



REPORT FOR THE HEARING
in Case E-1/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

Hörður Einarsson

and

The Government of Iceland

on the interpretation of Articles 4, 10 and 14 of the EEA Agreement.

I. Introduction

1. By an order dated 4 January 2001, registered at the Court on 11 January 2001, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in the case pending before it between Hörður Einarsson (hereinafter, the “Plaintiff”) and the Government of Iceland (hereinafter, the “Defendant”).

2. The dispute before the Héraðsdómur Reykjavíkur concerns the compatibility with the EEA Agreement of a provision of Icelandic law requiring the payment of lower rate of value-added tax (VAT) on the sale of books in Icelandic than on the sale of books in other languages.

II. Legal background

EEA law

3. The questions submitted by the national court concern the interpretation of Articles 4, 10 and 14 EEA.

4. Article 4 EEA reads as follows:

“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.”

5. Article 10 EEA reads as follows:

“Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Contracting Parties. Without prejudice to the arrangements set out in Protocol 5, this shall also apply to customs duties of a fiscal nature.”

6. Article 14 EEA reads as follows:

“No Contracting Party shall impose, directly or indirectly, on the products of other Contracting Parties any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Contracting Party shall impose on the products of other Contracting Parties any internal taxation of such a nature as to afford indirect protection to other products.”

National law

7. The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Lög nr. 50/1988 um virðisaukaskatt* (Act No. 50/1988 on Value Added Tax, hereinafter the “VAT Act”), as amended.

8. Section 1 of the VAT Act provides that VAT is to be paid to the State Treasury on all domestic transactions, and upon the importation of goods and services, as provided for in the Act. Section 2 provides that the duty to pay VAT applies, in principle, to all goods, both new and used.

9. The first paragraph of section 14 of the VAT Act provides that VAT is to be levied at the rate of 24.5%. The general rule of 24.5% VAT is subject to the exceptions provided for in the second paragraph of section 14. From the second paragraph it follows that VAT on the sale of certain goods and services is to be levied at the lower rate of 14%. The sale of books written in Icelandic or translated into that language is subject to the lower VAT rate.

10. Section 14 of the VAT Act currently reads as follows:

“Value Added Tax shall be levied at a rate of 24.5%, and shall accrue to the State Treasury.

Notwithstanding the provision of the first paragraph, Value Added Tax on the sale of the following goods and services shall be levied at a rate of 14%:

1. ...
2. *Lease of tourist accommodation and hotel rooms, and other temporary accommodation service.*
3. ...
4. *Radio station listener charges.*
5. *Sale of periodicals, daily papers, and national and regional newspapers.*
6. *Sale of books in the Icelandic language, original publications as well as translations.*
7. *Sale of warm water, electricity and fuel oil for heating of buildings, and of water for bathing.*
8. *Sale of food and other goods for human consumption as laid down in further detail by administrative regulation, except sale of sweets, beverages and other goods subject to the Customs Tariff Numbers enumerated in an Appendix to this Act; sale of alcoholic beverages, and sale of milk not pasteurised. Sale and service by restaurants, canteens and similar establishments of prepared food shall however be taxable under the first paragraph of this Section.*
9. *Access to road constructions.”*

11. Several amendments have been made regarding the levying of VAT on the sale of books in the Icelandic language since the VAT Act was first enacted. By the adoption of Act No. 119/1989 amending the VAT Act, all books in Icelandic were made exempt from VAT altogether, to bring them in line with other printed material in Icelandic.

12. The current rate of VAT applicable to books in Icelandic was introduced pursuant to Act No. 111/1992. Thus, VAT on the sale of all books in Icelandic, whether original publications or translations, is 14%. Books in foreign languages continue to be subject to the general VAT rate of 24.5%.

III. Facts and procedure

13. The Plaintiff, Hörður Einarsson, has on several occasions purchased books from abroad for his personal use. These books have been sent to him by post, with VAT payable on receipt. VAT has been charged at the rate of 24.5%, in accordance with the first paragraph of section 14 of the VAT Act.

14. The case pending before Héraðsdómur Reykjavíkur concerns VAT levied on books imported from the United Kingdom and Germany. Upon importation of the books, and in accordance with two customs declarations of 26 July 1999 and

one of 11 August 1999, the Plaintiff paid a total of ISK 3 735 VAT, representing 24.5% of the purchase price.

15. In a letter dated 21 May 1999 to the Minister of Finance, the Plaintiff objected to the application of different rates of VAT on books in foreign languages and books in Icelandic. The Ministry of Finance did not accept the objections raised, and informed the Plaintiff thereof in a letter dated 16 July 1999.

16. Following the letter from the Ministry of Finance, the Plaintiff made a complaint to the Commissioner of Customs in Reykjavík and, subsequently, to the State Customs Board. The Plaintiff's complaints were rejected in both administrative instances. The State Customs Board rendered its decision on 22 December 1999.

