuant to Article 49 of the Liechtenstein Lawyers Act. This requirement shall not apply if the European lawyer providing services has passed the aptitude test (Articles 54 et seq.).*

8 Failure by a lawyer to comply with the requirement of Article 57a of the Liechtenstein Lawyers Act would be failing to comply with a professional obligation, which might constitute a disciplinary offence under Article 31(1) of the Liechtenstein Lawyers Act. Moreover, the lawyer would not be entitled to remuneration under the Legal Agents Remuneration Scale Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*) as he would, according to paragraph 2 of Article 49 of the Liechtenstein Lawyers Act, be deemed not to be acting as a lawyer.

9 Article 49 of the Liechtenstein Lawyers Act reads as follows:

> *1) In proceedings in which the party is represented by a lawyer or in which a defending counsel must be engaged, the established European lawyer may act as the representative or defending counsel of a party only in conjunction with a lawyer included in the register of lawyers (a lawyer acting in conjunction). (...)*
>
> *2) (...) Procedural acts for which evidence of the conjunction situation has not been furnished at the time when they are performed shall be deemed not to have been performed by a lawyer. (...)*

EEA Law

10 36(1) EEA reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

11 According to Article 37(1)(d) EEA, the notion of "services" includes the "activities of the professions".

12 Article 37(2) EEA states that without prejudice to the provisions of Chapter 2 (right of establishment), "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

13 According to Article 39 EEA, the provisions of *inter alia* Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. According to Article 30 EEA, the Contracting Parties shall take the necessary measures, contained in Annex VII to the Agreement in order to make it easier for persons to take up and pursue activities as workers and self-employed persons.

14 According to its Article 1, Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter "the Directive", OJ 1977 L 78, p. 17), referred to at point 2 of Annex VII EEA on mutual recognition of professional qualifications, applies to the activities of lawyers pursued by way of provision of services.

15 A "lawyer" is defined in Article 1(2) of the Directive as any person entitled to pursue his professional activities under certain national designations, which, in the case of Austria, includes the designation of "Rechtsanwalt".

16 According to Article 2 of the Directive, each Contracting Party shall recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2) of the Directive.

17 Article 4(1) of the Directive provides that activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host State under the conditions laid down for lawyers established in that State, with the exception of any condition requiring residence, or registration with a professional organisation, in that State.

18 Pursuant to Article 4(2) of the Directive the rules of the professional conduct of the host State must be observed, without prejudice to the lawyer's obligations in his home State.

19 Article 5 of the Directive reads:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

- (...);

- to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.

20 Article 3 EEA reads:

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

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

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

21 Article 7 EEA reads:

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

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

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

22 Protocol 35 to the EEA Agreement on the implementation of EEA rules reads:

Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and

Whereas this consequently will have to be achieved through national procedures;

Sole Article

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

23 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.

III Findings of the Court

The first question

24 By its first question, the referring court essentially asks whether Article 36(1) EEA and the Directive preclude a Contracting Party from requiring that in court proceedings in which a party to the case is represented by a lawyer, or a defending counsel must be engaged, a lawyer from another EEA State who has not passed the national aptitude test must provide his or her service in conjunction with a lawyer who is included in the national register of lawyers (hereinafter "national lawyer").

25 The Principality of Liechtenstein, ESA and the Commission, referring to Cases 427/85 *Commission* v *Germany* [1988] ECR 1123 and C-294/89 *Commission* v *France* [1991] ECR I-3591, submit that a lawyer from another Contracting Party providing services cannot be obliged to work in conjunction with a national lawyer in proceedings for which the national legislation does not make representation by a lawyer mandatory.

26 Article 36(1) EEA prohibits any restriction on the free movement of services. Pursuant to Article 37(2) EEA, the person providing a service may temporarily pursue the activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals.

27 The freedom to provide services is one of the fundamental principles of the EEA Agreement. It may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the State where the service is provided. Furthermore, the rules must be appropriate for securing the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see Case 279/80 *Webb* [1981] ECR 3305, at paragraph 17 and Case C-205/99 *Analir and Others* [2001] ECR I-1271, at paragraph 25).

28 The Directive lays down more detailed rules with respect to the provision of services by lawyers. As stated in its preamble, it contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of provision of services. The Directive must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services.

29 Article 4(1) of the Directive provides that the activity of representing a client in legal proceedings in another EEA State must be pursued under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State. Article 4(2) of the Directive provides that the rules of professional conduct of the host State must be observed in the pursuit of those activities.

30 Article 5 of the Directive enables the EEA States to require lawyers from other EEA States representing a client in legal proceedings to work in conjunction with a national lawyer. The scope of this exemption from the main rule of the Directive, as interpreted in light of the general principles of the EEA Agreement referred to in paragraph 27 above, is limited to circumstances where considerations relating to the public interest justify the obligation for a lawyer to work in conjunction with a national lawyer. Such considerations do not exist in court proceedings for which representation by a lawyer is not mandatory (see for comparison Cases 427/85 *Commission* v *Germany*, at paragraph 14 and 294/89 *Commission* v *France*, at paragraph 19). Therefore, a provision of national law that requires lawyers from other EEA States to work in conjunction with a national lawyer in court proceedings for which representation by a lawyer is not mandatory infringes Article 36(1) and the Directive.

31 In light of the above, the answer to the first question must be that a provision of national law, according to which, in court proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, a lawyer from another EEA State providing services must call in a national lawyer to act in conjunction with him or her, does not fall under Article 5 of the Directive and is incompatible with Article 36(1) EEA and the Directive if it requires the appointment of a national lawyer in cases where representation by a lawyer is not mandatory.

The second question

32 The second question from the national court is whether a provision of national law such as that of Article 57a of the Liechtenstein Lawyers Act, which fails appropriately to transpose into national law a directive adopted in pursuance of Article 7 litra b of the EEA Agreement, may nevertheless be applied by a court of a State which is a Contracting Party to the EEA Agreement. An answer to the second question is requested should the answer to the first question be in the negative.

33 In this context, the second question can also be formulated as follows: does the EEA Agreement require that a provision of a directive that has been made part of the EEA Agreement be directly applicable and take precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law?

34 As a preliminary remark, the Court notes that it is not for it to assess under the advisory opinion procedure whether national law is compatible with EEA law. In a case such as the one at hand, this assessment must be made by the national court on the basis of the Court's answer to the first question. In this respect, it is noted that there is no reference to the main Agreement in the second question. Reference to Article 36(1) EEA is, however, made in the first question from the national court. From the Court's answer to that question, it follows that to require a lawyer from another EEA State to work in conjunction with a national lawyer in proceedings where representation by a lawyer is not mandatory, constitutes a violation not only of Directive 77/249/EEC but also of Article 36(1) of the main Agreement.

35 It has been submitted by the Principality of Liechtenstein that under the Liechtenstein constitutional system, a Treaty ratified by the Principality is as such part of the national legal order, and the request from the national court makes it clear that Article 36(1) is applicable as such in Liechtenstein law. The second question would therefore seem to be of practical importance only if the referring court should come to the conclusion that even taking into account Article 36(1) EEA, that court is unable to rule that the foreign lawyer in the case at hand does not have to be assisted by a national lawyer.

36 The Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway, as well as ESA, submit that the EC law principles of direct effect and primacy are not a part of EEA law. In that regard, reference is made to Protocol 35 EEA and Article 7 EEA as well as to case law of the Court. It is submitted that Protocol 35 EEA is to be understood to the effect that EEA rules are only to be accorded priority over national rules in so far as the EEA rules have been implemented into national rules, and as such conflict with other national rules. Furthermore, Protocol 35 EEA only concerns provisions that are framed in a manner capable of creating rights and are unconditional and sufficiently precise. Finally, all those who submitted observations to the Court expressed the view that national courts should, as far as possible, interpret national rules in such a way as to ensure conformity with the relevant EEA rules.

37 The EEA Agreement is based on the objectives of establishing a dynamic and homogeneous European Economic Area and of ensuring individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, at paragraphs 49 and 57, hereinafter "*Sveinbjörnsdóttir*"). The EEA Agreement is an international treaty ***sui generis*** that contains a distinct legal order of its own. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and objective of the EEA Agreement goes beyond what is usual for an agreement under public international law (see *Sveinbjörnsdóttir*, at paragraph 59 and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at paragraph 25, hereinafter "*Karlsson*").

38 The EEA Agreement establishes a particular system of means and mechanisms in order to achieve the abovementioned objectives. Article 7 EEA and Protocol 35 EEA are part of this system. Article 7 EEA stipulates that Acts referred to or contained in Annexes to the EEA Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order. Protocol 35 EEA obliges the EFTA States to introduce, if necessary, a statutory provision to the effect that, under their national

legal order, implemented EEA rules prevail in cases of possible conflict with other statutory provisions.

39 Moreover, it is inherent in the objectives of the EEA Agreement referred to in paragraph 37 above, as well as in Article 3 EEA, that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.

40 It follows from Article 7 EEA and Protocol 35 EEA that the EEA Agreement does not entail transfer of legislative powers. In *Karlsson,* the Court held this to mean that EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see *Karlsson*, at paragraph 28). This applies to all EEA law, including provisions of a directive such as the one at issue. Furthermore, this entails that EEA law does not require that non-implemented EEA rules take precedence over conflicting national rules, including national rules which fail to transpose the relevant EEA rules correctly into national law.

41 It follows from the above that, in cases of conflict between national law and non-implemented EEA law, the Contracting Parties may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly, and thereby avoid violation of EEA law in a particular case. It also follows that the Contracting Parties may decide on which administrative and judicial organs they confer such a power. However, even Contracting Parties which have introduced principles of direct effect and primacy of EEA law in their internal legal order remain under an obligation to correctly transpose directives into national law.

42 Furthermore, the Court notes that in cases of violation of EEA law by a Contracting Party, the Contracting Party is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in *Sveinbjörnsdóttir*, at paragraphs 62 et seq. and *Karlsson,* at paragraphs 25 and 37–48, are fulfilled. Finally, ESA has the power under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice to bring a case concerning a violation of EEA law before the EFTA Court.

43 In light of the above, the answer to the second question must be that the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.

IV Costs

44 The costs incurred by the EEA Contracting Parties, ESA and the Commission which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before *Fürstliches Landgericht*, any decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by *Fürstliches Landgericht* hereby gives the following Advisory Opinion:

1. A provision of national law, according to which, in court proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, a lawyer from another EEA State providing services must call in a national lawyer to act in conjunction with him or her, does not fall under Article 5 of Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services, referred to at point 2 of Annex VII EEA, and is incompatible with Article 36(1) EEA and the Directive if it requires the appointment of a national lawyer in cases where representation by a lawyer is not mandatory.

2. The EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 3 October 2007.

Skúli Magnússon
Registrar

Carl Baudenbacher
President

6. *L'Oreal*, mál nr. E-9/07 og 10/07, EFTA Court Report [2008] 259

JUDGMENT OF THE COURT
8 July 2008

(Exhaustion of trade mark rights)

In Joined Cases E-9/07 and E-10/07,

REQUESTS 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 Follo tingrett (Follo District Court) and Oslo tingrett (Oslo District Court), Norway, in cases pending before those courts between

L'Oréal Norge AS (Case E-9/07 and Case E-10/07);

L'Oréal SA (Case E-10/07)

and

Per Aarskog AS (Case E-9/07);

Nille AS (Case E-9/07);

Smart Club AS (Case E-10/07)

concerning the interpretation of the First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC),

THE COURT,

composed of: Thorgeir Örlygsson, Acting President, Henrik Bull (Judge-Rapporteur) and Martin Ospelt (ad hoc), Judges,

Registrar: Skúli Magnússon,

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* Language of the Request: Norwegian.

having considered the written observations submitted on behalf of:

– the Plaintiffs, represented by Toril Melander Stene, Attorney-at-law, Oslo;

– the Defendants, represented by Kjetil Vågen, Attorney at law, Oslo, and Kristin C. Slørdahl, Attorney at law, Oslo, respectively;

– the Government of the Kingdom of Norway, represented by Siri Veseth, Adviser, Ministry of Foreign Affairs, and Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;

– the Government of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

– the Government of the Principality of Liechtenstein, represented by Sabine Tömördy, Deputy Director, and Thomas Bischof, Legal Officer, EEA Coordination Unit, acting as Agents;

– the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Deputy Director, and Ida Hauger, National Expert, acting as Agents; and

– the Commission of the European Communities, represented by Hannes Krämer, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiffs, represented by Toril Melander Stene, the Defendants, represented by Kjetil Vågen and Kristin C. Slørdahl, respectively, the Government of the Kingdom of Norway, represented by Siri Veseth, the Government of Iceland, represented by Sesselja Sigurðardóttir, the EFTA Surveillance Authority, represented by Ida Hauger, and the Commission of the European Communities, represented by Hannes Krämer, at the hearing on 14 May 2008,

gives the following

Judgment

I Facts and procedure

1 The case concerns the question of whether it is in conformity with EEA law to maintain a principle of international exhaustion of trade mark rights.

2 The Plaintiffs, L'Oréal SA and L'Oréal Norge AS, are the parent company and a wholly-owned subsidiary in the L'Oréal Group.

3 The Defendants in Case E-9/07, Per Aarskog AS and Nille AS, are sister companies within a group where Nille Holding AS is the parent company. Per Aarskog AS is a wholesale company and provides for import and supply of goods to Nille retail stores in Norway. The Defendant in Case E-10/07, Smart Club AS, is a wholesale and retail company in the CG Holding Group. There are 6 Smart Club department stores in Norway. The Court will refer to the Defendants in Case E-9/07 and the Defendant in Case E-10/07 jointly as "the Defendants".

4 The REDKEN trade mark belongs to the companies in the L'Oréal Group. REDKEN is registered as a word trade mark for the whole of class 3 and products marked REDKEN have been sold in Norway since 1980.

5 The Defendants have carried out parallel imports by importing REDKEN products to Norway from the USA via third parties. The imports have been carried out without consent from the trade mark proprietor. The REDKEN products in question have been produced, put on the market and marketed in the USA upon consent from the trade mark proprietor.

6 With the plea that the imports infringe their exclusive trade mark rights, the Plaintiffs filed law suits before Follo tingrett (Case E-9/07) and Oslo tingrett (Case E-10/07) in January 2007. In both cases, the Plaintiffs are seeking an order that the Defendants be prohibited from importing, offering and putting on the market products marked REDKEN which have not been put on the market within the EEA by L'Oréal or with the consent of L'Oréal. The Plaintiffs also claim compensation for the alleged breach of their trade mark rights.

7 The Plaintiffs claim that EEA-wide exhaustion must apply in Norwegian trade mark law and, as the products have not been put on the market within the EEA by L'Oréal or with L'Oréal's consent, that the trade mark rights are not exhausted.

8 The Defendants claim that the import and resale of the REDKEN products is neither contrary to Section 4 of the Norwegian Trade Mark Act nor contrary to Article 7(1) of Council Directive 89/104/EEC (hereinafter "the Trade Mark Directive" or "the Directive"). The Defendants state that within the context of EEA law, Article 7(1) does not prohibit international exhaustion. Consequently, as the products had been put on the market in the USA by the trade mark proprietor or with his consent, the trade mark rights are exhausted according to the principle of international exhaustion as laid down in Norwegian trade mark law both before and after the implementation of the Trade Mark Directive.

9 By a letter dated 24 October 2007, registered at the Court on 31 October 2007, Follo tingrett made a request for an Advisory Opinion on the following two questions, in Case E-9/07:

3. Is Article 7(1) of Council Directive 89/104/EEC to be understood to the effect that a trade mark proprietor has the right to prevent imports from third countries outside the EEA when such imports take place without the consent of the trade mark proprietor?

4. Is Article 7(1) of Council Directive 89/104/EEC to be understood to the effect that international exhaustion is permitted?

10 By a letter dated 26 November 2007, registered at the Court on 29 November 2007, Oslo tingrett made a request for an Advisory Opinion on the same two questions, in Case E-10/07.

11 By a decision of 10 December 2007, the Court, pursuant to Article 39 of the Rules of Procedure and after having received observations from the parties, joined the two cases for the purposes of the written and oral procedures.

II Legal background

National Law

12 In Norway, the basic statutory provisions concerning trade marks are set forth in *lov av 3. mars 1961 nr. 4 om varemerker* (the Trade Mark Act of 3 March 1961 No 4), as amended *inter alia* by Act of 27 November 1992 No 113. The Trade Mark Act contains no rules dealing directly with exhaustion of trade mark rights, but traditionally it has been construed to entail international exhaustion.

