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# PUBLIC PROCUREMENT

# EEA - EFTA CASES 2006

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# ADVISORY OPINION OF THE COURT

12 May 1999*

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

In Case E-5/98

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

**Fagtún ehf.**

and

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

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

THE COURT,

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

Registrar: Gunnar Selvik,

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

after considering the written observations submitted on behalf of:

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

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

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

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

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

having regard to the Report for the Hearing,

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

gives the following

**Advisory Opinion**

*Facts and procedure*

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

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

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

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

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

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

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

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

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

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

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

*Legal background*

*1. EEA law*

10 Article 4 EEA reads:

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

11 Article 11 EEA reads:

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

12 Article 13 EEA reads:

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

*2. National law*

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

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

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

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

*Questions*

16 The following questions were referred to the EFTA Court:

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

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

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

*Findings of the Court*

*The second question*

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

*Applicability of Article 11 EEA*

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

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

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

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

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

*Interpretation of Article 11 EEA*

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

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

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

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

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

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

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

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

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

*Justification under Article 13 EEA*

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

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

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

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

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

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

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

*The first question*

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

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

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

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

*Costs*

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

On those grounds,

THE COURT,

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

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

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 12 May 1999.

Gunnar Selvik
Registrar

Bjørn Haug
President

**REPORT FOR THE HEARING**
in Case E-5/98

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

**Fagtún efh.**

and

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

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

## I. Introduction

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

## II. Facts and procedure

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

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

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

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

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

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

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

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

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

## III. Questions

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

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

## IV. Legal background

### EEA law

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

11. Article 4 EEA reads:

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

12. Article 11 EEA reads:

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

### Icelandic law

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

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

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

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

## V. Written Observations

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

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

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

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

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

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

*The first question*

### The Appellant

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

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

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

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

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

**The Defendants**

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

**The Government of Norway**

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

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

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

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

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

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

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

**The EFTA Surveillance Authority**

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

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

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

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

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

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

**The Commission of the European Communities**

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

*The second question*

**The Appellant**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**The Defendants**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**The Government of Norway**

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

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

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

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

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

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

**The EFTA Surveillance Authority**

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

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

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

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

**The Commission of the European Communities**

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

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

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

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

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

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

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

Carl Baudenbacher
Judge-Rapporteur

# ADVISORY OPINION OF THE COURT

1 April 1998*

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

In Case E-3/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Nedre Romerike herredsrett (Nedre Romerike Municipal Court) for an Advisory Opinion in the case pending before it between

**Jan and Kristian Jæger AS**

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

and

**Opel Norge AS**

on the interpretation of Article 53 of the EEA Agreement.

THE COURT,

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

Registrar: Asle Aarbakke, Legal Secretary

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

after considering the written observations submitted on behalf of:

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

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

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

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

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

having regard to the Report for the Hearing,

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

gives the following

## Advisory Opinion

*Facts and Procedure*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Legal background*

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

18 Article 53 EEA reads as follows:

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

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

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

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

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

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

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

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

*Applicability in time*

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

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

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

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

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

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

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

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

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

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

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

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

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

*The fourth question*

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

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

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

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

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

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

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

*The fifth question*

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

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

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

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

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

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

*The third question*

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

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

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

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

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

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

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

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

*The first and second questions*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The sixth question*

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

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

*Costs*

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

On those grounds,

THE COURT,

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

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

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

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

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

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

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

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

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

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

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

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 1 April 1998.

Asle Aarbakke
Registrar
Legal Secretary

Bjørn Haug
President

# ADVISORY OPINION OF THE COURT

1 April 1998*

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

In Case E-3/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Nedre Romerike herredsrett (Nedre Romerike Municipal Court) for an Advisory Opinion in the case pending before it between

**Jan and Kristian Jæger AS**

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

and

**Opel Norge AS**

on the interpretation of Article 53 of the EEA Agreement.

THE COURT,

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

Registrar: Asle Aarbakke, Legal Secretary

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

after considering the written observations submitted on behalf of:

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

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

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

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

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

having regard to the Report for the Hearing,

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

gives the following

## Advisory Opinion

*Facts and Procedure*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Legal background*

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

18 Article 53 EEA reads as follows:

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

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

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

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

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

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

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

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

*Applicability in time*

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

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

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

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

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

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

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

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

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

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

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

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

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

*The fourth question*

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

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

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

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

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

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

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

*The fifth question*

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

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

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

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

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

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

*The third question*

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

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

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

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

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

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

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

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

*The first and second questions*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The sixth question*

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

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

*Costs*

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

On those grounds,

THE COURT,

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

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

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

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

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

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

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

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

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

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

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

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 1 April 1998.

Asle Aarbakke
Registrar
Legal Secretary

Bjørn Haug
President

# REPORT FOR THE HEARING
in Case E-3/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Nedre Romerike Municipal Court (Nedre Romerike Herredsrett) for an Advisory Opinion in the case pending before it between

**Jan and Kristian Jæger AS**

and

**Opel Norge AS**

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

## I. Introduction

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

## II. Legal background

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

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

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

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

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

## III. Facts and Procedure

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

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

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

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

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

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

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

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

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

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

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

## IV. Questions

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

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

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

ownership interests in other companies which deal in motor vehicles?

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

c. Did such a prohibition exist in September 1995?

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

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

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

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

## V. Written observations

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

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

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

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

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

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

### 1. Jan and Kristian Jæger AS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30. The plaintiff suggests answering the questions as follows:

> *Question 1:*
> *Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions regarding a given shareholder structure of the dealer which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a competition-distorting effect, judged both per se and in context, and are prohibited.*
> *An independent, additional ground for considering the condition as prohibited will be present where an importer has not required all dealers to meet the condition formally and in fact without undue delay, including not treating differently dealers who joined the system before or after 1986.*
> *The concern of avoiding a "conflict of interest" does not make the condition lawful.*
> *The prohibitions applied in September 1995 and apply today.*
>
> *Question 2:*
> *Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions to the effect that the owners of the dealer are to sell off their (direct or indirect) ownership interest in other dealer companies which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a*

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

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

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

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

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

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

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

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

## 2. Opel Norge AS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. The Norwegian Government

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

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

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

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

### 4. The EFTA Surveillance Authority

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 See footnote 11.

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

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

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

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

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

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

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

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

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18 See footnote 9.

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

20 See footnote 11.