17. The Plaintiff then brought proceedings before the Héraðsdómur Reykjavíkur. In the proceedings, the Plaintiff has raised questions concerning the compatibility with the EEA Agreement of the Icelandic VAT system on books provided for in the VAT Act. On the 27 November 2000, Héraðsdómur Reykjavíkur decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Questions

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

1. Is it compatible with EEA law, in particular Articles 14 and 10 EEA, or, as the case may be, Article 4 EEA, that a value-added tax (VAT) on books is imposed in accordance with Icelandic law which is higher (24.5%) on books in foreign languages than on books in the Icelandic language (14%), when books in Icelandic are generally published in Iceland, while books in other languages are generally published in other countries, including other EEA countries?

2. In particular, is (a) Article 14 EEA to be understood in the sense that books in Icelandic and books in other languages are similar products within the meaning of that provision, or (b) different taxation on books according to language, in the manner described above, likely to afford indirect protection to domestic book production?

3. Can the difference in the VAT percentage levied be justified by the aim of the Icelandic authorities to enhance the position of the Icelandic language through a lower rate of VAT charged on books in Icelandic?

4. Does Iceland’s power to levy VAT prevent the application of EEA rules, in particular Articles 14 and 10 EEA, in the present case?

5. If, following the answers to the above questions, the rules regulating value-added tax on books are deemed incompatible with the EEA Agreement, do the EEA Agreement or the rules deriving therefrom contain any provisions as to what rules are to be applied in cases of conflict between national law and rules deriving from the EEA Agreement?

V. Written Observations

19. 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, Hörður Einarsson, hæstaréttarlögmaður (Supreme Court Advocate), representing himself;
- the Defendant, the Government of Iceland, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);
- the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, acting as Agent;
- the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Richard Lyal, member of its Legal Service, acting as Agent.

Hörður Einarsson

Questions 1 and 2

20. The Plaintiff, Hörður Einarsson, refers to the judgment of the Court of Justice of the European Communities in *Commission v Denmark*¹ and states that the aim of Article 14 EEA is to ensure the free movement of goods between the EEA States in normal conditions of competition, through the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other EEA States, and to guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.

21. The Plaintiff contends that discrimination based on language is, in practice, as close as possible to discrimination based on nationality. Most EEA States have their own national languages, and none of them share a language with Iceland. For this reason, as well as the fact that books in Icelandic are typically produced and published in Iceland, whereas books in other languages are typically produced and published outside Iceland, the difference in treatment provided for in the VAT Act constitutes indirect discrimination in violation of Article 14 EEA.

22. The Plaintiff submits that books in Icelandic and books in other EEA languages are “similar” products for the purposes of the first paragraph of Article 14 EEA. Referring again to *Commission v Denmark*,² the Plaintiff states that, in assessing the similarity requirement, it is necessary to consider whether the products have similar characteristics and meet the same needs from the point of view of consumers. The concept of similarity must be interpreted broadly, and the question is not whether products are strictly identical, but whether their use is similar and comparable, based on objective and subjective criteria. The Plaintiff also refers to the judgment in *Jacquier v Directeur Général des Impôts*,³ in which the Court of Justice of the European Communities held that products are similar if their characteristics and the needs which they serve place them in a competitive relationship.

23. In general, books are made from the same raw materials, and production methods are the same. The objective characteristics of books in Icelandic and books in other languages are the same. Referring to the judgment in *Rewe v Hauptzollamt Landau*,⁴ the Plaintiff points out that all printed books are

¹ Case 106/84 *Commission v Denmark* [1986] ECR 833.

² See footnote 1.

³ Case C-113/94 *Jacquier v Directeur Général des Impôts* [1995] ECR I-4203.

⁴ Case 45/75 *Rewe v Hauptzollamt Landau* [1976] ECR 181.

classified under the same heading in the Common Customs Tariff (Chapter 49), without any language distinction.

24. The Plaintiff adds that books are used to satisfy the same consumer needs, irrespective of language, *inter alia* for entertainment or enlightenment. A large part of the Icelandic population reads languages of other EEA States: English or the Scandinavian languages and, less often, German or French. Thus, books in Icelandic are generally substitutable. Icelanders read novels both in Icelandic and other languages, and students frequently read textbooks in English, Danish, Norwegian, Swedish, German or French.

25. The Plaintiff submits that it follows from *Commission v Denmark*⁵ that the question of whether products meet the same needs must be assessed with regard to differing categories of consumers, as well as to the dynamics of consumer demand. The products in question need not satisfy the same requirements for every consumer. Books in languages other than Icelandic serve the same consumer needs as books in Icelandic for all Icelandic consumers who read foreign languages.

26. Based on the abovementioned arguments, the Plaintiff contends that books in foreign languages and imported from other EEA States should not be subject to a higher rate of VAT than the 14% VAT levied on books in Icelandic. In this context, the Plaintiff refers to the judgments in *Bobie v Hauptzollamt Aachen-Nord*⁶ and *Haahr Petroleum v Åbenrå Havn and Others*.⁷

27. In the alternative, the Plaintiff submits that the two categories of books are competing products for the purposes of the second paragraph of Article 14 EEA. Referring to the case-law⁸ of the Court of Justice of the European Communities, the Plaintiff contends that books in languages other than Icelandic afford an alternative choice to readers and are at least in partial competition with books in Icelandic. Therefore, the different treatment with regard to VAT levied on books in Icelandic and books in other languages constitutes a violation of the second paragraph of Article 14 EEA.