13 When the Trade Mark Directive was implemented into the Norwegian internal legal order in connection with the adherence to the EEA Agreement, the lack of statutory provisions concerning exhaustion of rights was commented on in the government bill, Ot.prp. No 72 (1991–92) p. 55, in the following manner:

> *The Trade Mark Act contains no explicit rules on exhaustion. However, it is established Norwegian law that international exhaustion applies for trade marks.*
>
> ...
>
> *Since international exhaustion is the approach which creates the greatest price competition on the Norwegian market and is, therefore, best for Norwegian consumers, the Ministry is of the view that there should be no aim to switch over to EEA regional exhaustion until the issue is elucidated in more detail in further consultation or by the EFTA Court or the ECJ.*

EEA Law

14 Article 1(1) EEA reads as follows:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*

15 Article 65(2) EEA reads as follows:

> *Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.*

16 The obligations on the Contracting Parties with regard to principles of exhaustion of intellectual property rights, such as trade mark rights, are set forth in Article 2(1) of Protocol 28 EEA on Intellectual Property (hereinafter "Protocol 28"), which reads as follows:

> *1. To the extent that exhaustion is dealt with in Community measures or jurisprudence, the Contracting Parties shall provide for such exhaustion of intellectual property rights as laid down in Community law. Without prejudice to future developments of case-law, this provision shall be interpreted in accordance with meaning established in the relevant rulings of the Court of Justice of the European Communities given prior to the signature of the Agreement.*

17 The Trade Mark Directive is referred to at point 4 of Annex XVII to the EEA Agreement, on Intellectual Property (hereinafter "Annex XVII"). Pursuant to adaptation c in point 4 of Annex XVII, Article 7(1) of the Directive shall, for the purposes of the EEA Agreement, be replaced by the following:

> *The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Contracting Party under that trade mark by the proprietor or with his consent.*

18 Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") reads as follows:

> *2. In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.*

19 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.

III Findings of the Court

20 The national courts have referred two questions to the Court which both in essence concern whether Article 7(1) of the Trade Mark Directive is to be understood to the effect that it precludes international exhaustion of rights conferred by a trade mark with regard to goods originating from outside the EEA. The questions will therefore be dealt with together.

21 The questions from the national courts were submitted in light of the Advisory Opinion of the EFTA Court in Case E-2/97 *Mag Instrument Inc.* v *California Trading Company Norway*

[1997] EFTA Ct. Rep. 129 (hereinafter "*Maglite*") and the subsequent judgment of the Court of Justice of the European Communities (hereinafter the "ECJ") in Case C-355/96 *Silhouette International Schmied* v *Hartlauer Handelsgesellschaft* [1998] ECR I-4799 (hereinafter "*Silhouette*"). As explained below, the Court and the ECJ in those cases dealt with essentially the same legal issue but came to different conclusions.

22 In light of the Defendants' submissions, which also address the issue of whether Article 7(1) of the Trade Mark Directive can be directly applicable and take precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, the Court recalls, as a preliminary remark, that the Directive could not in any case have direct effect and primacy pursuant to EEA law, cf. Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, at paragraphs 40–41 and 43. Nonetheless, the national courts are bound to interpret national law as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule, cf. Case E-1/07 *Criminal proceedings against A*, at paragraph 39.

23 In relation to the substantive issue of exhaustion of trade mark rights, the Plaintiffs argue that it follows from *Silhouette* that Article 7(1) of the Directive must be interpreted to introduce, also in the context of EEA law, mandatory EEA-wide exhaustion of trade mark rights regardless of the origin of the goods in question. Thus, the Directive does not leave the EEA States with the option of introducing or maintaining international exhaustion. This submission is in essence supported by the Commission of the European Communities. The Defendants, supported by the Government of Iceland, the Government of the Principality of Liechtenstein and the Government of the Kingdom of Norway, refer to the conclusion in *Maglite* that Article 7(1) of the Trade Mark Directive leaves it open for the EFTA States to maintain international exhaustion in relation to goods originating from outside the EEA. In their view, the EFTA Court should uphold this interpretation of the Trade Mark Directive in the context of EEA law. The EFTA Surveillance Authority has also argued in favour of this conclusion, while recognising that there are arguments to the contrary.

24 The Court notes that prior to the Advisory Opinion in *Maglite*, the interpretation of Article 7(1) of the Trade Mark Directive was disputed in legal circles. There were weighty arguments in favour of interpreting the provision as prohibiting only national exhaustion, while leaving open the choice between EEA-wide exhaustion and international exhaustion. Indeed, as is apparent from the case file, in the aftermath of the rulings by the EFTA Court and the ECJ which are at the heart of the present case, several EU Member States sought an amendment to the Directive expressly allowing international exhaustion. Those States basically argued along the same lines as the EFTA Court had done in *Maglite* with regard to the benefits of international exhaustion. However, there were also weighty arguments in favour of interpreting the provision as introducing mandatory EEA-wide exhaustion with no option of international exhaustion.

25 After the EFTA Court opted for an interpretation allowing international exhaustion in *Maglite*, the ECJ opted for mandatory EEA-wide exhaustion in *Silhouette* and then upheld that interpretation in Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103 (hereinafter "*Sebago*"), which concerned goods originating from outside the EEA.

26 The divergence between *Maglite* on the one hand and *Silhouette* and *Sebago* on the other is limited to exhaustion of trade mark rights in relation to goods originating from outside the EEA. In allowing international exhaustion for goods originating from outside the EEA, the Court attached importance to the EEA Agreement not establishing a customs union with a common commercial policy, cf. *Maglite*, at paragraph 27. The EFTA States remain free to conclude treaties and agreements with third countries in relation to foreign trade. In light of those considerations, the Court found that it should be for the legislators and courts of the EFTA States to decide whether they wish to introduce or maintain a principle of international exhaustion of rights conferred by a trade mark with regard to goods originating from outside the EEA, cf. *Maglite*, at paragraph 28.

27 The main objective of the EEA Agreement is to create a homogeneous EEA, cf. *inter alia* Article 1(1) EEA and the fourth and the fifteenth recitals of the Preamble to the Agreement. Homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and EC law are to be construed in the same way. However, differences in scope and purpose may under specific circumstances lead to a difference in interpretation between EEA law and EC law (see for comparison Case E-2/06 *EFTA Surveillance Authority* v *Norway* [2007] EFTA Ct. Rep. 163, at paragraph 59).

28 The institutional system of the European Economic Area foresees two courts at the international level, the EFTA Court and the ECJ, interpreting the common rules. It is an inherent consequence of such a system that from time to time the two courts may come to different conclusions in their interpretation of the rules. The EFTA States have sought to minimise this risk by establishing, in Article 3(2) SCA, an obligation for the EFTA Court to "pay due account to the principles laid down by the relevant rulings" of the ECJ given after the date of signature of the EEA Agreement. In its interpretation of EEA rules, the Court has consistently taken into account the relevant rulings of the ECJ given after the said date. Furthermore, Article 2(1) of Protocol 28, which provides for the harmonisation of the rules on exhaustion of intellectual property rights on the basis of the principles laid down in case law of the ECJ existing at the time of signature of the EEA Agreement, emphasises that this is "[w]ithout prejudice to future developments of case law".

29 Neither Article 3(2) SCA nor Article 2(1) of Protocol 28 explicitly addresses the situation where the EFTA Court has ruled on an issue first and the ECJ has subsequently come to a different conclusion. However, the consequences for the internal market within the EEA are the same in that situation as in a situation where the ECJ has ruled on an issue first and the EFTA Court subsequently were to come to a different conclusion. This calls for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question.

30 As mentioned in paragraph 25 above, the ECJ came to the conclusion in *Silhouette* and *Sebago* that Article 7(1) of the Directive entails mandatory EEA-wide exhaustion of trade mark rights. Whereas the EFTA Court attached particular importance to considerations relating to free trade and competition in the interest of consumers, cf. *Maglite*, at paragraph 19, the ECJ emphasised the overall objective of facilitating the free movement of goods and services and in that regard

the Directive's objective of ensuring the same protection for registered trade marks within the whole of the internal market, cf. *Silhouette* at paragraph 24. Both sets of arguments are equally valid in a Community law context and an EEA law context.

31 Next, it needs to be considered whether differences in scope and purpose between Community law and EEA law nevertheless constitute compelling grounds for divergent interpretations of Article 7(1) of the Directive in EEA law and EC law.

32 With regard to the arguments concerning trade relations with third countries, which are specific to the EEA, the Government of the Kingdom of Norway and the Government of Iceland asserted during the oral hearing that it is unusual for their agreements with third countries to include clauses concerning exhaustion of intellectual property rights. In their view, it is therefore more important in practice to be able to decide on the exhaustion regime vis-à-vis third countries purely as a matter of domestic law. In this regard, the Court notes that the present case does not concern a situation in which the EFTA State in question has entered into an agreement with a third State on exhaustion of trade mark rights. In effect, the question to be answered in the present case is whether the Trade Mark Directive should be interpreted as not restricting the EFTA States in their freedom to provide for international exhaustion of trade mark rights, as a unilateral measure, in relation to goods originating from outside the EEA.

33 According to Article 65(2) EEA, the provisions contained in Protocol 28 and Annex XVII "shall apply to all products", "unless otherwise specified". Article 65(2) does not make a reservation against rules providing for mandatory EEA-wide exhaustion of rights relating to goods originating from outside the EEA. Nor does Protocol 28 or Annex XVII make any such reservation. On the contrary, according to Article 2(1), first sentence, of Protocol 28, "the Contracting Parties shall provide for such exhaustion of intellectual property rights as laid down in Community law". This allows for the incorporation into Annex XVII of legal acts providing for mandatory EEA-wide exhaustion of rights, regardless of the origin of the goods to which the rights relate.

34 This interpretation of Article 65(2) EEA and Article 2(1) of Protocol 28 is also reflected in the fact that directives with a clear wording to this effect have been incorporated into the Agreement. Article 4(2) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society provides that the "distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent". The relevant EEA Joint Committee Decision No 110/2004 of 9 July 2004 does not contain any specific EEA adaptations of Article 4(2). Accordingly, point 8 of Protocol 1 EEA on Horizontal Adaptations applies, according to which "the Community" shall be read as a reference to the territories of the Contracting Parties as defined in Article 126 EEA. The same applies to Article 9(2) of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, cf. EEA Joint Committee Decision No 56/2007 of 8 June 2007.

35 Furthermore, Article 2(1) of Protocol 28 does not exclude mandatory EEA-wide exhaustion of trade mark rights as one of the possible "future developments" in the case law of the ECJ which, implicitly, would be relevant also for EEA law. In this context, it is noted that the

conclusion, in *Maglite*, at paragraph 22, that Article 2 of Protocol 28 only provided for EEA-wide exhaustion as a minimum requirement was built on the premise that "to date" there was no case law of the ECJ which ruled out international exhaustion of rights.

36 Thus, it is clear that the EEA Agreement foresees the possibility of mandatory EEA-wide exhaustion of intellectual property rights, also in relation to goods originating from outside the EEA.

37 In the light of what is stated above in relation to the scope of the provisions of the EEA Agreement concerning intellectual property rights and, more specifically, exhaustion of such rights, the Court holds that the differences between the EEA Agreement and the EC Treaty with regard to trade relations with third countries do not constitute compelling grounds for divergent interpretations of Article 7(1) of the Trade Mark Directive in EEA law and EC law.

38 Based on the above, the Court concludes that Article 7(1) of the Trade Mark Directive is to be interpreted to the effect that it precludes the unilateral introduction or maintenance of international exhaustion of rights conferred by a trade mark regardless of the origin of the goods in question.

IV Costs

39 The costs incurred by the Government of the Kingdom of Norway, the Government of Iceland, the Government of the Principality of Liechtenstein, 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 a step in the proceedings pending before Follo tingrett and Oslo tingrett, respectively, any decision on costs for the parties to those proceedings is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by Follo tingrett and Oslo tingrett, hereby gives the following Advisory Opinion:

> Article 7(1) of First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) is to be interpreted to the effect that it precludes the unilateral introduction or maintenance of international exhaustion of rights conferred by a trade mark regardless of the origin of the goods in question.

Thorgeir Örlygsson Henrik Bull Martin Ospelt

Delivered in open court in Luxembourg on 8 July 2008.

Skúli Magnússon
Registrar

Thorgeir Örlygsson
Acting President

IV

Dómar Hæstaréttar Íslands

1. *Erla María*, mál nr. 236/1999

Fimmtudaginn 16. desember 1999.

Nr. 236/1999. Íslenska ríkið

(Guðrún Margrét Árnadóttir hrl.)

gegn

Erlu Maríu Sveinbjörnsdóttur

(Stefán Geir Þórisson hrl.

Þorsteinn Einarsson hdl.)

og gagnsök

Gjaldþrot. Laun. Skaðabætur. Stjórnarskrá. EES-samningurinn, EFTA-dómstóllinn. Ráðgefandi álit. Gjafsókn. Sératkvæði.

E var gjaldkeri hjá hlutafélaginu V, sem úrskurðað var gjaldþrota vorið 1995. Skiptastjóri þrotabúsins hafnaði launakröfu E sem forgangskröfu í búið, þar sem hún væri systir eins aðaleiganda V. Af þessum sökum synjaði Ábyrgðasjóður launa vegna gjaldþrota E um greiðslu úr sjóðnum og vísaði til 1. mgr. 5. gr. laga nr. 53/1993 um ábyrgðasjóð launa vegna gjaldþrota, þar áskilið var að launakrafa væri viðurkennd sem forgangskrafa svo að til ábyrgðar sjóðsins stofnaðist, en einnig til 6. gr. sömu laga. E krafðist skaðabóta úr hendi íslenska ríkisins, þar sem það hefði ekki réttilega lagað löggjöf landsins að tilskipun nr. 80/987/EBE um samræmingu á lögum aðildarríkjanna um vernd til handa launþegum verði vinnuveitandi gjaldþrota, eins og hún var tekin upp í 24. tl. XVIII. viðauka við EES-samninginn. Talið var, að ríkið hefði ekki fært fram nokkur gögn því til styrktar, að svo hefði háttað til um E, að ákvæði 6. gr. laga nr. 53/1993 ætti við um hana. Hefði sjóðsstjórnin því ekki haft heimild til þess að úrskurða E greiðslur úr sjóðnum, af þeirri ástæðu einni, að krafa hennar uppfyllti ekki skilyrði 5. gr. laga nr. 53/1993. Á það var fallist með héraðsdómi, að ekki væri samræmi milli tilskipunar nr. 80/987/EBE og laga nr. 53/1993 og væri misræmið verulegt að því er sneri að E. Vísað var til álits EFTA-dómstólsins þess efnis, að samkvæmt grundvallarreglum EES-samningsins bæru aðilar hans skaðabótaábyrgð gagnvart einstaklingum á því tjóni, sem hlytist af ófullnægjandi lögfestingu tilskipunar, enda væri nánar tilgreindum skilyrðum fullnægt. Bæri við skýringu EES-samningsins að hafa hliðsjón af ráðgefandi áliti EFTA-dómstólsins kæmi ekkert fram sem leiddi til þess, að vikið yrði frá því

áliti. Samkvæmt 2. gr. stjórnarskrár lýðveldisins Íslands nr. 33/1944 væri það hins vegar í valdi íslenskra dómstóla að skera úr um hvort bótaábyrgð ríkisins nyti fullnægjandi lagastoðar að íslenskum rétti. Meginmál EES-samningsins hefði lagagildi hér á landi, sbr. 2. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið, og væri eðlilegt að lögin sem lögfestu samninginn væru skýrð svo að einstaklingar ættu kröfu til þess að íslenskri löggjöf væri hagað til samræmis við EES-reglur. Tækist það ekki leiddi það af lögunum og meginreglum og markmiðum EES-samningsins að ríkið yrði skaðabótaskylt að íslenskum rétti. Að þessu virtu, svo og aðdraganda og tilgangi laga nr. 2/1993 var skaðabótaábyrgð ríkisins, vegna ófullnægjandi lögfestingar tilskipunarinnar, talin fá næga stoð í þeim lögum, en ljóst þótti að E hefði fengið greiðslur úr ábyrgðasjóði launa hefði aðlögunin verið með réttum hætti. Varð niðurstaðan því sú að ríkið hefði í verulegum mæli brugðist þeirri skyldu að tryggja E réttindi til greiðslu úr ábyrgðasjóði launa við gjaldþrot að íslenskum rétti, svo sem því hefði borið. Bæri ríkið skaðabótaábyrgð gagnvart E vegna þessara mistaka og færi um bótaábyrgð þess samkvæmt almennum reglum um bótaábyrgð hins opinbera. Var því staðfest niðurstaða héraðsdóms um að ríkið skyldi greiða E skaðabætur vegna synjunar ábyrgðasjóðsins.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Pétur Kr. Hafstein, Guðrún Erlendsdóttir, Haraldur Henrysson, Hjörtur Torfason og Hrafn Bragason.