28. The Plaintiff adds that it may not be necessary to distinguish between the first and second paragraphs of Article 14 EEA in this case, since the contested VAT system on books must be regarded as a *per se* infringement of Article 14 as a whole. The plaintiff finds support for this view *inter alia* in the judgments in *Commission v Denmark*⁹ and *Haahr Petroleum v Åbenrå Havn and Others*.¹⁰

⁵ See footnote 1.

⁶ Case 127/75 *Bobie v Hauptzollamt Aachen-Nord* [1976] ECR 1079.

⁷ Case C-90/94 *Haahr Petroleum v Åbenrå Havn and Others* [1997] ECR I-4085.

⁸ Case 216/81 *COGIS v Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Case 319/81 *Commission v Italy* [1983] ECR 601; Case 184/85 *Commission v Italy* [1987] ECR 2013.

⁹ See footnote 1.

29. Based on the judgment in *Haahr Petroleum v Åbenrå Havn and Others*,¹¹ the Plaintiff further adds that Articles 10 and 14 EEA are mutually exclusive. The Plaintiff also cites the statement of the EFTA Court in *Fagtún*¹² to the effect that Article 4 EEA applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rule prohibiting discrimination.

Question 3

30. The Plaintiff acknowledges that, in principle, differential internal taxation may be objectively justified. However, the Plaintiff contends that the VAT system on books at issue in the present case is not justified by the objective of enhancing the position of the Icelandic language, as argued by the Defendant.

31. The Plaintiff states that the Court of Justice of the European Communities has been reluctant to accept objective justification on grounds of cultural policy. The Plaintiff suggests that this would be even more difficult under the EEA Agreement than under the EC Treaty, since the former does not contain a provision corresponding to Article 151 EC.

32. The Plaintiff acknowledges that Iceland and the other EEA States may take various measures to promote their national languages. However, such measures must not constrain the free movement of goods. Measures of internal taxation usually serve fiscal purposes, and are not a logical means of promoting a language. The Plaintiff contends, in essence, that protection of domestic products is the true intention and the obvious consequence of the contested VAT system on books. Referring to the judgment in *Collectieve Antennevoorziening Gouda*,¹³ the Plaintiff submits that the Government of Iceland has not proved that the measure has in fact enhanced the position of the Icelandic language, or that it is an indispensable measure for that purpose.

33. The Plaintiff suggests that the VAT system on books runs counter to the Joint Declaration on the Co-operation in Cultural Affairs, attached to the Final Act. On this point, the Plaintiff refers to the judgment in *Distribuidores Cinematográficos v Spanish State*.¹⁴

34. The VAT Act exempts all printed books in the Icelandic language, regardless of cultural value, content or quality. Referring again to *Distribuidores*

¹⁰ See footnote 7.

¹¹ See footnote 7.

¹² Case E-5/98 *Fagtún* [1999] EFTA Court Report 51.

¹³ Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007.

¹⁴ Case C-17/92 *Distribuidores Cinematográficos v Spanish State* [1993] ECR I-2239.

Cinematográficos v Spanish State,¹⁵ the Plaintiff submits that the measure in question must be regarded as overly broad.

35. The Plaintiff adds that the levying of a lower rate of VAT on books in Icelandic than on books in other languages is in violation of Article 10 of the European Convention on Human Rights (freedom of expression). It must be regarded as an interference with the right to receive or impart information and ideas regardless of frontiers. Fundamental rights, including the freedom of expression, must be taken into account when considering whether the contested provision of the VAT Act may be objectively justified. On this point, the Plaintiff refers to the judgment in *Familiapress v Bauer Verlag*.¹⁶

36. Books in languages other than Icelandic cannot be regarded as products harmful to the Icelandic language or Icelandic culture in general. The Plaintiff compares the impact of the printed word to that of television broadcasts, which are not subject to a differentiated tax burden. On that basis, the Plaintiff argues that the Icelandic “language policy” is inconsistent and disproportionate.

37. The Plaintiff concludes that the contested VAT system on books is not objectively justified by reasons relating to the protection of the Icelandic language.

Question 4

38. The Plaintiff states that, in principle, Iceland is free to arrange its internal taxation unaffected by the EEA Agreement. However, Article 14 EEA prohibits internal taxation, including VAT, which discriminates against products imported from other EEA States. Referring to the judgment in *Commission v Greece*,¹⁷ the Plaintiff contends that Iceland is not entitled to use its system of taxation as a barrier to trade between the EEA States.

Question 5

39. The Plaintiff states that the question of which rule is to be applied in case of conflict between national law (in this case, section 14 of the VAT Act) and EEA law (in this case, Article 14 EEA) must be considered on the basis of the provisions of the EEA Agreement and their objective, as well as the case-law of the EFTA Court and the Court of Justice of the European Communities.

40. The provision of the EEA Agreement at issue, Article 14 EEA, is a legal provision of the highest order within EEA law, corresponding to a provision of

¹⁵ See footnote 14.

¹⁶ Case C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689.

¹⁷ Case 176/84 *Commission v Greece* [1987] ECR 1193.

the EC Treaty. It has been given the force of law under the Icelandic legal system through the adoption of Article 2(1) of Act No. 2/1993.

41. Neither the EEA Agreement nor the EC Treaty expressly resolves the question of primacy. This did not prevent the Court of Justice of the European Communities from accepting primacy for Community law as the only logical and workable relationship between Community law and national law. In a similar manner, the lack of explicit provisions in the EEA Agreement on State liability for incorrect implementation of directives did not prevent the EFTA Court from holding that such liability existed under EEA law in *Sveinbjörnsdóttir v Iceland*.¹⁸ The Plaintiff contends that the EFTA Court would have a sound foundation for deciding in favour of primacy of EEA law, based on both the general purpose of the EEA Agreement and the explicit provision in Protocol 35 EEA.

42. The Plaintiff acknowledges that the EEA Agreement is not as far-reaching as the EC Treaty. However, referring again to *Sveinbjörnsdóttir v Iceland*,¹⁹ the Plaintiff contends that the EEA Agreement is of such a nature that some of the common rules of interpretation are not automatically applicable to cases of conflict between EEA law and national law, where consistency of construction is required.

43. Three primary considerations apply, relating to the objective of homogeneity, to the reciprocal nature of the EEA Agreement, and to rights conferred on individuals. None of these considerations will be effective unless provisions of the EEA Agreement are given primacy over conflicting national legislation.

44. The principal reasons given for giving primacy to Community law in the judgment in *Costa v ENEL*²⁰ apply equally to the relationship between EEA law and national law.

45. The judicial defence of rights of individuals under the EEA Agreement in national courts would not be possible unless the provisions of the EEA Agreement are given precedence. On that basis, the Plaintiff contends that primacy is implied in the EEA Agreement itself.

46. Under Protocol 35 to the EEA Agreement, Iceland is under an obligation to let the “implemented EEA rules”, including Article 14 EEA, prevail in case of conflict between the contested provision of the VAT Act and the EEA Agreement. However, the Plaintiff argues that the terms of Article 3 of Act No. 2/1993, intended to implement Protocol 35 in Iceland, are insufficient since they merely provide that national legislation is to be construed in accordance with

¹⁸ Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report 95.

¹⁹ See footnote 18.

²⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585.

EEA law. This deficiency creates legal uncertainty and does not respect the requirements of homogeneity and reciprocity, which are fundamental elements of the EEA Agreement.

47. The principle of primacy of EEA law must be seen as an integral part of the EEA Agreement. Referring to the case-law²¹ of the EFTA Court and the Court of Justice of the European Communities, the plaintiff submits that Article 14 EEA fulfils the criteria of being unconditional and sufficiently precise.

48. The Plaintiff concludes that it follows from the nature of the EEA Agreement and Protocol 35 to the EEA Agreement that EEA law prevails in cases of conflict between national legislation and provisions of the EEA Agreement.

The Government of Iceland

Questions 1 and 2

49. The Defendant, the Government of Iceland, points out that the first question posits that books in Icelandic are “generally published in Iceland”, whereas it is estimated that about 30-40% of books in Icelandic, published in Iceland during 1999 and 2000, were printed abroad. Books in foreign languages are frequently published in Iceland.

50. The Defendant contends that the levying of VAT at a rate of 24.5% on books in languages other than Icelandic is compatible with the first paragraph of Article 14 EEA.

51. The Defendant notes that, in the assessment of whether products are “similar” for the purposes of Article 14 EEA, it is necessary to consider whether the products have similar physical characteristics, and whether they serve to meet the same needs from the point of view of the consumers. In the latter regard, language is of fundamental importance in assessing the utility of a book. The language of a book is a decisive, objective characteristic of differentiation. Only those who read Icelandic will derive any useful benefit from books in that language. The distinction is of such a fundamental nature that books in different languages can never be regarded as “similar” products. The ability to read the language is a prerequisite for the utility of a book. Consequently, it is not logical to argue that books in Icelandic and books in other languages are “similar” products for the purposes of the first paragraph of Article 14 EEA. The Defendant finds support for this argument in the case-law of the Court of Justice

²¹ Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15; Case 57/65 *Lütticke v Hauptzollamt Saarlouis* [1966] ECR 205; Case 27/67 *Fink-Frucht v Hauptzollamt München* [1968] ECR 223.

of the European Communities, in particular in *Walker v Ministeriet for Skatter og avgifter*,²² *Commission v Denmark*²³ and *Commission v Italy*.²⁴

52. The Defendant submits that the contested VAT system for books is totally neutral with regard to the place of production of books, and does not give rise to any form of discrimination. The rate of 14% VAT is applied to all books in Icelandic, regardless of whether they are produced in Iceland or in any other EEA State. The different treatment is based exclusively on objective characteristics of the products, namely the language in which books are published. The VAT Act does not affect the possibilities for individuals and economic operators to produce books in Icelandic outside Iceland. Moreover, it does not prevent individuals and economic operators in Iceland from producing or publishing books in foreign languages.