Aðaláfrýjandi skaut máli þessu til Hæstaréttar 15. júní 1999. Hann krefst aðallega sýknu af öllum kröfum gagnáfrýjanda og málskostnaðar í héraði og fyrir Hæstarétti. Til vara krefst hann þess að dæmdar fjárhæðir í héraði verði lækkaðar og málskostnaður í héraði og fyrir Hæstarétti verði látinn falla niður.

Málinu var gagnáfrýjað 14. september 1999. Gagnáfrýjandi krefst þess aðallega að aðaláfrýjandi greiði 739.104 krónur með dráttarvöxtum samkvæmt III. kafla vaxtalaga nr. 25/1987 frá 13. mars 1995 til greiðsludags. Til vara krefst hún staðfestingar héraðsdóms. Þá krefst hún málskostnaðar í héraði, fyrir EFTA-dómstólnum og fyrir Hæstarétti eins og málið væri ekki gjafsóknarmál en gagnáfrýjandi hefur gjafsókn fyrir öllum dómstólunum.

Skýrsla framsögumanns í máli E-9/97 fyrir EFTA-dómstólnum hefur verið lögð fyrir Hæstarétt sem nýtt skjal.

I.

Gagnáfrýjandi var gjaldkeri hjá Vélaverkstæði Sigurðar Sveinbjörnssonar hf., sem

úrskurðað var gjaldþrota 22. mars 1995. Með bréfi 13. október sama ár hafnaði skiptastjóri kröfum hennar sem forgangskröfum í þrotabúið og vitnaði til lokamálsgreinar 112. gr. laga nr. 21/1991 um gjaldþrotaskipti ofl., sbr. 3. gr. sömu laga. Í bréfi frá ábyrgðasjóði launa vegna gjaldþrota 18. mars 1996 var talið, að af þessum sökum yrði að hafna kröfum hennar í sjóðinn samkvæmt 1. mgr. 5. gr. laga nr. 53/1993 um ábyrgðasjóð launa vegna gjaldþrota og 6. gr. sömu laga. Lögmaður gagnáfrýjanda óskaði endurskoðunar stjórnar sjóðsins á þessari ákvörðun og vísaði því til styrktar til tilskipunar nr. 80/987/EBE frá 20. október 1980 í 24. tl. XVIII. viðauka við EES-samninginn um samræmingu á lögum aðildarríkjanna um vernd til handa launþegum verði vinnuveitandi gjaldþrota, sbr. og bókun 35 við sama samning. Þessari ósk gagnáfrýjanda var hafnað með bréfi 1. apríl 1996. Var þar talið að vegna tengsla hennar við forsvarsmenn félagsins hefði hún verið í betri aðstöðu til þess en almennt gerist um launþega að fylgjast með stöðu félagsins, en hún er systir manns sem var eigandi 40% hlutafjár í hinu gjaldþrota félagi. Félli því krafa hennar undir undanþáguákvæði tilskipunar nr. 80/987/EBE, 2. tl. 1. gr. og 10. gr. Vitnað var til þess að ábyrgðasjóðurinn væri stofnaður með lögum nr. 52/1992, meðal annars með hliðsjón af tilskipuninni og til að undirbúa aðild Íslands að EES-samningnum. Var talið að ákvæði laga nr. 53/1993 væru í fullu samræmi við ákvæði tilskipunarinnar. Gagnáfrýjandi höfðaði því næst mál á hendur aðaláfrýjanda.

II.

Í héraðsdómi er vitnað til úrskurðar dómsins 14. október 1997 um að hafna frávísunarkröfu aðaláfrýjanda. Byggði aðaláfrýjandi þessa frávísunarkröfu á því að fyrri löggjöf um ábyrgð ríkisins á greiðslu launa við gjaldþrot launagreiðanda, og forsaga laga nr. 53/1993 og skýring þeirra, leiddi til þess að samkvæmt lögunum hafi stjórn sjóðsins ótvíræða heimild til þess að greiða launakröfur þeirra, sem eru nákomnir gjaldþrotamanni, enda þótt krafan geti ekki notið forgangsréttar í þrotabú, sbr. 3. mgr. 112. gr. laga nr. 21/1991. Sakarefnið ætti því ekki undir dómstóla að svo stöddu meðan gagnáfrýjandi hefði ekki tæmt allar málsskotsleiðir á hendur ábyrgðasjóði launa. Héraðsdómur taldi hins vegar að rétt stjórnvöld hefðu synjað um greiðsluskyldu og þótt gagnáfrýjandi gæti leitað réttar síns gagnvart sjóðnum fyrir dómstólum, sbr. 2. mgr. 14. gr. laga nr. 53/1993, þyrfti hún ekki að láta reyna á greiðsluskyldu sjóðsins fyrir dómstólum áður en hún leitaði úrlausnar um skaðabótaskyldu aðaláfrýjanda vegna atvika sem leiddu til synjunar sjóðsins á greiðsluskyldu. Byggði héraðsdómur þá meðal annars á því að mál

á hendur aðaláfrýjanda hlyti að byggjast á öðrum forsendum en úrslit máls um greiðsluskyldu sjóðsins. Þessum úrskurði var ekki áfrýjað til Hæstaréttar.

Þá er í héraðsdómi rakinn úrskurður dómsins 5. nóvember 1997 um að leita ráðgefandi álits EFTA-dómstólsins, sbr. 1. gr. laga nr. 21/1994 um öflun álits þess dómstóls um skýringu samnings um Evrópska efnahagssvæðið. Spurningar héraðsdóms til EFTA-dómstólsins voru: „1. Ber að skýra gerð þá, sem er að finna í 24. tl. í viðauka XVIII við Samninginn um Evrópska efnahagssvæðið (tilskipun ráðsins nr. 80/987/EBE frá 20. október 1980, eins og henni var breytt með tilskipun ráðsins 87/164/EBE frá 2. mars 1987), einkum 2. mgr. 1. gr. og 10. gr. hennar, á þann veg að samkvæmt henni megi með landslögum útiloka launþega, vegna skyldleika við eiganda, sem á 40% í gjaldþrota hlutafélagi, frá því að fá greidd laun frá ábyrgðasjóði launa á vegum ríkisins þegar launþeginn á ógoldna launakröfu á hendur þrotabúinu? Um er að ræða skyldleika í fyrsta lið til hliðar, þ.e.a.s. systkini.

2. Ef svarið við spurningu nr. 1 er á þá leið, að launþegann megi ekki útiloka frá því að fá laun sín greidd, varðar það ríkið skaðabótaábyrgð gagnvart launþeganum að hafa ekki, samfara aðild sinni að Samningnum um Evrópska efnahagssvæðið, breytt landslögum á þann veg að launþeginn ætti samkvæmt þeim lögbundinn rétt til launagreiðslnanna?“

EFTA-dómstóllinn lét uppi ráðgefandi álit 10. desember 1998. Er það að miklu leyti rakið í héraðsdómi. Taldi dómstóllinn að gerðina, sem vísað er til í fyrri spurningu héraðsdóms, yrði að skýra á þann veg að það væri andstætt henni að á Íslandi væru í gildi lagaákvæði sem útilokuðu launþega, sem er systkini eiganda 40% hlutar í gjaldþrota fyrirtæki sem launþeginn vann hjá, frá þeirri greiðsluábyrgð sem mælt er fyrir um í 3. gr. tilskipunarinnar vegna skyldleika. Þá taldi dómstóllinn að aðilum EES-samningsins bæri skylda til að sjá til þess að það tjón fengist bætt sem einstaklingur yrði fyrir vegna þess að landsréttur væri ekki réttilega lagaður að ákvæðum tilskipunar sem væri hluti EES-samningsins.

III.

Ábyrgðasjóður launa ábyrgist greiðslu vinnulaunakröfu launþega við gjaldþrot eftir ákveðnum reglum sem fram koma í lögum nr. 53/1993. Félagsmálaráðherra fer með

framkvæmd laganna. Skipar hann sjóðnum þriggja manna stjórn en sjóðurinn er þó í vörslu félagsmálaráðuneytis sem sér um daglega afgreiðslu og reikningshald hans í umboði sjóðstjórnar. Sjóðurinn er fjármagnaður með sérstöku ábyrgðargjaldi af greiddum vinnulaunum. Samkvæmt 14. gr. laga nr. 53/1993 skal sjóðstjórn að fenginni umsögn skiptastjóra taka ákvörðun um það hvort krafa skuli greidd úr ábyrgðasjóðnum. Skilyrði fyrir ábyrgð sjóðsins koma fram í 5. gr. laganna. Samkvæmt greininni tekur ábyrgðin til þeirra launakrafna í bú vinnuveitenda sem viðurkenndar hafa verið sem forgangskröfur samkvæmt gjaldþrotaskiptalögum með nánari skilgreiningum sem fram koma í a. til d. liðum greinarinnar. Í 6. gr. laga nr. 53/1993 segir svo að ákveðnir launþegar geti þó ekki krafið sjóðinn um greiðslu krafna samkvæmt a. til d. liðum 1. mgr. 5. gr. Þannig nær ábyrgð sjóðsins aðeins til þeirra krafna sem í senn uppfylla skilyrði laga nr. 21/1991 til að verða viðurkenndar sem forgangskröfur og skilyrði laga nr. 53/1993. Þau ákvæði 6. gr. sem hér skipta máli koma fram í c. og d. lið 1. mgr. greinarinnar. Samkvæmt c. liðnum er hér átt við forstjóra, framkvæmdastjóra og aðra þá sem vegna stöðu sinnar hjá hinum gjaldþrota vinnuveitanda áttu að hafa þá yfirsýn yfir fjárhag fyrirtækisins að þeim mátti ekki dyljast að gjaldþrot þess væri yfirvofandi á þeim tíma sem unnið var fyrir vinnulaununum. Aðaláfrýjandi hefur ekki fært fram nokkur gögn því til styrktar að svo hafi háttað til um gagnáfrýjanda. Í d. lið 1. mgr. greinarinnar eru maki og skyldmenni vinnuveitanda í beinan legg og maki skyldmennis í beinan legg útilokuð frá greiðslu. Undanþága er þó veitt frá þessu ákvæði ef það leiðir að mati sjóðstjórnar til mjög ósanngjarnrar niðurstöðu og getur stjórnin þá heimilað greiðslu til þessara launþega úr ríkissjóði, eins og þar segir, enda þótt launakrafan hafi ekki verið viðurkennd sem forgangskrafa, sbr. 3. gr. og 3. mgr. 112. gr. gjaldþrotaskiptalaga.

Áður er fram komið að bróðir gagnáfrýjanda átti 40% eignarhlut í hinu gjaldþrota félagi. Hún tengist félaginu því um fyrsta legg til hliðar. Ákvæði d. liðar 1. mgr. 6. gr. laga nr. 53/1993 á því ekki við um hana. Skiptastjóri úrskurðaði að launakrafa hennar væri ekki forgangskrafa og vísaði um það efni til 3. mgr. 112. gr. gjaldþrotaskiptalaga, sbr. 3. gr. sömu laga. Krafa gagnáfrýjanda uppfyllti því ekki skilyrði upphafsákvæðis 5. gr. laga nr. 53/1993 og hafði sjóðstjórnin af þeirri ástæðu einni ekki heimild að lögum til þess að úrskurða henni greiðslur úr sjóðnum.

IV.

Með lögum nr. 2/1993 um Evrópska efnahagssvæðið var heimilað að fullgilda EES-samninginn fyrir Íslands hönd. Samkvæmt 1. mgr. 2. gr. laganna hefur meginmál samningsins lagagildi á Íslandi. Í 7. gr. samningsins segir: „Gerðir sem vísað er til eða er að finna í viðaukum við samning þennan, eða ákvörðunum sameiginlegu EES-nefndarinnar, binda samningsaðila og eru þær eða verða teknar upp í landsrétt sem hér segir: a. gerð sem samsvarar reglugerð EBE skal sem slík tekin upp í landsrétt samningsaðila; b. gerð sem samsvarar tilskipun EBE skal veita yfirvöldum samningsaðila val um form og aðferð við framkvæmdina.“

Tilskipun nr. 80/987/EBE um samræmingu á lögum aðildarríkjanna um vernd til handa launþegum verði vinnuveitandi gjaldþrota er að finna í 24. tl. XVIII. viðauka við EES-samninginn. Var tilskipunin því samkvæmt greindri 7. gr. samningsins bindandi fyrir Ísland og bar að taka efni hennar upp í landsrétt samkvæmt ákvæðinu í samræmi við b. lið þess. Eftir því sem fram kemur í gögnum málsins var tilskipunin að hluta til notuð sem fyrirmynd tiltekinna ákvæða laga nr. 53/1993. Mun ætlunin hafa verið sú að ákvæði laganna uppfylltu samningsskyldur Íslands samkvæmt tilskipuninni, sbr. og bókun 35 um framkvæmd EES-reglna, sem Ísland hefur einnig fullgilt. Samkvæmt þeirri bókun áttu samningsaðilar ekki að framselja löggjafarvald sitt til stofnana Evrópska efnahagssvæðisins og því átti að ná markmiðum samningsins með þeirri málsmeðferð sem gilti í hverju landi um sig. Jafnframt sagði þar að vegna þeirra tilvika þar sem komið gæti til árekstra milli EES-reglna, sem komnar væru til framkvæmda, og annarra settra laga, skuldbyndu EFTA-ríkin sig til að setja, ef þörf krefði, lagaákvæði þess efnis að EES-reglur giltu í þeim tilvikum.

Í 24. tl. XVIII. viðauka við EES-samninginn er svo fyrir mælt að tilskipun nr. 80/987/EBE, eins og henni var breytt með tilskipun 87/164/EBE, skuli aðlaga á þann hátt að Ísland megi undanþiggja ábyrgðasjóð greiðslum á sama hátt og gert er í 6. gr. laga nr. 53/1993. Hins vegar var ekki tekið upp í viðaukann ákvæði sama efnis og upphafsákvæði 5. gr. laganna, sem gerir greiðslur úr sjóðnum skilyrtar því að þær hafi verið viðurkenndar sem forgangskröfur. Þessi ákvæði 24. tl. viðaukans heimiluðu því ekki að undanskilja gagnáfrýjanda frá rétti til greiðslu úr ábyrgðasjóði vegna þess eins að hún tengdist þrotamanni um fyrsta lið til hliðar. Er sú skýring í samræmi við niðurstöðu EFTA-dómstólsins, sem um er getið hér að framan, en við skýringu ákvæða EES-samningsins ber að hafa hliðsjón af ráðgefandi áliti hans. Hið sama á við um skýringu þeirra gerða sem vísað er til í viðauka samningsins og teljast óaðskiljanlegur hluti hans, sbr. 119. gr. EES-samningsins. Aðaláfrýjandi

hefur heldur ekki sýnt fram á að aðrar undanþágur viðaukans, sbr. 10. gr. tilskipunarinnar, geti átt við gagnáfrýjanda, sbr. og það sem rakið er í III. kafla hér að framan. Verður að fallast á það með héraðsdómi að ekki sé samræmi milli tilskipunarinnar, eins og Ísland skuldbatt sig til að aðlaga hana samkvæmt 24. tl. XVIII. viðauka við EES-samninginn, og laga nr. 53/1993. Misræmið sem varð milli tilskipunarinnar og laganna er verulegt að því er snýr að gagnáfrýjanda. Verður það ekki skýrt til samræmis eftir skýringarreglu 3. gr. laga nr. 2/1993.

V.

EFTA-dómstóllinn hefur látið í ljós það álit að samkvæmt grundvallarreglum EES-samningsins beri aðilar hans skaðabótaábyrgð gagnvart einstaklingum á því tjóni, sem hlýst af ófullnægjandi lögfestingu tilskipunar, enda sé nánar tilgreindum skilyrðum fullnægt. Við skýringu ákvæða EES-samningsins ber sem fyrr segir að hafa hliðsjón af ráðgefandi áliti EFTA-dómstólsins komi ekkert fram sem leiða eigi til þess, að vikið verði frá því áliti. Samkvæmt 2. gr. stjórnarskrár lýðveldisins Íslands nr. 33/1944 er það hins vegar í valdi íslenskra dómstóla að skera úr um hvort bótaábyrgð aðaláfrýjanda njóti fullnægjandi lagastoðar að íslenskum rétti.