53. The Defendant also contends that the levying of a lower rate of VAT on books in Icelandic than on books in other languages is compatible with the second paragraph of Article 14 EEA.

54. The Defendant points out that the second paragraph of Article 14 EEA presupposes that the products are in competition with each other. It follows from the arguments set out above in relation to the first paragraph of Article 14 EEA that there is no competition between books in Icelandic and books in other languages. Any competition between books in different languages must at least be regarded as negligible.

55. Even if some competition were deemed to exist, the Defendant considers that the contested provision does not afford indirect protection against competition within the meaning of the second paragraph of Article 14 EEA. Books in Icelandic are, in general, considerably more expensive than books in other languages, even though the VAT rate imposed on the former is lower. To support this, the Defendant refers to information obtained from the book trade.²⁵

56. The Defendant is of the opinion that the judgment in *COGIS v Amministrazione delle Finanze dello Stato*,²⁶ referred to by the Plaintiff, does not provide any guidance for the interpretation of the second paragraph of Article 14 EEA. However, guidance may be found in *Commission v Belgium*.²⁷ In that case, it was established that, notwithstanding the different VAT rates, the domestic

²² Case 243/84 *Walker v Ministeriet for Skatter og avgifter* [1986] ECR 875.

²³ See footnote 1.

²⁴ Case 184/85 *Commission v Italy* [1987] ECR 2013.

²⁵ Information on prices on books in different languages collected by the Defendant from a bookstore and book publisher in Iceland in April 2001 (Annexes 1 – 3 to the written observations of the Defendant).

²⁶ Case 216/81 *COGIS v Amministrazione delle Finanze dello Stato* [1982] ECR 2701.

²⁷ Case 356/85 *Commission v Belgium* [1987] ECR 3299.

products were considerably less expensive than the foreign products. The Court of Justice of the European Communities held that the difference in VAT rates had no protective effect, as the VAT rates would not affect the prices to any significant extent. The party claiming that indirect protection exists has the burden of proving that the different rates will affect the prices. The Defendant submits that no evidence has been produced to indicate that the different VAT rates of the contested VAT Act affect the competitive position of the respective products. On the contrary, books in Icelandic are in general more expensive than books in other languages, despite the lower VAT imposed on the former.

57. The Defendant adds that Article 10 EEA is not applicable to the present case. It follows from the case-law²⁸ of the Court of Justice of the European Communities that the provisions of the EC Treaty corresponding to Articles 14 and 10 EEA are mutually exclusive. Based on the judgments in *Interzuccheri v Rezzano e Cavassa*²⁹ and *IGAV v ENCC*,³⁰ the Defendant submits that Article 14 EEA is applicable to a general system of internal taxation imposing duties systematically on both imported and domestic products on the basis of the same criteria. VAT is not imposed by reason of the fact that products cross a frontier. Therefore, the VAT levied on books in Iceland is outside the scope of Article 10 EEA.

58. The Defendant further adds that differentiated VAT rates on books do not constitute discrimination on grounds of nationality, and are therefore compatible with Article 4 EEA.

Question 3

59. In the alternative, the Defendant states that the contested VAT rates on books must be considered justified on objective grounds, and as being proportionate to its legitimate purpose.

60. The Defendant states that it is the protection of the Icelandic language and Icelandic identity that underlies the contested VAT rate on books in Icelandic. When the Icelandic Parliament was considering whether to introduce a lower VAT rate on books in Icelandic than on books in other languages, particular emphasis was placed on the protection of Icelandic culture and the Icelandic language. The Defendant refers to a statement made by the Minister of Finance, who spoke for the bill, in his initial speech:

²⁸ Case C-28/96 *Fazenda Pública v Fricarnes* [1997] ECR I-4939; Case C-266/91 *CELBI v Fazenda Pública* [1993] ECR I-4337; Case C-90/94 *Haahr Petroleum v Åbenrå Havn and Others* [1997] ECR I-4085; Case C-212/96 *Chevassus-Marche v Conseil Régional de la Réunion* [1998] ECR I-743.

²⁹ Case 105/76 *Interzuccheri v Rezzano e Cavassa* [1977] ECR 1029.

³⁰ Case 94/74 *IGAV v ENCC* [1975] ECR 699.

“A small nation is always in a disadvantageous position when international mass media engulf it with such immense strength as seen in the past few years, and this will continue in the future. Under such conditions it is important to strengthen the foundation on which the Icelandic identity is chiefly based, which is our national language; fact and fiction literature in the Icelandic language.”

61. Icelandic is a distinct language; its use is in fact almost exclusively limited to Iceland and the 280 000 persons living there. Icelandic is subject to a continuous challenge from other languages. One of the reasons for this is the meagre selection of television programmes available in Icelandic. It has been a declared policy of the Government of Iceland to protect to the greatest possible extent the cornerstone of Icelandic identity and culture, the Icelandic language. This policy can be discerned in Icelandic legislation. The Defendant refers in particular to the Radio Broadcasting Act, the Personal Names Act and the various institutions established by law whose purpose is to promote and protect the Icelandic language. This policy is also reflected in the contested provision of the VAT Act.

62. When introducing VAT on books in Icelandic, the legislator took the view that, if the general VAT rate of 24.5% was applied, there could be irreparable negative consequences. Books in Icelandic were already relatively expensive, and Icelandic book publishers had been in difficulties for a long time. The result was the adoption of the current rate of 14% VAT, by the amendments to the VAT Act made in Act No. 111/1992. That lower rate of VAT is intended to strengthen the foundation of the Icelandic language by ensuring that books in Icelandic will continue to be published.

63. Icelanders are, in general, able to read and understand texts that are the original sources providing knowledge of the settlement of Iceland, written soon after the year 1100, on the basis of earlier oral sources. These texts can still be understood without any special education or knowledge on the reader's part, because the Icelandic language has remained fundamentally unaltered. This long linguistic history without fundamental alterations is unique, and is linked to the national policy of protecting the language. It is of inestimable value that the same language in which the Icelandic sagas, which rank among the foremost literary achievements of the Occident in the middle ages, has been preserved and handed down through many generations. For Icelanders it is invaluable, not only as a communicative tool, but also as a channel of cultural heritage between generations, and as a means of artistic expression. Written Icelandic preserves ancient word forms and letters. The Defendant also refers to the Icelandic tradition of personal names, a heritage unique in modern Europe. Lastly, Icelandic is practically devoid of dialects, and is regarded as a worthy research subject by linguists throughout the world, and the existence of living people speaking this ancient language is deemed of very high importance.

64. Referring to the fundamental considerations underlying Article 13 EEA, the Defendant contends that the Icelandic language constitutes a national treasure of artistic and historic value, which the Icelanders have the honour and duty of protecting. Depriving the Government of Iceland of one of the most efficient means of protecting a cultural treasure would result in irreparable cultural damage. The language provides a foundation for national culture and identity.

65. The Defendant considers that the contested VAT rates for books is important in the light of the relatively low numbers of Icelandic speakers, and the resulting disadvantages for Icelandic book publishing as compared to foreign book publishing. It is a moderate measure, designed to achieve the legitimate aim of protecting the Icelandic language, and inseparable from the other means serving the same purpose.

66. In further support of the contention that protecting the Icelandic language is a legitimate aim, the Defendant refers to Article 6(3) EU, which provides that the European Union is to respect the national identities of its Member States. Language is the most decisive factor distinguishing one nation from another. This is all the more true when the cultural heritage of a nation is as intertwined with its language as that of the Icelanders.

67. The Defendant also refers to the judgment in *Groener v Minister for Education and the City of Dublin Vocational Educational Committee*,³¹ in which the Court of Justice of the European Communities recognised the protection of language as a legitimate interest that may take precedence over the four freedoms, provided that the means and aims are proportionate.

Question 4

68. The Defendant states that the EEA Agreement does not provide for a fiscal or customs union, nor for co-ordination of taxation policy or an approximation of taxes. Domestic taxation is matter for each EEA State to decide. However, taxation must not lead to discrimination between domestic goods and goods imported from other EEA States.

69. The Defendant notes that it is undisputed that the Plaintiff is obliged to pay VAT on imported books. The dispute concerns the level of taxation. That question is not governed by the EEA Agreement. Even if the EFTA Court were to conclude that the provision of the VAT Act is not fully compatible with EEA law, it is not possible to derive from the EEA Agreement any right or duty to levy VAT at rates different from those prescribed by the VAT Act. An obligation to reduce the VAT rate on books in foreign languages would be in contravention

³¹ Case C-379/87 *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967.

of the sovereign right of an EEA State to establish the rates at which VAT is levied.

Question 5

70. The Defendant submits that the EEA Agreement does not contain any specific rules on the issue of conflict between national rules and EEA rules. Moreover, no such rules can be derived from the EEA Agreement by way of interpretation. Protocol 35 to the EEA Agreement imposes a duty on EEA States to introduce a statutory provision to the effect that EEA rules are to prevail in cases of conflict between implemented EEA rules and other statutory provisions. However, as clearly stated in the Preamble to Protocol 35, this must be achieved through national procedures.

The Government of Liechtenstein

Questions 1 and 2

71. As regards the first paragraph of Article 14 EEA, the Government of Liechtenstein observes that, in order to assess whether books in Icelandic and books in foreign languages are to be qualified as “similar” products, regard must be had to the wide definition given in *COGIS v Amministrazione delle Finanze dello Stato*.³² However, the Government of Liechtenstein states that it is not in a position to evaluate whether these products have similar characteristics and meet the same needs for the consumer. Moreover, the assessment of these criteria inevitably hinges on the languages involved.

72. The Government of Liechtenstein observes that it follows from the case-law of the Court of Justice of the European Communities on the corresponding Article 90 EC that the single individual is not the relevant standard for the assessment of the similarity of two products for the purposes of the first paragraph of Article 14 EEA. However, the Court of Justice of the European Communities has not dealt with product characteristics which are as closely linked to the individual consumer as books in a specific language. The cases have mostly dealt with products which could be (and probably were) consumed by all consumers on one occasion or another.