Samkvæmt 4. mgr. aðfararorða EES-samningsins, sbr. og 15. mgr. þeirra, er það markmið hans að mynda einsleitt Evrópskt efnahagssvæði sem grundvallast á sameiginlegum samræmdum reglum, sem leitast á við að skýra af samkvæmni, svo sem nánar er kveðið á um í 1. þætti 3. kafla VII. hluta hans, sbr. og bókun 35 um framkvæmd EES-reglna, sem frá er skýrt í IV. kafla. Í 3. gr. samningsins sjálfs skuldbinda samningsaðilar sig til að gera allar viðeigandi almennar eða sérstakar ráðstafanir til að tryggja að staðið verði við þær skuldbindingar sem af samningnum leiðir. Íslenska ríkið var þannig skuldbundið samningsaðilum sínum eftir 7. gr. EES-samningsins til þess að laga íslenskan rétt að tilskipun nr. 80/987/EBE svo að efnislegt samræmi yrði á milli íslenskra réttarreglna og ákvæða tilskipunarinnar. Þessi aðlögun átti að tryggja einstaklingum réttindi að íslenskum rétti til ákveðinna greiðslna úr ábyrgðasjóði við gjaldþrot og samkvæmt áðursögðu skyldi vera tiltekið samræmi á milli þessara greiðslna og sambærilegra réttinda annars staðar á hinu Evrópska efnahagssvæði. Skuldbinding íslenska ríkisins var í því fólgin að veita einstaklingum ákveðin réttindi að vissum skilyrðum uppfylltum. Ljóst þykir samkvæmt því sem segir í IV. kafla að gagnáfrýjandi hefði fengið greiðslur úr ábyrgðasjóði launa við gjaldþrot hefði aðlögunin verið með réttum hætti.

Það leiðir af 7. gr. EES-samningsins og bókun 35 við hann að samningurinn felur ekki í sér framsal löggjafarvalds. Hins vegar hefur meginmál EES-samningsins lagagildi hér á landi. Er samkvæmt framansögðu eðlilegt að lögin sem lögfesta meginmál samningsins séu skýrð svo að einstaklingar eigi kröfu til þess að íslenskri löggjöf sé hagað til samræmis við EES-reglur. Takist það ekki leiði það af lögum nr. 2/1993 og meginreglum og markmiðum EES-samningsins að aðaláfrýjandi verði skaðabótaskyldur að íslenskum rétti. Að þessu virtu, svo og aðdraganda og tilgangi laga nr. 2/1993 fær skaðabótaábyrgð aðaláfrýjanda, vegna ófullnægjandi lögfestingar tilskipunarinnar, næga stoð í þeim lögum.

Niðurstaðan verður því sú að aðaláfrýjandi hafi í verulegum mæli brugðist þeirri skyldu að tryggja gagnáfrýjanda réttindi til greiðslu úr ábyrgðasjóði launa við gjaldþrot að íslenskum rétti, svo sem honum bar í samræmi við tilskipun nr. 80/987/EBE eftir því sem segir í 24. tl. XVIII. viðauka við EES-samninginn. Aðaláfrýjandi ber samkvæmt öllu framansögðu skaðabótaábyrgð gagnvart gagnáfrýjanda vegna þessara mistaka og fer um bótaábyrgð hans að almennum reglum um bótaábyrgð hins opinbera.

VI.

Sundurliðun krafna gagnáfrýjanda er rakin í héraðsdómi. Aðaláfrýjandi hefur fallist á að miða megi ákvörðun bótafjárhæðar við dag þann sem fyrirtækið var lýst gjaldþrota, þrátt fyrir ákvæði 112. gr. gjaldþrotaskiptalaganna, sbr. 2. gr. sömu laga, og 2. mgr. 3. gr., sbr. a. lið 1. mgr. 2. gr., tilskipunar nr. 80/987/EBE, en samkvæmt ákvæðum þessum væri rétt að miða niðurstöðuna við frestdag. Samkvæmt þessu og annars með vísun til raka hins áfrýjaða dóms ber að staðfesta hann um ákvörðun bótafjárhæðar og um vexti og dráttarvexti.

Ákvæði héraðsdóms um málskostnað er staðfest.

Málskostnaður fyrir Hæstarétti fellur niður. Allur gjafsóknarkostnaður gagnáfrýjanda fyrir Hæstarétti greiðist úr ríkissjóði, svo sem nánar greinir í dómsorði.

Dómsorð:

Héraðsdómur á að vera óraskaður.

Málskostnaður fyrir Hæstarétti fellur niður. Allur áfrýjunarkostnaður gagnáfrýjanda, Erlu Maríu Sveinbjörnsdóttur, greiðist úr ríkissjóði, þar með talin þóknun til lögmanns hennar,

500.000 krónur.

2. *Stjörnugrís*, mál nr. 15/2000

Fimmtudaginn 13. apríl 2000.

Nr. 15/2000.	Stjörnugrís hf.
	(Baldur Guðlaugsson hrl.)
	gegn
	íslenska ríkinu
	(Skarphéðinn Þórisson hrl.)

Stjórnarskrá. Eignarréttur. Atvinnufrelsi. Framsal valds. Ógilding stjórnvalds-ákvörðunar. Evrópska efnahagssvæðið. EES-samningurinn. Sératkvæði.

Félagið S keypti jörðina M í hreppnum L til að reisa þar svínabú. Hóf S undirbúning að byggingu og starfrækslu búsins, sem var ætlað fyrir 8.000 grísi að meðaltali eða um 20.000 á ári. Lét S vinna deiliskipulag af lóð á jörðinni þar sem búið skyldi reist og samþykkti hreppsnefnd L deiliskipulagið og var það auglýst. Í kjölfar bréfs frá nágrönnum jarðarinnar M óskaði umhverfisráðherra eftir áliti skipulagsstjóra á því hvort framkvæmdin skyldi sæta mati á umhverfisáhrifum á grundvelli laga nr. 63/1993 um mat á umhverfisáhrifum. Lagði skipulagsstjóri til að ráðherra ákvæði að bygging og rekstur búsins á jörðinni yrði háð mati á umhverfisáhrifum. Eftir að hafa leitað álits hreppsnefndar L, byggingarnefndar og heilbrigðiseftirlits ákvað umhverfisráðherra, með vísan til þess hversu umfangsmikil fyrirhuguð starfsemi var, að meta bæri umhverfisáhrif fyrirhugaðrar byggingar og rekstrar svínabús á M á grundvelli 6. gr. laga nr. 63/1993. Höfðaði S mál til að fá ákvörðunina fellda úr gildi. Talið var að heimild 6. gr. laga nr. 63/1993, sem fær ráðherra vald til að ákveða, að fengnu áliti skipulagsstjóra, að tilteknar framkvæmdir verði háðar mati á umhverfisáhrifum, væri ótakmörkuð af öðru en almennri markmiðslýsingu í 1. gr. laganna og háð mati ráðherra. Þannig hefði ráðherra fullt ákvörðunarvald um það, hvort tiltekin framkvæmd, sem ekki fellur undir 5. gr. laga nr. 63/1993, skuli sæta mati á umhverfisáhrifum samkvæmt 6. gr., en talið var ljóst að slík ákvörðun gæti haft í för með sér umtalsverða röskun á eignarráðum og atvinnufrelsi þess, sem ætti í hlut. Var talið, að svo víðtækt og óheft framsal löggjafans á valdi sínu til framkvæmdarvaldsins stríddi gegn 72. og 75. gr. stjórnarskrárinnar og væri ólögmætt. Var ákvörðun umhverfisráðherra um að fyrirhugaðar framkvæmdir á jörðinni M skyldu sæta mati á umhverfisáhrifum því dæmd ógild.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Guðrún Erlendsdóttir, Haraldur Henrysson, Hjörtur Torfason, Hrafn Bragason og Pétur Kr. Hafstein.

Áfrýjandi skaut málinu til Hæstaréttar 10. janúar 2000. Hann krefst þess, að felld verði úr gildi ákvörðun stefnda 30. ágúst 1999 þess efnis, að meta beri samkvæmt lögum nr. 63/1993 umhverfisáhrif fyrirhugaðrar byggingar og rekstrar svínabús að Melum í Leirár- og Melahreppi í Borgarfjarðarsýslu. Þá krefst áfrýjandi málskostnaðar í héraði og fyrir Hæstarétti.

Stefndi krefst staðfestingar héraðsdóms og málskostnaðar fyrir Hæstarétti.

Fyrir Hæstarétt hefur verið lagt starfsleyfi heilbrigðiseftirlits Vesturlands frá 22. desember 1999 fyrir svínabú áfrýjanda að Melum og gildir það í tvö ár frá útgáfudegi fyrir „þauleldi á fráfærugrísum, þar til þeir ná sláturstærð, í svínahúsi þar sem ekki skulu hýstir fleiri en 2950 grísir samtímis.“

Mál þetta sætir flýtimeðferð samkvæmt XIX. kafla laga nr. 91/1991 um meðferð einkamála.

I.

Í héraðsdómi er skilmerkilega gerð grein fyrir atvikum málsins og málsástæðum aðila. Þar kemur fram, að í umsókn áfrýjanda var gert ráð fyrir 8.000 grísum á búinu að Melum að meðaltali eða um 20.000 grísum á ári. Hin umdeilda ákvörðun umhverfisráðherra 30. ágúst 1999 var tekin með hliðsjón af því, hversu umfangsmikil starfsemin myndi verða, og var hún reist á 6. gr. laga nr. 63/1993 um mat á umhverfisáhrifum. Það var niðurstaða ráðuneytisins, að virtu áliti skipulagsstjóra ríkisins og hreppsnefndar Leirár- og Melahrepps, að bygging og rekstur svínabús á Melum væri þess eðlis, að rétt væri að láta fyrirhugaða starfsemi sæta mati á umhverfisáhrifum.

II.

Í 6. gr. laga nr. 63/1993 segir, að umhverfisráðherra sé heimilt, að fengnu áliti skipulagsstjóra, að ákveða að tiltekin framkvæmd eða framkvæmdir, sem kunni að hafa í för með sér umtalsverð áhrif á umhverfi, náttúruauðlindir og samfélag, en ekki væri getið í 5. gr.,

yrðu háðar mati samkvæmt lögunum. Í 1. mgr. 5. gr. laganna eru í tíu liðum taldar upp framkvæmdir, sem skulu skilyrðislaust sæta mati á umhverfisáhrifum, en í 2. mgr. segir, að ennfremur séu háðar mati þær framkvæmdir, sem upp eru taldar í fylgiskjali með lögunum og ekki tilgreindar í 1. mgr. Þar er rekstur svínabúa eða þauleldi svína ekki nefnt.

Í athugasemdum með frumvarpi til laga nr. 63/1993 segir um 7. gr. þess, er síðar varð 6. gr. laganna, að telja verði heimild þessa ákvæðis í samræmi við tilgang og markmið tilskipunar nr. 85/337/EBE, bæði með hliðsjón af formála hennar og 2. gr., þar sem efnislega komi fram, að ekki skuli leyfa framkvæmdir, sem geti haft í för með sér veruleg áhrif á umhverfið fyrr en farið hafi fram mat á því, hver áhrifin kunni að verða. Var í athugasemdunum sérstaklega vísað til 4. gr. tilskipunarinnar varðandi skilgreiningu á þeim framkvæmdum. Þá var sagt, að ætti einungis að meta umhverfisáhrif vegna þeirra framkvæmda, sem taldar væru upp í viðauka I með tilskipuninni væri markmiðum hennar aðeins að óverulegu leyti náð miðað við íslenskar aðstæður og þar með þeim skuldbindingum, sem EES-samningurinn legði íslenska ríkinu á herðar.

Í 1. mgr. 4. gr. umræddrar tilskipunar er kveðið á um það, að með fyrirvara um 3. mgr. 2. gr. skuli framkvæmdir, sem taldar eru upp í I. viðauka, vera háðar undangengnu mati á umhverfisáhrifum. Í 2. mgr. sömu greinar segir, að framkvæmdir samkvæmt II. viðauka sæti slíku mati, ef aðildarríkin telji þær þess eðlis, að það sé nauðsynlegt. Í II. viðauka með tilskipuninni eru svínabú talin meðal þeirra framkvæmda á sviði landbúnaðar, sem falli undir 2. mgr. 4. gr.

Hinn 22. febrúar 2000 var lagt fram á Alþingi frumvarp til laga um mat á umhverfisáhrifum. Í athugasemdum með frumvarpinu kemur fram, að í því sé höfð hliðsjón af tilskipun nr. 97/11/EB um breytingu á tilskipun nr. 85/337/EBE, en fyrrnefnda tilskipunin hafi tekið gildi hjá Evrópusambandinu 14. mars 1999, verið staðfest í sameiginlegu EES-nefndinni 26. febrúar sama ár og öðlast gildi sex mánuðum síðar. Í I. viðauka þessarar nýrri tilskipunar eru stöðvar, þar sem fram fer þauleldi svína með meira en 3.000 stæði fyrir alisvín, háðar mati á umhverfisáhrifum samkvæmt 1. mgr. 4. gr. hinnar fyrri tilskipunar með áorðnum breytingum.

III.

Í 72. gr. stjórnarskrár lýðveldisins Íslands nr. 33/1944 er kveðið á um friðhelgi

eignarréttar og í 75. gr. hennar um atvinnufrelsi, sbr. 10. gr. og 13. gr. stjórnarskipunarlaga nr. 97/1995. Má hvorugt skerða nema með lagaboði að því tilskildu, að almenningsþörf krefji. Þessi fyrirmæli stjórnarskrárinnar verða ekki túlkuð öðruvísi en svo, að hinum almenna löggjafa sé óheimilt að fela framkvæmdarvaldshöfum óhefta ákvörðun um þessi efni. Löggjöfin verður að mæla fyrir um meginreglur, þar sem fram komi takmörk og umfang þeirrar réttindaskerðingar, sem talin er nauðsynleg. Á þetta einnig við um ráðstafanir til að laga íslenskan rétt að skuldbindingum Íslands samkvæmt EES-samningnum. Í samræmi við stjórnskipun landsins er það á valdi löggjafans en ekki framkvæmdarvaldsins að ákveða, hvernig heimild íslenska ríkisins í 2. mgr. 4. gr. tilskipunar nr. 85/337/EBE verði nýtt.

Í 6. gr. laga nr. 63/1993 er umhverfisráðherra fengið vald til þess að ákveða, að fengnu áliti skipulagsstjóra, að tilteknar framkvæmdir verði háðar mati samkvæmt lögunum, ef hann telur þær kunna að hafa í för með sér umtalsverð áhrif á umhverfi, náttúruauðlindir og samfélag. Engar efnisreglur koma fram í þessu ákvæði, eins og raunin er í 5. gr. laganna og fylgiskjali með þeim. Þessi heimild er því ótakmörkuð af öðru en almennri markmiðslýsingu 1. gr. og háð mati ráðherra, eins og stefndi viðurkennir og telur nauðsynlegt til að ná tilgangi laganna og tilskipunar nr. 85/337/EBE, sbr. lög nr. 2/1993 um Evrópska efnahagssvæðið. Umhverfisráðherra hefur því í raun fullt ákvörðunarvald um það, hvort tiltekin framkvæmd, sem ekki fellur undir 5. gr. laga nr. 63/1993, skuli sæta mati á umhverfisáhrifum samkvæmt 6. gr., en slík ákvörðun getur haft í för með sér umtalsverða röskun á eignarráðum og atvinnufrelsi þess, er í hlut á. Svo víðtækt og óheft framsal löggjafans á valdi sínu til framkvæmdarvaldsins stríðir gegn framangreindum mannréttindaákvæðum stjórnarskrárinnar og er ólögmætt. Ber því að fallast á dómkröfur áfrýjanda.

Rétt þykir, að stefndi greiði áfrýjanda málskostnað í héraði og fyrir Hæstarétti, eins og í dómsorði greinir.

Dómsorð:

Ákvörðun umhverfisráðherra 30. ágúst 1999 þess efnis, að fyrirhugaðar byggingar og rekstur svínabús áfrýjanda, Stjörnugríss hf., að Melum í Leirár- og Melahreppi í Borgarfjarðarsýslu skuli sæta mati samkvæmt lögum nr. 63/1993 um mat á umhverfisáhrifum, er ógild.

Stefndi, íslenska ríkið, greiði áfrýjanda 500.000 krónur í málskostnað í héraði og fyrir Hæstarétti.

3. *Hörður Einarsson*, mál nr. 477/2002

Fimmtudaginn 15. maí 2003.

Nr. 477/2002.