73. The Government of Liechtenstein acknowledges that if the general and broad approach of the Court of Justice of the European Communities is followed, the likely result is that books in Icelandic and books in other languages will be regarded as similar products, and the application of different rates of VAT will be contrary to Article 14 EEA. However, the products at issue in the present case are

³² See footnote 26.

only to a limited extent comparable to the products considered in the previous case-law, and consumer needs with respect to books are different than with respect to other products. There is also the particular situation of the Icelandic language to consider. In the light of these factors, the Government of Liechtenstein believes it is appropriate to adopt a differentiated approach.

74. As regards the second paragraph of Article 14 EEA, the Government of Liechtenstein considers that, assuming that most books in Icelandic have Iceland as their origin, the preferential rate for books in Icelandic might, in practice, result in discrimination, even if books in Icelandic and books in other languages may only be in partial, indirect or potential competition.

75. The Government of Liechtenstein acknowledges that the lower VAT rate applies to all books in Icelandic, regardless of where, and by whom, they are produced or published. However, since in practice, most books in Icelandic are produced and published in Iceland, the contested provision of the VAT Act may lead to indirect protection of domestic products.

76. The Government of Liechtenstein submits that it must be assumed that the different VAT rate may influence the decision of consumers to buy books in Icelandic. It is the objective of the differentiated VAT rates on books to make Icelandic titles more competitive. Even if the difference in VAT is not sufficient to eliminate the price differential between books in Icelandic and books in other languages, the lower VAT rate will still place the Icelandic titles in a more favourable position than would otherwise be the case.

77. The Government of Liechtenstein concludes that the contested VAT rates on books are incompatible with the second paragraph of Article 14 EEA.

Question 3

78. The Government of Liechtenstein acknowledges that the preservation of the national language as part of the national identity and cultural heritage is an objective of general interest.

79. However, the Government of Liechtenstein is in doubt whether Article 14 EEA allows for justification of any kind whatsoever and, if so, whether the contested VAT rate differential on books is proportionate or appropriate in the light of alternative measures and the objective pursued.

80. The Government of Liechtenstein submits that neither the EEA Agreement itself nor any rulings of the Court of Justice of the European Communities or the EFTA Court provide for any available grounds of justification in the present case. Internal taxation affording indirect protection of domestic products within the meaning of the second paragraph of Article 14 EEA is not capable of justification.

81. In addition, the Government of Liechtenstein contends that if the statement by the Defendant to the effect that competition would be unaffected by the contested VAT system were correct, the VAT system would not contribute to the objective pursued, that is, to promote the sale of books in Icelandic.

82. In any event, the EEA Agreement offers other possibilities which are better suited for protecting and promoting cultural concerns and which seem to be more suitable than a differentiation in VAT rates.

Question 4

83. Referring to the judgment in *Norway v EFTA Surveillance Authority*,³³ the Government of Liechtenstein contends that the power of Iceland to levy VAT is not affected by the EEA Agreement as such. However, certain provisions, including Article 14 EEA, contain requirements which must be respected whenever taxes are imposed.

Question 5

84. The Government of Liechtenstein states that it is not for the EFTA Court to decide the VAT rate applicable to books in Iceland. This must be left to the national court or to the national legislator. The general principles of the EEA Agreement only require that national provisions contrary to the EEA Agreement must not be applied.

The Government of Norway

Questions 1 and 2

85. In considering whether the Icelandic VAT system for books is contrary to the first paragraph of Article 14 EEA, the Government of Norway relies on *Walker v Ministeriet for Skatter og avgifter*,³⁴ and contends that a concrete assessment must be made to determine whether products are “similar”.

86. The Government of Norway observes that the Icelandic VAT system places books in Icelandic and other books in different tax classifications. Referring to the judgment in *Fink-Frucht v Hauptzollamt München*,³⁵ the Government of Norway submits that this may indicate dissimilarity.

³³ Case E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report 74.

³⁴ See footnote 22.

³⁵ Case C-27/67 *Fink-Frucht v Hauptzollamt München* [1968] ECR 223.

87. While acknowledging that books in different languages have numerous physical similarities, the Government of Norway contends that language must be seen as an objective characteristic. The most important aspects of books are their language and content, not the material presentation or the mode of production. Books in a language that prospective readers cannot read are of no value to them. Books in different languages do not fulfil the same consumer needs, and cannot be regarded as similar products within the meaning of the first paragraph of Article 14 EEA.

88. In considering the second paragraph of Article 14 EEA, the Government of Norway states that two cumulative conditions determine whether there is a breach: first, books in different languages must be considered as competing products, and, second, the VAT system must afford indirect protection to Icelandic books.

89. The Government of Norway submits that books in Icelandic and books in other languages are not in a competitive relationship. For many Icelandic consumers, language barriers prevent them from reading books in foreign languages. That fact distinguishes the present situation from the one in *Commission v Italy*.³⁶

90. Based on *inter alia* the judgment in *Walker v Ministeriet for Skatter og avgifter*,³⁷ the Government of Norway submits, in essence, that EEA law, at the present stage of development, does not restrict the freedom of each EEA State to lay down a VAT system which differentiates between products on the basis of objective criteria.