Íslenska ríkið

(Einar Karl Hallvarðsson hrl.)

gegn

Herði Einarssyni

(Hörður Einarsson hrl.

Guðmundur B. Ólafsson hdl.)

Virðisaukaskattur. EES-samningurinn. EFTA-dómstóllinn. Ráðgefandi álit.

H var gert að greiða 24,5% virðisaukaskatt af tollverði bóka á ensku sem hann flutti inn frá Bretlandi og Þýskalandi, en 14% virðisaukaskattur var lagður á innlendar bækur, sbr. 6. tl. 14. gr. laga nr. 50/1988 um virðisaukaskatt. Taldi hann að þessi greinarmunur færi í bága við 14. gr. EES-samningsins og krafðist þess að úrskurður ríkistollanefndar þar um yrði felldur úr gildi og honum endurgreiddur ofgreiddur virðisaukaskattur sem næmi þessum mismuni. Með vísan til 3. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið var talið að ákvæði 2. mgr. 14. gr. EES-samningsins um bann við skattlagningu, sem væri til þess fallin að vernda óbeint framleiðsluvörur eins samningsaðila gagnvart framleiðsluvörum annarra aðila samningsins, bæri að skýra sem sérreglu um skattalega meðferð á innflutningi frá öðrum EES-ríkjum, er gengi framar eldra ákvæði laga nr. 50/1988 um lægri virðisaukaskatt af sölu bóka á íslenskri tungu. Hefði því verið óheimilt eftir að EES-samningnum var veitt lagagildi með lögum nr. 2/1993 að gera greinarmun á bókum á íslensku og öðrum tungum við álagningu virðisaukaskatts. Var úrskurður ríkistollanefndar því ógiltur og íslenska ríkinu gert að endurgreiða H umræddan mismun.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Hrafn Bragason, Garðar Gíslason, Gunnlaugur Claessen, Ingibjörg Benediktsdóttir og Pétur Kr. Hafstein.

Héraðsdómi var áfrýjað 18. október 2002 að fengnu leyfi Hæstaréttar. Áfrýjandi krefst

aðallega sýknu af kröfum stefnda og málskostnaðar í héraði og fyrir Hæstarétti. Til vara er þess krafist, að kröfur stefnda verði lækkaðar og málskostnaður látinn falla niður.

Stefndi krefst staðfestingar héraðsdóms og málskostnaðar fyrir Hæstarétti.

I.

Eins og greinir í héraðsdómi eru málavextir óumdeildir. Stefndi keypti bækur á ensku frá Bretlandi og Þýskalandi á árinu 1999 og var við innflutninginn gert að greiða 24,5% virðisaukaskatt af tollverði þeirra samkvæmt tveimur tollskýrslum 26. júlí 1999 og einni 11. ágúst sama ár, samtals 3.735 krónur. Með bréfi til fjármálaráðherra 21. maí 1999 hafði stefndi meðal annars krafist þess, að hætt yrði að innheimta 24,5% virðisaukaskatt af bókum, sem fluttar væru inn frá öðrum ríkjum á Evrópska efnahagssvæðinu, og þess í stað yrði lagður á þær 14% virðisaukaskattur, eins og lagður væri á innlendar bækur. Fjármálaráðuneytið taldi skattlagningu þessa ekki brjóta í bága við EES-samninginn og hafnaði erindi stefnda 16. júlí 1999. Stefndi kærði framangreinda álagningu til tollstjórans í Reykjavík og síðar ríkistollanefndar, sem staðfesti synjun tollstjóra á kröfu stefnda með úrskurði 22. desember 1999. Stefndi krefst þess í málinu, að þessi úrskurður ríkistollanefndar verði felldur úr gildi og áfrýjanda gert að endurgreiða sér ofgreiddan virðisaukaskatt, sem nemur mismuni 14% og 24,5% álagningar virðisaukaskatts á hinar innfluttu bækur, samtals að fjárhæð 1.601 krónu.

Við meðferð málsins í héraði var leitað ráðgefandi álits EFTA-dómstólsins um fimm tilteknar spurningar, sem fram koma í héraðsdómi, og eru svör dómstólsins 22. febrúar 2002 skilmerkilega reifuð í dóminum. Á grundvelli röksemda um hverja spurningu fyrir sig lét EFTA-dómstóllinn frá sér fara eftirfarandi ráðgefandi álit:

„1. Vald EES-ríkis til að leggja á virðisaukaskatt útilokar ekki beitingu EES-reglna.

2. Ákvæði í landslögum EES-ríkis, sem kveður á um að bækur á tungumáli þess beri lægri virðisaukaskatt en bækur á erlendum málum, samrýmist ekki 14. gr. EES-samningsins.

3. Slíkt ákvæði í landslögum verður ekki réttlætt með tilvísun til þeirra almannahagsmuna að bæta stöðu þjóðtungunnar.

4. Þegar ákvæði landslaga samrýmist ekki 14. gr. EES-samningsins og sú grein hefur verið innleidd í landslög, er upp komin sú staða sem skuldbinding EFTA-ríkjanna samkvæmt bókun 35 við EES samninginn gildir um, en hún er reist á þeirri forsendu, að EES-regla, sem innleidd hefur verið í landslög, skuli hafa forgang.“

II.

Með 1. - 3. gr. laga nr. 21/1994 um öflun álits EFTA-dómstólsins um skýringu samnings um Evrópska efnahagssvæðið er íslenskum dómstólum veitt heimild til að leita ráðgefandi álits EFTA-dómstólsins. Er það gert til þess að stuðla að samkvæmni í skýringum á ákvæðum EES-samningsins og þar með samræmdri framkvæmd hans, en það er eitt af meginmarkmiðum samningsins að mynda öflugt og einsleitt Evrópskt efnahagssvæði, er meðal annars grundvallist á sameiginlegum reglum og sömu samkeppnisskilyrðum, eins og kemur fram í 4. mgr. aðfararorða samningsins. Hafa Íslendingar skuldbundið sig til að gera allar viðeigandi ráðstafanir til að stuðla að þessum markmiðum, sbr. 3. gr. EES-samningsins. Þótt álit EFTA-dómstólsins séu ekki bindandi að íslenskum rétti leiðir af framansögðu, að íslenskum dómstólum er rétt að hafa hliðsjón af ráðgefandi áliti hans við skýringar á efni ákvæða EES-samningsins nema sérstakar ástæður mæli því í gegn, sbr. og dóma Hæstaréttar 18. nóvember og 16. desember 1999, bls. 4429 og 4916 í dómasafni.

Í spurningum Héraðsdóms Reykjavíkur til EFTA-dómstólsins var ekki gerður greinarmunur á 1. og 2. mgr. 14. gr. EES-samningsins, þegar álits var leitað á því, hvort sú tilhögun bryti í bága við greinina, að lagður væri hærri virðisaukaskattur á bækur á erlendum tungumálum (24,5%) en á bækur á íslensku (14%). EFTA-dómstóllinn kaus að fara þá leið, án þess að rökstyðja það nánar, að reisa niðurstöðu sína um fyrstu og aðra spurningu Héraðsdóms Reykjavíkur á því, að regla í landslögum EES-ríkis, sem mælti svo fyrir, að virðisaukaskattur á bækur á tungu þess ríkis væri lægri en á bækur á erlendum tungum, væri andstæð 2. mgr. 14.

gr. EES-samningsins. Því væri ekki nauðsynlegt að taka til athugunar, hvort sú skattalega meðferð, sem væri hagstæð bókum á íslensku, bryti í bága við 1. mgr. 14. gr. samningsins. Þá var 10. gr. EES-samningsins heldur ekki tekin til athugunar, þar sem 10. og 14. gr. samningsins voru taldar útiloka hvor aðra samkvæmt dómaframkvæmd dómstóls Evrópubandalaganna og yrði þeim ekki beitt samtímis.

Þar sem ekki liggur fyrir álit EFTA-dómstólsins um þýðingu 1. mgr. 14. gr. EES-samningsins fyrir úrlausnarefni málsins og með hliðsjón af því, sem að framan er sagt um vægi ráðgefandi álits þessa dómstóls fyrir íslenskum dómstólum, þykir rétt að taka fyrst til athugunar 2. mgr. 14. gr. EES-samningsins og kanna, hvort hún leysir úr ágreingsefni þessa máls. Í því sambandi er þess jafnframt að gæta, eins og fram kemur í áliti EFTA-dómstólsins, að það er hinn almenni tilgangur 14. gr. EES-samningsins að tryggja frjálsa vöruflutninga við eðlilegar samkeppnisaðstæður milli ríkja á hinu Evrópska efnahagssvæði með því að koma í veg fyrir alla vernd, sem kynni að stafa af skattlagningu innanlands, er felur í sér mismunun gagnvart framleiðsluvörum annarra aðildarríkja, og að tryggja að innlend skattlagning hafi engin áhrif á samkeppni milli innlendrar og innfluttrar framleiðslu.

III.

Í 1. mgr. 14. gr laga nr. 50/1988 um virðisaukaskatt er svo fyrir mælt, að virðisaukaskattur skuli vera 24,5% og renni hann í ríkissjóð, sbr. lög nr. 119/1989. Með lögum nr. 111/1992 var 2. mgr. aukið við 14. gr. virðisaukaskattslaganna þess efnis, að þrátt fyrir ákvæði 1. mgr. skyldi virðisaukaskattur af tiltekinni vöru og þjónustu vera 14%. Í 6. tl. hins nýja ákvæðis var sala bóka á íslenskri tungu, jafnt frumsaminna sem þýddra, felld undir hið lægra skatthlutfall. Þegar ráðgefandi álit EFTA-dómstólsins í þessu máli lá fyrir var sú breyting gerð á þessum tölulið, að virðisaukaskattur af sölu allra bóka skyldi nema 14%, sbr. lög nr.

64/2002. Þegar fjármálaráðherra mælti á Alþingi fyrir þessari breytingu lét hann þess getið, að vegna niðurstöðu EFTA-dómstólsins yrði af samræma virðisaukaskatt af sölu bóka og best væri að gera það strax í stað þess að bíða endanlegrar niðurstöðu íslenskra dómstóla.

Með 2. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið var meginmáli EES-samningsins veitt lagagildi hér á landi. Samkvæmt 3. gr. laganna skal skýra lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur, sem á honum byggja. Af athugasemdum með frumvarpi til laganna um þessa grein verður ráðið, að henni hafi verið ætlað að fullnægja skuldbindingu samningsaðila í bókun 35 við EES-samninginn, en þar segir meðal annars, að komi til árekstra á milli EES-reglna, sem komnar séu til framkvæmda, og annarra settra laga skuldbindi EFTA-ríkin sig til að setja, ef þörf krefji, lagaákvæði þess efnis að EES-reglur gildi í þeim tilvikum. Í athugasemdunum segir jafnframt, að í 3. gr. felist meðal annars, að innlend lög, sem eigi stoð í EES-samningnum, verði jafnan túlkuð sem sérreglur laga gagnvart ósamræmanlegum yngri lögum, að því leyti að yngri lög víki þeim ekki, ef þau stangast á, nema löggjafinn taki það sérstaklega fram. Þetta sé nauðsynlegt til að tryggja samræmi í reglunum á Evrópska efnahagssvæðinu. Í bókun 35 sé og skýrlega tekið fram, að þessi skýringarregla skuli ekki hafa í för með sér framsal á löggjafarvaldi og sé 3. gr. við það miðuð.

Í þessu ljósi verður að telja, að ákvæði 2. mgr. 14. gr. EES-samningsins um bann við skattlagningu, sem er til þess fallin að vernda óbeint framleiðsluvörur eins samningsaðila gagnvart framleiðsluvörum annarra aðila samningsins, beri að skýra sem sérreglu um skattalega meðferð á innflutningi frá öðrum EES-ríkjum, er gangi framar eldra ákvæði áðurgildandi 6. tl. 14. gr. laga nr. 50/1988 um lægri virðisaukaskatt af sölu bóka á íslenskri tungu en annarra bóka. Eftir að EES-samningnum var veitt lagagildi með lögum nr. 2/1993 var því óheimilt að

gera greinarmun á bókum á íslensku og öðrum tungum við álagningu virðisaukaskatts.

Með þessum athugasemdum og að öðru leyti með skírskotun til forsendna héraðsdóms verður hann staðfestur. Hefur þá ekki verið tekin afstaða til þess, hvort 1. mgr. 14. gr. EES-samningsins kunni jafnframt að taka til þess álitaefnis, sem úr er leyst í þessu dómsmáli.

Áfrýjandi skal greiða stefnda 200.000 krónur í málskostnað fyrir Hæstarétti.

Dómsorð:

Héraðsdómur skal vera óraskaður.

Áfrýjandi, íslenska ríkið, greiði stefnda, Herði Einarssyni, 200.000 krónur í málskostnað fyrir Hæstarétti.

4. *Ákæruvaldið gegn X*, mál nr. 251/2004

Fimmtudaginn 28. október 2004.

Nr. 251/2004.

Ákæruvaldið

(Bogi Nilsson ríkissaksóknari)

gegn

X

(Viðar Lúðvíksson hrl.)

Bifreiðir. Vöruflutningar. Evrópska efnahagssvæðið. Refsiheimild. Stjórnarskrá.

X var saksóttur fyrir umferðarlagabrot með því að hafa ekið vöruflutningabifreið yfir sjö daga tímabil án þess að taka sér „lögboðna vikuhvíld.“ Var þetta í ákæru talið varða við a. lið 1. gr. reglugerðar nr. 136/1995 um aksturs- og hvíldartíma ökumanna o.fl. í innanlandsflutningum og við flutning innan Evrópska efnahagssvæðisins, sbr. ákvæði reglugerðar ráðsins (EBE) nr. 3820/85 um samhæfingu tiltekinnar löggjafar á sviði félagsmála er varðar flutninga á vegum, sbr. 6. mgr. 44. gr., sbr. 1. mgr. 100. gr. umferðarlaga nr. 50/1987. Talið var að sjálfstæða verknaðalýsingu á broti varðandi hvíldartíma ökumanna væri hvorki að finna í 6. mgr. 44. gr. umferðarlaga né heldur í reglugerð nr. 136/1995 sem sett væri með stoð í lögunum. Væri því ekki um að ræða svo skýra refsiheimild að samrýmanleg væri 1. mgr. 69. gr. stjórnarskrárinnar. Var X því sýknaður af kröfu ákæruvaldsins.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Markús Sigurbjörnsson og Ólafur Börkur Þorvaldsson og Jónatan Þórmundsson prófessor.

Ríkissaksóknari skaut málinu til Hæstaréttar 7. júní 2004 og krefst þess að ákærði verði sakfelldur samkvæmt ákæru og dæmdur til refsingar.

Ákærði krefst þess aðallega að hinn áfrýjaði dómur verði staðfestur, en til vara að honum verði gerð vægasta refsing sem lög leyfa.

Með ákæru 12. febrúar 2004 var ákærði saksóttur fyrir umferðarlagabrot með því að hafa ekið bifreiðinni [...] frá og með laugardeginum 2. nóvember til og með föstudeginum 8. nóvember 2002, eða í sjö daga „án þess að taka sér lögboðna vikuhvíld.“ Var þetta í ákæru talið varða við a. lið 1. gr. reglugerðar nr. 136/1995 um aksturs- og hvíldartíma ökumanna o.fl. í innanlandsflutningum og við flutning innan Evrópska efnahagssvæðisins, sbr. „1. undirgrein 1. mgr. 6. gr.“ og 3. tölulið 8. gr. reglugerðar ráðsins (EBE) nr. 3820/85 um samhæfingu tiltekinnar löggjafar á sviði félagsmála er varðar flutninga á vegum, sbr. 6. mgr. 44. gr., sbr. 1. mgr. 100. gr. umferðarlaga nr. 50/1987 með áorðnum breytingum. Ákærði hefur fyrir dómi viðurkennt þann akstur sem að framan greinir.

Í 1. gr. reglugerðar nr. 136/1995 segir meðal annars að ákvæði samningsins um Evrópska efnahagssvæðið sem vísað er til í 20., 21. og 23. tölulið XIII. viðauka við hann, skuli gilda hér á landi, með þeim breytingum og viðbótum sem leiðir af viðaukanum, bókun 1 við samninginn og öðrum ákvæðum hans, svo og þeirri aðlögun sem leiðir af ákvæðum 2.-4. gr. reglugerðarinnar. Er reglugerð ráðsins (EBE) nr. 3820/85 ein þeirra gerða sem vísað er til í viðaukanum, sbr. a. lið 1. gr. reglugerðar nr. 136/1995. Efnislýsingu þess brots sem ákærða er gefið að sök telur ákæruvaldið vera í ákvæðum sem með réttu eru 2. mgr. 1. töluliðar 6. gr. og 3. töluliður 8. gr. reglugerðar ráðsins (EBE) nr. 3820/85. Í 2. mgr. 1. töluliðar 6. gr. reglugerðarinnar kemur fram að ökumaður skuli „eftir sex akstursdaga hið mesta taka sér vikulegan hvíldartíma“ eins og skilgreint er í 3. tölulið 8. gr. Í þeirri grein eru einnig ákvæði um svokölluð hvíldartímabil. Þar segir meðal annars að ökumaður skuli á sólarhrings fresti fá daglegan tilgreindan hvíldartíma. Í 3. tölulið greinarinnar segir að í hverri viku skuli framlengja eitt þeirra hvíldartímabila sem um geti í 1. og 2. tölulið með vikulegum hvíldatíma sem sé í allt 45 klukkustundir samfellt. Heimilt sé að stytta þennan hvíldartíma niður í 36 klukkustundir samfellt hið minnsta ef hann er tekinn á bækistöð ökutækis eða ökumanns eða í minnst 24 klukkustundir samfellt ef hann er tekinn annars staðar. Þá er komist svo að orði að sérhverja styttingu beri að bæta upp með jafnlangri hvíld sem tekin sé óslitið fyrir lok þriðju viku eftir þá viku sem um ræðir.

Reglugerð nr. 136/1995 var sett meðal annars með stoð í þágildandi ákvæði 6. mgr. 44. gr. umferðarlaga. Í því var hvorki að finna sjálfstæða verknaðalýsingu á broti varðandi hvíldartíma ökumanna né aðrar efnisreglur þar um, heldur sagði einungis að dómsmálaráðherra gæti sett reglur um hvíldartíma ökumanna. Efnisákvæði 2. mgr. 44. gr. umferðarlaga kemur ekki til álita í máli þessu þar sem ákærða er ekki gefið að sök í ákæru að hafa brotið gegn því lagaákvæði, heldur hinum valkvæðu ákvæðum reglugerðar ráðsins (EBE) nr. 3820/85 um hvíldartíma ökumanna. Ákvæði 1. mgr. 100. gr. umferðarlaga hefur að geyma aðgreinda refsireglu sem vísar

til verknaðarlýsinga í öðrum ákvæðum laganna og í ákvæðum reglna sem settar eru samkvæmt þeim. Breytir þetta ákvæði engu um niðurstöðu málsins þar sem sjálfstæða verknaðarlýsingu var hvorki að finna í 6. mgr. 44. gr. laganna, eins og áður segir, né heldur í reglugerð nr. 136/1995 sem sett var með stoð í umferðarlögum. Samkvæmt þessu er hér ekki um að ræða svo skýra refsiheimild að samrýmanleg sé 1. mgr. 69. gr. stjórnarskrárinnar. Verður því staðfest niðurstaða hins áfrýjaða dóms um sýknu ákærða.

Eftir þessum úrslitum skal greiða allan sakarkostnað í héraði og fyrir Hæstarétti úr ríkissjóði, eins og nánar greinir í dómsorði.

Dómsorð:

Héraðsdómur skal vera óraskaður um annað en sakarkostnað.

Allur sakarkostnaður í héraði og áfrýjunarkostnaður málsins greiðist úr ríkissjóði, þar með talin málsvarnarlaun skipaðs verjanda ákærða á báðum dómstigum, Viðars Lúðvíkssonar hæstaréttarlögmanns, samtals 350.000 krónur.

Dómur Héraðsdóms Reykjaness 28. apríl 2004.

Mál þetta er með ákæru útgefinni 12. febrúar sl. höfðað gegn X, kt. [...] fyrir umferðarlagabrot með því að hafa ekið bifreiðinni [...], frá og með laugardeginum 2. nóvember til og með föstudagsins 8. nóvember 2002, eða í sjö daga, án þess að taka sér lögboðna vikuhvíld.

Telst þetta varða við a-lið 1. gr. reglugerðar nr. 136,1995, um aksturs- og hvíldartíma ökumanna o.fl. í innanlandsflutningum og í flutningum innan Evrópska Efnahagssvæðisins, sbr. 1. undirgrein 1. mgr. 6. gr., sbr. 3. tl. 8. gr. EBE-reglugerðar nr. 3820/85, um samhæfingu tiltekinnar löggjafar á sviði félagsmála er varðar flutninga á vegum, sbr. 6. mgr. 44. gr., sbr. 100. gr. umferðarlaga nr. 50,1987, sbr. lög nr. 82,1998 og 57,1997.

Þess er krafist að ákærði verði dæmdur til refsingar.

Af hálfu ákærða er haldið uppi vörnum í málinu og gerðar þær kröfur aðallega að hann verði sýknaður af kröfum ákæruvaldsins en til vara er þess krafist að honum verði einungis gerð vægasta refsing sem lög frekast leyfa og að hún verði skilorðsbundin. Þá er krafist hæfilegra málsvarnarlauna

til skipaðs verjanda hans hrl. Viðars Lúðvíkssonar.

I. Málavextir

Þann 3. febrúar 2003 var fyrirtækinu Y ehf., sem var skráður eigandi bifreiðarinnar [...], sent bréf þar sem innkölluð voru til eftirlits skráningarblöð og afrit úr akstursdagbók bifreiðarinnar fyrir tímabilið frá 1. október 2002 til 20. nóvember 2002 og bárust gögnin Vegagerðinni 20. febrúar 2003 og leiddi rannsókn þeirra í ljós, að ákærður hafði verið ökumaður bifreiðarinnar tímabilið 2. til 8. nóvember 2002 eða í 7 daga án þess að taka sér lögboðna vikuhvíld svo sem mælt væri fyrir um í reglugerð nr. 136,1995, sbr. 2. mgr. 6. gr. sbr. 8. gr. EBE-reglugerðar nr. 3820/1985 og var málið kært til sýslumannsins í Kópavogi 21. febrúar 2003. Ákærða var í framhaldi af því boðið að ljúka málinu með sektargerð lögreglustjóra, dags. 3. maí 2003 og greiða 50.000 krónur í sekt sem hann sinnti ekki.

Ákærður hefur við skýrslutöku hjá lögreglu og hér fyrir dómi viðurkennt að hafa ekið þessa 7 daga eins og fram komi í akstursdagbók og eins og skráningarblöð ökuritans beri með sér. Hann vísaði hins vegar til bæklings sem Vegagerðin hafi gefið út um akstur og hvíldartíma í flutningum á vegum, þar sem fram komi að vinnuvikan skuli vera frá mánudegi til sunnudagskvölds. Hann hafi tekið sér þá frí frá akstri fimmtudaginn 31. október og föstudaginn 1. nóvember, en ekið laugardaginn 2. nóvember og sunnudaginn 3. nóvember og þar með hafi lokið þeirri akstursviku. Mánudaginn 4. nóvember hafi svo byrjað ný vinnuvika og hann þá unnið eðlilega vinnuviku til föstudagsins 8. nóvember og svo tekið sér lögboðna hvíld eins og næstu helgar á eftir. Hann tók fram að vikuna á eftir þ.e. 11. til 17. nóvember hafi yfirleitt verið mjög stuttur vinnudagur, 3-4 klukkustundir á dag. Fram kom hjá ákærða að aksturinn 2. og 3. nóvember hafi verið að [...] og aftur til [...], en aksturinn í vikunni 4.-8. nóvember verið á höfuðborgarsvæðinu með biðtímum og hléum.

II. Niðurstöður.

Ljóst er af framburði ákærða og ökurita bifreiðarinnar [...] og akstursbók ákærða fyrir bifreiðina, að hann ekur henni samfellt í 7 daga frá 2. nóvember til 8. nóvember 2002 án þess að taka sér vikuhvíld, svo sem mælt er fyrir um í EBE reglugerð nr. 3820/1985. Hinsvegar sýnir akstursbókin, að ákærður hefur eins og hann heldur fram, ekki verið við akstur 2 daga á undan, þ.e. 31. október og 1. nóvember og hann tekur sér 2ja daga hvíld 9. og 10. nóvember.

Samkvæmt þessu hefur ákærður ekið 5 daga í vikunni frá 28. október til 3. nóvember og fengið 2ja daga frí og svo ekur hann í 5 daga í vikunni 4. til 10. nóvember og tekur sér þá 2ja daga frí. Þá staðfesta skráningarblöð ökuritans frásögn ákærða um langan samfelldan akstur 2. og 3. nóvember, svo sem til [...]og aftur til [...], en skráningarblöðin fyrir 4-8. nóvember sýna að þar er um að ræða styttri

vinnudaga og aksturstímabilin eru styttri og oft verulegt bil á milli þeirra, sem telja verður biðtíma. Þannig er vinnutíminn 4. nóvember 8 tímar, þar af biðtímar a.m.k. 2 tímar, 5. nóvember er 8 tímar, þar af biðtímar a.m.k. 2 tímar, 5. nóvember er vinnutíminn um 12 tímar, en þar af biðtímar 6-7 tímar og 8. nóvember er vinnutíminn 7 tímar og biðtímar a.m.k. 2 tímar og miðað við að hann lýkur vinnu kl. 16:00 er tíminn þar til hann hefur akstur aftur 62 tímar. Samkvæmt þessu er aksturinn þessa 7 daga að frádregnum biðtímum vel innan við 44 tíma, en eftir reglugerðinni nr. 136/1995 er ökumanni heimilt að aka 60 til 64 tíma með þargreindum hléum vikulega.

Í málinu hefur verið lagt fram samkomulag milli Trausta félags sendiferðabifreiðastjóra, Vegagerðarinnar og dómsmálaráðuneytisins, dags. 12. júlí 1996.

Samkvæmt þessu samkomulagi sem gert er eftir gildistöku reglugerðarinnar og hlýtur að vera til fyllingar henni, skal draga fasta biðtíma frá helgarhvíld.

Þó að fallast megi á það með ákærða að heimildin í 44. gr. umferðarlaga sem ráðherra er fengin til að ákveða hvíldartíma ökumanna, sé án frekari tilgreiningar of víðtækt framsal löggjafarvalds, er til þess að líta, að reglugerð EBE sem kveður á um hvernig hvíldartíma ökumanna nr. 3820/1985 hafði verið samþykkt í ráði Evrópubandalagsins í lok ár 1985 og bar aðildarríkjum bandalagsins sem og þeim ríkjum sem eru aðilar EES samningsins að samþykkja lög og stjórnsýslufyrirmæli, sem nauðsynleg væru til að framfylgja reglugerðinni. Þessi reglugerð var því til staðar er umferðarlögin nr. 85/1987 voru sett og var Íslenska ríkinu skylt að innleiða hana hér á landi og verður að túlka heimildina í 6. mgr. 44. gr. umferðarlaganna í því ljósi, að ráðherra sé heimilt að setja reglugerð sem gilti hér á landi í samræmi við reglugerð EBE nr. 3820/1985 og jafnframt á það við um nánari takmarkanir sbr. 11. gr. reglugerðarinnar. Þetta gerði dómsmálaráðherra með setningu reglugerðar nr. 136/1995, þar sem kveðið er á um það m.a. að reglugerð nr. 3820/1985 að teknu tilliti til þeirrar aðlögunar sem getur í 2.-4. gr. reglugerðarinnar nr. 136/1995 skuli gilda hér á landi og brot á reglugerðinni skuli sæta viðurlögum skv. heimild í 44. gr. sbr. 100. gr. umferðarlaga og er það í samræmi við 1. lið 11. gr. reglugerðar EBE nr. 3820/1985.

Reglugerð nr. 136/1995 hefur verið auglýst og birt með lögformlegum hætti og verður á grundvelli þess að telja að fram sé komin nægileg tilgreining til beitingar refsiákvæðum umferðarlaga um brot á ákvæðum reglugerðar EBE nr. 3820/1985 um lágmarkshvíldartíma ökumanna o.fl.

Í 2.-4. reglugerð nr. 136/1995 og svo í samkomulaginu frá 12. júlí 1993 milli Trausta félags sendiferðabifreiðastjóra, dómsmálaráðuneytisins og Vegagerðarinnar eru tilgreindar tilhliðranirnar frá reglugerð EBE nr. 3820/1985.

Engin undantekning er þar heimiluð frá 2. mgr. 6. gr. reglugerðarinnar um að ökumanni sé skylt að taka vikulegan hvíldartíma eftir sex akstursdaga og verður því að telja að þessi regla gildi nú almennt hér á landi. Hins vegar þykir verða að túlka þessa reglu eftir þeim aðstæðum sem hún miðast við og í samræmi við þær meginreglur sem fram koma í reglugerð EBE nr. 3820/1985. Ljóst er að regla þessi miðast í megindráttum við daglegan langakstur vöruflutninga- og sendiferðabifreiða og þá á þjóðvegum og hraðbrautum milli Suður og Norður-Evrópu, sem er mjög lýjandi og einhæfur akstur, en slíkur samfelldur langferðarakstur kallar örugglega á helgarhvíld að loknum sex dögum, þegar ekið hefur verið allt að 10 tíma á dag og jafnvel 12 tíma, þannig að heildaraksturstími hefur numið 60-64 tímum. Mikill munur er á þessu og þegar eknar eru stuttar vegalengdir í senn og biðtímar eru á milli og er það engan veginn sambærilegt og öll skynsemisrök mæla gegn því að það sama gildi í báðum tilvikum. Þá er til þess að líta að oft eru aðstæður í íslensku atvinnulífi mjög sérstæðar og kalla á áhlaupavinnu og er þá litið fram hjá því hvort það er helgi eða ekki og er þá tilhliðrun nauðsynleg eins og gerist í þessu tilviki, að helgarfrí eða helgarhvíld er flutt fram vegna aukaferðar

Í máli þessu sá ákærður fram á mikla vinnu og tók sér því gott tveggja daga frí, en svo um helgina 2.-3. nóvember 2002 ók hann frá [...] til [...] og aftur til [...] og var þetta samfelldur akstur með lögbundinni hvíld og hléum á milli, en eftir það þ.e. 4.-8. nóvember er aksturinn meira slitinn í sundur með biðtímum o.fl., svo aksturstíminn varð ekki svo sem fyrr greinir nema 44 tímar, þó að akstursdagarnir væru sjö, en 22 tímar frá 4. til 8. nóvember.

Það er mat réttarins að 2. mgr. 6. gr. EBE reglugerðar nr. 3820/1985 eigi fyrst og fremst við er um sé að ræða samfelldan akstur með lögboðnum hvíldum, þar sem aksturinn stendur í t.d. 10-12 tíma á dag með nauðsynlegum hléum. Aðeins 2 dagar á umræddu aksturstímabili hjá ákærða falla undir þessa skilgreiningu, en að öðru leyti var um að ræða akstursdaga með miklum biðtímum, sem samkvæmt samkomulaginu frá 12. júlí 1996, skyldi dragast frá helgarhvíld. Þegar þetta er virt og að ákærður fær rúma helgarhvíld eftir akstursvikuna verður það ekki talið honum til sakar í greint sinn að hafa verið við akstur meira en 6 akstursdaga og skal hann sýknaður af kröfum ákæruvaldsins í málinu. Ákvæðið miðað m.a. að því, að ökumaður fái eðlilega helgarhvíld í hverri viku, sem hann fékk í þessu tilviki. Þá ber að vísa til þess, að ekki er vísað til þessa ákvæðis í ákæru.

Dæma ber að allur kostnaður sakarinnar greiðist úr ríkissjóði, þar með talin málsvarnarlaun skipaðs verjanda ákærða hrl. Viðars Lúðvíkssonar sem ákveðast 105.000 krónur.

Af hálfu ákæruvaldsins flutti málið Guðmundur Siemsen, fulltrúi sýslumannsins í Kópavogi.

DÓMSORÐ

Ákærður, X, er sýkn af kröfum ákæruvaldsins.

Allur kostnaður sakarinnar þar með talin málsvarnarlaun skipaðs verjanda ákærða, Viðars Lúðvíkssonar hrl. 105.000 krónur greiðist úr ríkissjóði.

5. *Omega Farma*, mál nr. 276/2004

Þriðjudaginn 7. september 2004.

Nr. 276/2004.

Íslenska ríkið
(Óskar Thorarensen hrl.)

gegn

Omega Farma ehf.

(Andri Árnason hrl.)

Kærumál. Ráðgefandi álit. EFTA-dómstóllinn.

Hafnað var kröfu O ehf. um að aflað yrði ráðgefandi álits EFTA-dómstólsins um skýringu á tilteknu ákvæði tilskipunar ráðsins 65/65/EBE, nú tilskipun Evrópuþingsins og ráðsins 2001/83/EB.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Gunnlaugur Claessen, Ingibjörg Benediktsdóttir og Ólafur Börkur Þorvaldsson.

Sóknaraðili skaut málinu til Hæstaréttar með kæru 22. júní 2004, sem barst réttinum ásamt kærumálsgögnum 30. sama mánaðar. Kærður er úrskurður Héraðsdóms Reykjavíkur 21. júní 2004, þar sem tekin var til greina krafa varnaraðila um að leitað yrði ráðgefandi álits EFTA-dómstólsins um skýringu á tilteknu ákvæði tilskipunar ráðsins 65/65/EBE um samræmingu ákvæða í lögum eða stjórnsýslufyrirmælum um sérlyf, sbr. nú tilskipun Evrópuþingsins og ráðsins 2001/83/EB um bandalagsreglur um lyf sem ætluð eru mönnum og felldi fyrrgreinda tilskipun úr gildi og tengist málarekstri aðilanna fyrir héraðsdómi. Kæruheimild er í 3. mgr. 1. gr. laga nr. 21/1994 um öflun álits EFTA-dómstólsins um skýringu samnings um Evrópska efnahagssvæðið. Sóknaraðili krefst þess að hafnað verði kröfu varnaraðila um að leitað verði álits EFTA-dómstólsins og honum dæmdur málskostnaður í héraði og kærumálskostnaður.

Varnaraðili krefst þess að úrskurður héraðsdómara verði staðfestur og sér dæmdur kærumálskostnaður.

I.

Samkvæmt gögnum málsins sótti varnaraðili 20. september 2000 um markaðsleyfi hjá Lyfjastofnun fyrir sérlyfið Arizil samkvæmt ákvæðum reglugerðar nr. 462/2000 um markaðsleyfi fyrir sérlyf, merkingar þeirra og fylgiseðla með síðari breytingum. Um var að ræða svokallaða einfalda umsókn samkvæmt 14. gr. áðurnefndrar reglugerðar. Samkvæmt c. lið 1. mgr. ákvæðisins þarf umsækjandi ekki að leggja fram eiturefnafræðileg, lyfjafræðileg og klínísk gögn með slíkri umsókn geti hann sýnt fram á að lyf sé jafngilt (essentially similar) öðru lyfi, sem hefur haft gilt markaðsleyfi á Evrópska efnahagssvæðinu í sex ár að lágmarki og hefur markaðsleyfi hér á landi. Í niðurlagi ákvæðisins er tekið fram að þessi takmörkun gildi þó ekki falli einkaleyfi viðkomandi lyfs fyrr úr gildi. Engin gögn um eiturefnafræðilegar, lyfjafræðilegar eða klínískar rannsóknir fylgdu umsókn varnaraðila, en vísað þess í stað í gögn sérlyfsins Aricept, sem veitt hafi verið markaðsleyfi á Íslandi. Með bréfi Lyfjastofnunar 8. febrúar 2001 var umsókn varnaraðila hafnað að svo stöddu. Í bréfinu var sérstaklega vísað til liðar iii. í a. lið 8. töluliðar 2. mgr. 4. gr. tilskipunar ráðsins 65/65/EBE og tekið fram að samkvæmt ákvæðinu þurfi frumlyf að hafa verið á markaði Evrópska efnahagssvæðisins lengur en sex ár eða heimild að liggja fyrir frá markaðsleyfishafa frumlyfs til að vísa í gögn þess. Þá var tekið fram að þar sem umsókn varnaraðila um markaðsleyfi fyrir sérlyfið uppfyllti ekki þessi skilyrði gæti Lyfjastofnun ekki fallist á umsóknina að svo stöddu. Kröfu varnaraðila 14. febrúar 2001 um að Lyfjastofnun endurskoðaði ákvörðun sína var hafnað 26. nóvember 2001. Hinn 15. janúar 2002 kærði varnaraðili ákvörðunina til heilbrigðis- og tryggingamálaráðuneytisins og krafðist að hún yrði felld úr gildi og Lyfjastofnun gert að taka umsóknina til efnislegrar meðferðar. Með úrskurði ráðuneytisins 31. maí 2002 var ákvörðun Lyfjastofnunar staðfest.

II.

Fyrir héraðsdómi krefst varnaraðili að úrskurður heilbrigðis- og tryggingamálaráðuneytisins verði ógiltur jafnframt því sem hann krefst viðurkenningar á skaðabótaábyrgð sóknaraðila vegna ólögmætrar synjunar Lyfjastofnunar á veitingu umrædds leyfis. Heldur varnaraðili því fram að áðurnefnt sérlyf, Arizil, sé í meginatriðum eins og

sérlyfið Aricept, sem veitt hafi verið markaðsleyfi í Bretlandi 14. febrúar 1997 og á Íslandi 1. september 1998, en umsóknin hafi byggst á síðastgreindu markaðsleyfi. Þá sé ljóst að einkaleyfi þess lyfs hafi ekki verið lengur fyrir hendi. Hafi því umsókn varnaraðila uppfyllt skilyrði ákvæðis c. liðar 1. mgr. 14. gr. reglugerðar nr. 462/2000, sbr. ákvæði liðar iii. í a. lið 8. töluliðar 2. mgr. 4. gr. tilskipunar ráðsins 65/65/EBE, sbr. 1. gr. tilskipunar 87/21/EBE um breytingu á þeirri tilskipun, sem innleitt var í íslenskan rétt með fyrrgreindu ákvæði reglugerðar nr. 462/2000, sbr. nú lið iii. í a. lið 1. mgr. 10. gr. tilskipunar 2001/83/EB. Sé sérlyfið Arizil jafngilt öðru lyfi, sem markaðsleyfi var fyrir en ekki einkaleyfi. Með vísan til þessa sé nauðsynlegt og fullt tilefni til að leita ráðgefandi álits EFTA-dómstólsins og fá úr því skorið hvernig túlka og skýra beri fyrrgreint ákvæði umræddrar tilskipunar. Þá sé rétt að leita slíks álits á grundvelli sjónarmiða um einsleitni og meginreglunnar um að lög beri að skýra til samræmis við þjóðréttarlegar skuldbindingar, sbr. og 3. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið, en ekki verði séð að umþrætt ákvæði tilskipunarinnar og þar með reglugerðarinnar hafi verið túlkað af annað hvort EFTA-dómstólnum eða dómstól Evrópubandalaganna.

Sóknaraðili heldur því fram að ekki sé þörf á að leita álits EFTA-dómstólsins þar sem deilt sé um skýringu á tilteknu ákvæði reglugerðar nr. 462/2000 og ekkert misræmi sé á milli ákvæða umræddra tilskipana og íslensku réttarreglnanna. Telur hann óhugsandi að leita þurfi álits EFTA-dómstólsins í hvert skipti sem íslenskir dómstólar fjalli um réttarreglu, sem eigi uppruna sinn í reglum Evrópubandalagsins. Þurfi því rík rök að standa til þess að leitað verði slíks álits með heimild í lögum nr. 21/1994, en þau séu ekki fyrir hendi í þessu máli.

III.

Sá ágreiningur aðila, sem hér skiptir máli, varðar þá málsástæðu varnaraðila að skýra beri niðurlagsákvæði c. liðar 1. mgr. 14. gr. reglugerðar nr. 462/2000 þannig að það heimili stjórnvaldi að falla frá því að hið sambærilega lyf þurfi að hafa verið minnst sex ár á markaði á Evrópska efnahagssvæðinu og vera á markaði hérlendis, sé einkaleyfi ekki til staðar. Fyrir liggur að umþrætt ákvæði er efnislega samhljóða lið iii. í a. lið 8. tölulið 2. mgr. 4. gr. tilskipunar 65/65/EBE, sbr. nú lið iii. í a. lið 1. mgr. 10. gr. tilskipunar 2001/83/EB, en fyrrgreinda tilskipunin var eins og sú síðargreinda hluti af EES-samningnum áður en hún var felld úr gildi og leyst af hólmi með tilskipun 2001/83/EB. Það leiðir af 1. mgr. 34. gr. samnings

milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, sbr. 1. mgr. 1. gr. laga nr. 21/1994, að hlutverk EFTA-dómstólsins er að skýra EES-samninginn og gerðir, sem í viðaukum við hann er getið. Sönnunarfærsla um staðreyndir máls, skýring innlends réttar og beiting gerða, sem getið er í viðaukum við EES-samninginn að íslenskum lögum fer fram fyrir íslenskum dómstólum. Með vísan til þessa og atvika málsins að öðru leyti verður ekki litið svo á að það hafi þýðingu fyrir úrslit málsins að bera upp spurningu við EFTA-dómstólinn um skýringu á ákvæði fyrrnefndrar tilskipunar, sem er efnislega samhljóða ákvæði reglugerðar nr. 462/2000 og reynir á í málinu. Þá er ekki nægjanlegt eitt og sér að vísa til þess að ákvæðið hafi ekki áður verið túlkað af EFTA-dómstólnum eða dómstól Evrópubandalaganna. Verður hinn kærði úrskurður því felldur úr gildi.

Varnaraðili verður dæmdur til að greiða sóknaraðila málskostnað í héraði og kærumálskostnað, sem verður ákveðinn í einu lagi eins og nánar greinir í dómsorði.

Dómsorð:

Hafnað er kröfu varnaraðila um að aflað verði ráðgefandi álits EFTA-dómstólsins um skýringu á tilteknu ákvæði tilskipunar ráðsins 65/65/EBE, nú tilskipun Evrópuþingsins og ráðsins 2001/83/EB.

Varnaraðili, Omega Farma ehf., greiði sóknaraðila, íslenska ríkinu, samtals 300.000 krónur í málskostnað í héraði og kærumálskostnað.

Úrskurður Héraðsdóms Reykjavíkur 21. júní 2004.

Fyrir er tekið: Málið nr. E-8526/2003: Omega Farma ehf. gegn Lyfjastofnun og Íslenska ríkinu.

Stefnandi hefur, með vísan til laga nr. 21/1994 um öflun álits EFTA-dómstólsins um skýringu samningsins um Evrópska efnahagssvæðið, krafist þess að héraðsdómur leiti ráðgefandi álits EFTA-dómstólsins en stefndu hafa mótmælt þeirri kröfu. Í þinghaldi 10. júní sl. var aðilum gefinn kostur á að tjá sig um álitaefnið og að því loknu var málið tekið til úrskurðar.

Sá þáttur í ágreiningi málsaðila sem gefur tilefni til þessa úrskurðar lýtur að því hvernig túlka beri ákvæði í reglugerð nr. 462/2000 um markaðsleyfi fyrir sérlyf, merkingar þeirra og fylgiseðla. Umrædd reglugerð tók mið af tilskipun ráðherraráðs Evrópubandalaganna nr. 65/65/EBE með síðari breytingum, sem þá var í gildi, sbr. nú tilskipun ráðsins 2001/83/EB og er í reynd innleiðing þessara tilskipana inn í

íslenskan rétt. Með undirritun samningsins um Evrópska efnahagssvæðið undirgengust íslensk stjórnvöld þá skuldbindingu að túlka landslög til samræmis við samninginn og réttarheimildir sem settar eru með stoð í honum. Ekki verður séð að umþrætt ákvæði tilskipunarinnar, og þar með reglugerðarinnar, hafi verið túlkað af annaðhvort EFTA-dómstólnum eða Evrópudómstólnum.

Samkvæmt 4. gr. tilskipunar 65/65/EBE, sbr. nú 8. gr. tilskipunar 2001/83/EB, skal sá sem sækir um markaðsleyfi fyrir frumlyf leggja fram niðurstöður úr eðlisefnafræðilegum, líffræðilegum eða örverufræðilegum prófunum, svo og eiturefnafræðilegum, líflyfjafræðilegum og klínískum prófunum. Hinsvegar þarf sá, sem sækir um markaðsleyfi fyrir samheitalyf, það er að segja lyf sem er jafngilt öðru lyfi, frumlyfi, ekki að láta niðurstöður úr slíkum prófunum fylgja umsókn sinni hafi frumlyfið haft markaðsleyfi innan hins Evrópska efnahagssvæðis sex undangengin ár og sé á markaði í því aðildarríki þar sem sótt er um markaðsleyfi fyrir samheitalyfið, eins og fram kemur í iii) lið, a) liðar 8. tl. 2. mgr. 4. gr. tilskipunar 65/65/EBE, sbr. nú iii) lið a) liðar 1. mgr. 10. gr. tilskipunar 2001/83/EB. Í iii) lið beggja tilskipana segir ennfremur: „Aðildarríkjunum er heimilt að beita ekki ákvæðum um sex ára tímabil eftir að einkaleyfi fyrir upprunalega sérlyfinu rennur út.” Sambærileg fyrirmæli um sex ára lágmarkstíma frumlyfs á markaði eru í 14. gr. reglugerðar nr. 462/2000. Í lok c) liðar 1. mgr. 14. gr. reglugerðarinnar segir að takmörkunin, sem felst í því að frumlyf þurfi að hafa haft gilt markaðsleyfi í sex ár hið minnsta innan Evrópska efnahagssvæðisins, gildi þó ekki, falli einkaleyfi viðkomandi lyfs fyrr úr gildi.

Álitaefnið lýtur, nánar tiltekið, að því hvort túlka megi undanþáguákvæði í niðurlagi c) liðar 1. mgr. 14. gr. reglugerðar nr. 462/2000, sbr. lið iii, a) liðar 8.tl. 2. mgr. 4. gr. tilskipunar 65/65/EBE, sbr. nú lið iii í a) lið 1. mgr. 10. gr. tilskipunar 2001/83/EB þannig að frumlyf þurfi ekki að hafa verið á markaði sex ár hið minnsta, til þess að unnt sé að fá samheitalyf skráð á grundvelli svonefndrar einfaldrar umsóknar, hafi frumlyfið aldrei fengið einkaleyfi í því aðildarríki þar sem sótt er um markaðsleyfi fyrir samheitalyfið. Þar sem niðurstaða þessa álitaefnis kann að hafa verulega þýðingu fyrir úrslit málsins þykir rétt, í ljósi skuldbindingarinnar um samræmda túlkun, að leita álits EFTA-dómstólsins á þeirri spurningu sem sett er fram í úrskurðarorði.

Málskostnaður verður ekki ákveðinn að svo stöddu.

Ingiríður Lúðvíksdóttir, settur héraðsdómari, kveður upp þennan úrskurð.

Úrskurðarorð:

Leita ber ráðgefandi álits EFTA-dómstólsins á eftirfarandi:

Ber að skýra ákvæði liðar iii í a-lið 8. tl. 2. mgr. 4. gr. tilskipunar ráðsins nr. 65/65/EBE með síðari breytingum, sbr. nú lið iii í a-lið 1. mgr. 10. gr. tilskipunar ráðsins nr. 2001/83/EB, á þann hátt að stjórnvaldi, sem veitir markaðsleyfi fyrir sérlyf, sé heimilt að víkja frá skilyrðinu um sex ára

markaðsleyfi upprunalegs sérlyfs (frumlyfs) hafi það lyf aldrei fengið einkaleyfi í því aðildarríki þar sem sótt er um markaðsleyfi fyrir lyf sem er í meginatriðum eins (samheitalyf)?

Málskostnaður verður ekki ákveðinn að svo stöddu.

6. *HOB-vín ehf.*, mál nr. 212/2005

Þriðjudaginn 7. júní 2005.

Nr. 212/2005.

Íslenska ríkið

(Óskar Thorarensen hrl.)

gegn

HOB víni ehf.

(Stefán Geir Þórisson hrl.)

Kærumál. Evrópska efnahagssvæðið. EFTA dómstóllinn. Ráðgefandi álit.

Fallist var á þá kröfu stefnda í einkamáli að óskað yrði ráðgefandi álits EFTA-dómstólsins á því, hvort það stæðist tiltekin ákvæði EES-samningsins, að ÁTVR krefðist þess af birgjum sínum, að þeir afhentu fyrirtækinu áfengi til smásölu á sérstakri gerð vörubretta og jafnframt að verð vörubrettis væri innifalið í vöruverði.

Dómur Hæstaréttar.

Mál þetta dæma hæstaréttardómararnir Markús Sigurbjörnsson, Garðar Gíslason, Guðrún Erlendsdóttir, Gunnlaugur Claessen og Hrafn Bragason.

Sóknaraðili skaut málinu til Hæstaréttar með kæru 13. maí 2005, sem barst réttinum ásamt kærumálsgögnum 20. sama mánaðar. Kærður er úrskurður Héraðsdóms Reykjavíkur 4. maí 2005, þar sem ákveðið var að leita ráðgefandi álits EFTA-dómstólsins um nánar tilgreind atriði í tengslum við mál varnaraðila á hendur sóknaraðila. Kæruheimild er í 3. mgr. 1. gr. laga nr. 21/1994 um öflun álits EFTA-dómstólsins um skýringu samnings um Evrópska efnahagssvæðið. Sóknaraðili krefst þess að hafnað verði að leita álits EFTA-dómstólsins á þeim atriðum, sem greinir í hinum kærða úrskurði, og varnaraðila gert að greiða sér málskostnað í héraði ásamt kærumálskostnaði.

Varnaraðili krefst þess að úrskurður héraðsdómara verði staðfestur og sér dæmdur

kærumálskostnaður.

Með vísan til forsendna hins kærða úrskurðar verður hann staðfestur á þann hátt sem í dómsorði greinir.

Sóknaraðila verður gert að greiða varnaraðila kærumálskostnað eins og nánar greinir í dómsorði.

Dómsorð:

Leitað er ráðgefandi álits EFTA-dómstólsins á eftirfarandi:

1. Standa 11. gr. og 16. gr. samningsins um Evrópska efnahagssvæðið því í vegi að ríkisfyrirtæki, sem hefur einkaleyfi til smásölu á áfengi, krefjist þess af birgjum sínum, að þeir afhendi fyrirtækinu áfengi til smásölu á sérstakri gerð vörubretta (EUR-vörubrettum) og jafnframt að verð vörubrettis sé innifalið í vöruverði?
2. Stendur 59. gr. samningsins í vegi skilyrðum af þessu tagi?

Sóknaraðili, íslenska ríkið, greiði varnaraðila, HOB víni ehf., 150.000 krónur í kærumálskostnað.

Úrskurður Héraðsdóms Reykjavíkur 4. maí 2005.

Mál þetta var höfðað með stefnu birtri 9. desember 2004. Stefnandi er HOB vín ehf., Kaplahrauni 1, Hafnarfirði. Stefndu eru Áfengis og Tóbaksverslun ríkisins (ÁTVR), Stuðlahálsi 2, Reykjavík, og fjármálaráðherra fyrir hönd íslenska ríkisins, Arnarhváli, Reykjavík.

Við fyrirtöku málsins í þinghaldi 22. apríl sl. krafðist stefnandi þess að leitað yrði ráðgefandi álits EFTA-dómstólsins með heimild í lögum nr. 21/1994 um öflun álits EFTA-dómstólsins um skýringu samningsins um Evrópska efnahagssvæðið. Af hálfu stefndu var kröfu stefnanda mótmælt. Aðilum var gefinn kostur á að færa fram munnlegar athugasemdir sínar í þinghaldi 22. apríl sl., en að því loknu var krafa stefnanda tekin til úrskurðar.

Efnislegur ágreiningur aðila í máli þessu lýtur að kröfu ÁTVR í reglum, sem fyrirtækið hefur sett sér og staðfestar hafa verið af fjármálaráðherra, um að stefnandi og aðrir birgjar afhendi áfengi til sölu í vínbúðum fyrirtækisins á svokölluðum EUR-vörubrettum og jafnframt sé verð brettanna innifalið í vöruverði. Krefst stefnandi þess í málinu að viðurkennt verði með dómi að stefnda ÁTVR sé óheimilt

að gera þessa kröfu, en stefndu krefjast sýknu.

I.

Málsatvik

Stefnandi er innflutnings- og heildverslun með áfengi og flytur inn áfengi frá aðildarríkjum Evrópska efnahagssvæðisins ætlað til smásölu. Um heild- og smásölu áfengis gilda annars vegar lög nr. 63/1969 um verslun með áfengi og tóbak, með síðari breytingum, en hins vegar áfengislög nr. 75/1998, með síðari breytingum. Í III. kafla laga nr. 75/1998 er fjallað um innflutning áfengis. Samkvæmt kaflanum er innflutningur áfengis í atvinnuskyni háður leyfi ríkislögreglustjóra og veitir leyfið innflytjanda heimild til að selja eða afhenda innflutt áfengi til þeirra sem hafa leyfi til að framleiða, selja eða veita áfengi í atvinnuskyni. Samkvæmt 2. gr. laga nr. 63/1969 annast ÁTVR innflutning og innkaup á vínanda, áfengi og tóbaki samkvæmt lögunum og dreifingu þessara vara undir yfirstjórn fjármálaráðherra. Í 5. gr. laganna kemur fram að ÁTVR selji áfengi innanlands og í 10. gr. áfengislaga nr. 75/1998 kemur fram að verslunin hafi einkarétt til smásölu áfengis. Samkvæmt framangreindu er smásala áfengis eingöngu í höndum Áfengis- og tóbaksverslunar ríkisins og er verslunin því eini viðskiptavinur fyrirtækja sem flytja inn áfengi ætlað til smásölu á innanlandsmarkaði. Í 2. gr. laga nr. 63/1969 kemur fram að ÁTVR skuli gæta jafnræðis gagnvart öllum áfengis- og tóbaksbirgjum.

Samkvæmt 14. gr. laga nr. 63/1969 er ráðherra heimilt að kveða nánar á um framkvæmd laganna með reglugerð. Á grundvelli þessarar heimildar hefur verið sett reglugerð nr. 369/2003 um Áfengis og tóbaksverslun ríkisins. Í III. kafla þeirrar reglugerðar er fjallað um innkaup og sölu áfengis, m.a. reglur um hvernig standa skuli að vali á áfengi til sölu í vínbúðum til reynslu og frambúðar. Þá kemur fram í 10. gr. reglugerðarinnar að stjórn ÁTVR skuli setja sérstakar reglur um val á vöru til sölu í vínbúðum og skuli reglurnar hljóta staðfestingu ráðherra og birtar í Stjórnartíðindum. Á grundvelli þessarar heimildar hafa verið settar reglur nr. 351/2004 um innkaup og sölu áfengis og skilmálar í viðskiptum við birgja. Í þessum reglum kemur fram að verð til birgja fer eftir samningi þeirra við ÁTVR hverju sinni. Í fjórða lið reglnanna er að finna ýmis ákvæði sem lúta að nánari skilmálum í viðskiptum við birgja. Í gr. 4.9 segir m.a. að við afhendingu vöru skuli gæta eftirtalinna atriða:

> Sé magn vöru í afhendingu meira en sem svarar einu lagi á bretti skal varan afhent á EUR-vörubretti. Andvirði vörubretta sé innifalið í vöruverði. Mesta þyngd vöru og brettis sé 900 kg og mesta hæð þess 150 cm. Sé hleðsla á bretti umfram 70 cm að hæð, skal vefja vörurnar plastskæni. [...] Sé reglum þessum ekki fylgt, getur ÁTVR hafnað móttöku vöru.

Í málinu er ágreiningslaust að til reglna nr. 351/2004, þar á meðal framangreinds ákvæðis, er vísað í þeim samningum sem stefnandi hefur gert við ÁTVR um sölu áfengis. Samkvæmt atvikum málsins, eins og þau liggja fyrir á þessu stigi málsins, verður stefnandi því, líkt og aðrir birgjar ÁTVR,

að reikna með andvirði vörubretta við gerð samninga við ÁTVR um sölu áfengis. Í málinu hefur ekki verið upplýst hvort EUR-vörubretti séu framleidd samkvæmt tilteknum lands- eða evrópustaðli, en af gögnum málsins verður þó ráðið að vörubretti sem þessi séu mjög tíðkanleg í öllum flutningi á vöru. Þá liggja ekki fyrir í málinu upplýsingar um hvort verð og framboð á EUR-brettum kunni að vera mismunandi milli aðildarríkja Evrópska efnahagssvæðisins. Að lokum er ekki fram komið í málinu að ÁTVR miði við tiltekið verð á vörubrettum eða leitist við að hafa áhrif á það hvernig stefnandi og aðrir birgjar reikna andvirði vörubretta í samningum þeirra um sölu áfengis til ÁTVR.

Af hálfu stefndu er fullyrt að í framkvæmd sé tekið við vörum á öðrum vörubrettum sem uppfylli sömu lágmarkskröfur og EUR-vörubretti. Þá er einnig fullyrt að í framkvæmd sé birgjum ekki gert skylt að afhenda vöru á vörubretti ef um er að ræða svo lítið magn að rúmist í einu lagi á bretti (9 kassar af bjór eða 9-25 kassar af léttvíni). Af hálfu stefnanda hefur fullyrðingum stefndu um tilvist þessara framkvæmdareglna ekki verið mótmælt sérstaklega.

Af hálfu ÁTVR hefur verið upplýst að fyrirtækið taki árlega við um 35.000 vörubrettum í dreifingarmiðstöð sinni. Um 5.500 þessara bretta séu metin ónothæf, en önnur séu seld. Tekjur af sölu vörubretta árið 2004 hafi verið 7.431.500 krónur. Kostnað við förgun, geymslu og umsýslu vörubrettanna telur ÁTVR vera um 7,3 milljónir krónur.

II.

Málsástæður og lagarök aðila

Málatilbúnaður stefnanda er einkum reistur á því að umrætt skilyrði í gr. 4.9 í reglum nr. 351/2004 sé í andstöðu við samninginn um Evrópska efnahagssvæðið, einkum 11. gr., 1. mgr. 59. gr. og 53. gr., en meginmál samningsins hafi verið lögfest með lögum nr. 2/1993. Stefnandi telur að umrætt skilyrði feli í sér ráðstöfun sem hafi sambærileg áhrif og magntakmörkun í skilningi 11. gr. samningsins. Skilyrðið geri það að verkum að erfiðara sé að koma nýrri vöru að hjá ÁTVR auk þess sem það feli í sér að lagðar séu auknar byrðar á smærri vörusendingar, þ.e. litlar vörusendingar sem séu þó stærri en sem nemi einu lagi á bretti. Stefnandi vísar til dómaframkvæmdar Evrópudómstólsins um að ekki komi til greina að telja að umrætt skilyrði geti helgast af lögmætum sjónarmiðum eða undanþáguákvæði 13. gr. samningsins. Hann vísar til 16. gr. samningsins um að tryggja skuli að hvers konar ríkisrekin einkasala sé aðlöguð með þeim hætti að ekki sé um að ræða neina mismunun milli þegna aðildarríkja Evrópska efnahagssvæðisins um það með hvaða hætti varanna er aflað og þær markaðssettar. Umrætt skilyrði í reglum ÁTVR feli í sér mismunun þar sem það bitni í raun miklu frekar á innfluttu áfengi en innlendri framleiðslu. Stefnandi vísar einnig til þess að umrætt skilyrði feli

í sér brot á 1. mgr. 59. sbr. e. lið 1. mgr. 53. gr. EES samningsins sem misbeitingu á markaðsráðandi stöðu ÁTVR.

Stefndu byggja varnir sínar m.a. á því að ákvæði 4.9. í reglum nr. 351/2004 um innkaup og sölu áfengis og skilmála í viðskiptum við birgja sé í fullu samræmi við ákvæði samningsins um Evrópska efnahagssvæðið. Reglurnar eigi sér fullnægjandi lagastoð í lögum nr. 63/1969 um verslun með áfengi og tóbak, en í 2. gr. laganna komi fram að þess skuli gætt að jafnræði gildi gagnvart öllum áfengisbirgjum. Af hálfu stefndu er bent á að meðferð áfengis á vörulager sé orðin mjög skipulögð og tæknivædd með það að markmiði að hámarka nýtingu á húsnæði og mannafla, en tryggja jafnframt vandaða meðferð á hinni viðkvæmu vöru með lágmarks rýrnun. Vörumóttaka fari þannig fram að lyftarar keyri inn í vöruflutningabílana og taki vöruna og komi henni svo beint fyrir í vörurekkum, oft í mikilli hæð frá gólfi, þar sem hún sé geymd þar til henni er ráðstafað aftur. Tekist hafi að ná samtímis miklum afköstum og lágmarks tjónatíðni þannig að rýrnun sé nú í lágmarki eða aðeins um 0,3%. Forsenda framangreindrar birgðastjórnunar ÁTVR sé sú að allar vöru komi inn með sambærilegum hætti að því er varðar allan ytri frágang og merkingar og á eins vörubrettum, óháð því hvert upprunaland vörunnar sé. Verklagi þessu hafi þannig verið komið á af praktískum ástæðum og sé það nauðsynlegt vegna geymslu og meðferðar viðkomandi vara í vöruhúsi. Tilgangurinn sé að tryggja öryggi í meðferð vörunnar og koma í veg fyrir tjón á henni. Ákvæðið nái jafnt til allra áfengisbirgja, innlendra sem erlendra, og óháð því hvort um innlenda eða erlenda framleiðslu er að ræða. Stefndu benda á að vöruhús ÁTVR hafi beinlínis verið hannað með EUR-vörubretti í huga. Þá benda stefndu á að undanþága sé gerð hvað smærri vörusendingar varðar til þess að tryggja jafnræði birgja. Því er mótmælt af hálfu stefndu að auðveldara sé fyrir innlenda en erlenda birgja að afla sér notaðra bretta gegn vægara verði, en ekkert liggi fyrir í málinu um verð á brettum, notuðum og nýjum, hvorki hérlendis né í öðrum ríkjum Evrópska efnahagssvæðisins. Að lokum er vísað til þess að heimilt sé að nota önnur vörubretti sem uppfylli sömu lágmarkskröfur og séu birgjar því ekki þvingaðir til að kaupa sérstaka tegund vörubretta.

III.

Niðurstaða

Málatilbúnaður stefnanda í máli þessu er að verulegu leyti reistur á því að stefndu hafi brotið gegn ákvæðum samningsins um Evrópska efnahagssvæðið, sbr. samnefnd lög nr. 2/1993. Nánar tiltekið telur stefnandi annars vegar að þær reglur ÁTVR, sem áður greinir, feli í sér ráðstafanir sambærilegar við magntakmarkanir í skilningi 11. gr. samningsins og verði þessar takmarkanir hvorki réttlættar með vísan til hlutrænna sjónarmiða né þeirra ástæðna sem greinir í 13. gr. samningsins. Leiði af þessu að

viðskiptahættir ÁTVR, sem ríkiseinkasölu, séu andstæðir 16. gr. samningsins. Stefnandi telur einnig að umræddar reglur ÁTVR feli í sér brot á ákvæðum 53. og 54. gr. samningsins, sbr. 59. gr. samningsins.

Að mati dómara liggur nægilega fyrir að skýring framangreindra ákvæða samningsins um Evrópska efnahagssvæðið hefur raunverulega þýðingu fyrir kröfu stefnanda og þar með úrslit málsins. Þá er það álit dómara að staðreyndir málsins liggi nægilega fyrir á þessu stigi málsins svo að til greina komi að óska eftir ráðgefandi áliti EFTA-dómstólsins samkvæmt lögum nr. 21/1994.

Af 34. gr. samnings milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, svo og EES-samningnum í heild, verður dregin sú ályktun að dómari aðildarríkis skuli ekki óska eftir ráðgefandi áliti um skýringu EES-reglna nema fyrir hendi sé réttlætanlegur vafi um túlkun þessara reglna með hliðsjón af fyrirliggjandi sakarefni. Þótt dómara sé ljóst að fyrir hendi séu fordæmi EFTA-dómstólsins um skýringu þeirra ákvæða sem að framan greinir, svo og fjölmörg fordæmi Evrópudómstólsins sem taka ber tillit til samkvæmt 6. gr. EE-samningsins, er það álit hans að þessi fordæmisréttur taki ekki af tvímæli um skýringu umræddra ákvæða með hliðsjón af sakarefni málsins. Samkvæmt framangreindu telur dómari nægilegt tilefni til þess að afla ráðgefandi álits EFTA-dómstólsins með þeim hætti sem nánar greinir í úrskurðarorði.

Skúli Magnússon héraðsdómari kveður upp úrskurð þennan.

Ú R S K U R Ð A R O R Ð

Leitað verður ráðgefandi álits EFTA-dómstólsins um eftirfarandi atriði: Er ríkisfyrirtæki, sem hefur einkaleyfi til smásölu á áfengi, heimilt að krefjast þess af birgjum sínum, að þeir afhendi fyrirtækinu áfengi til smásölu á sérstakri gerð vörubretta (EUR-vörubrettum) og jafnframt krefjast þess að verð vörubrettis sé innifalið í vöruverði, sbr. annars vegar 11. gr. og 16. gr. EES-samningsins og hins vegar 59. gr., sbr. einkum a. lið 54. gr., EES-samningsins?