91. The Icelandic VAT system is neutral as to the origin of books. Books printed in other EEA States are subject to the lowest VAT rate as long as they are written in Icelandic. Today, books in Icelandic are produced both in Iceland and abroad; Norwegian experience indicates that the proportion of domestic language books produced abroad may well increase.

92. The lowest VAT rate will be applicable to books written in a foreign language and translated into Icelandic. That would presumably be the case for a significant proportion of titles published. This implies that the system does not protect the Icelandic book industry.

93. The Government of Norway contends that a disparity in taxation rates must have a certain protective effect to be in breach of EEA law. In the judgment in *Commission v Belgium*,³⁸ it was held that a difference in taxation rates of six percentage points had no protective effect for the domestic product, which would still be considerably cheaper than the imported product. Final selling prices are

³⁶ See footnote 24.

³⁷ See footnote 22.

³⁸ See footnote 27.

relevant and perhaps decisive factors in determining whether a tax system has protective effect.

94. The disparity of 10 percentage points in applicable VAT rates is unlikely to have significant effect. Books in Icelandic remain more expensive than books in other languages. The lower VAT rate does not provide a protective effect for the Icelandic book industry.

95. The Government of Norway concludes that the contested VAT system on books is in conformity with both the first and second paragraphs of Article 14 EEA.

Question 3

96. The Government of Norway argues that differential internal taxation may, in principle, be objectively justified. The Government of Norway finds support for this contention in the judgment in *Chemial Farmaceutici v DAF*.³⁹ Reference is also made to the judgments in *Commission v France*⁴⁰ and *Outokumpu*.⁴¹ Since the concepts of objective justifications are generally the same in relation to all the fundamental freedoms under the EEA Agreement, case-law in those areas is also relevant when dealing with the question of objective justification under Article 14 EEA.

97. In considering whether cultural policies may be considered as grounds for objective justification, the Government of Norway notes that the significance of cultural policy in Community law has increased in recent years, and is now a factor to be taken into account in Community actions. This is reflected in Article 151(1) and (4) EC and Article 6 EU, read with the fifth paragraph of the Preamble to the Treaty on European Union.

98. The Government of Norway further notes that the intention stated in the Joint Declaration on the Co-operation in Cultural Affairs, attached to the Final Act, corresponds to the objectives of Article 151(4) EC. Article 6 EU is not mirrored in the EEA Agreement, but, in the light of the principle of homogeneity embodied therein, Article 6 EU will still be of relevance.

99. The Government of Norway recalls that cultural policy has been a key issue in several cases before the Court of Justice of the European Communities.⁴²

³⁹ Case 140/79 *Chemial Farmaceutici v DAF* [1981] ECR 1.

⁴⁰ Case 196/85 *Commission v France* [1987] ECR 1597.

⁴¹ Case C-213/96 *Outokumpu* [1998] ECR I-1777.

⁴² Case C-180/89 *Commission v Italy* [1991] ECR I-709; Case C-154/89 *Commission v France* [1991] ECR I-659; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069; Case C-148/91 *Vereniging Veronica v Commissariaat voor de Media* [1993] ECR I-487.

100. The Government of Norway submits that the protection and promotion of the national language is an important part of cultural policy, capable of justifying discriminatory national measures. The Government of Norway finds support for this submission in Council Decision of 22 September 1997 on cross-border fixed book prices in European linguistic areas,⁴³ the judgments in *Groener v Minister for Education and the City of Dublin Vocational Educational Committee*⁴⁴ and *Échirolles Distribution*,⁴⁵ and the Decision of the Parliament and the Council of 14 February establishing the Culture 2000 program.⁴⁶

101. Language is essential to preserve and promote national identity and is an important part of cultural heritage. In support of this, the Government of Norway refers to the European Charter for Regional or Minority Languages.⁴⁷ The purpose of a language policy is to implement measures that will ensure the continued existence of functional national languages.

102. Icelandic is a unique ancient language and an important part of European cultural heritage. The fact that Icelandic is used only by a small population of 280 000 people makes it important to have a strong, declared policy on the protection of the language, especially in an era of globalisation.

103. Supporting literature is an important language policy measure. There is a broad range of measures available to ensure national book production. The Icelandic VAT system on books is one way of promoting the Icelandic language. The Government of Norway contends that most EEA States make use of their VAT systems to promote cultural objectives, such as national literature and language.

104. The Government of Norway concludes that the contested VAT system for books is objectively justified by the need to protect and promote the Icelandic language.

⁴³ Council Decision of 22 September 1997, 1997 OJ C 305, p. 2.

⁴⁴ See footnote 31.

⁴⁵ Case C-9/99 *Échirolles Distribution* [2000] ECR I-8207.

⁴⁶ Decision 508/2000/EC of the European Parliament and the Council, 2000 OJ L 63, p. 1.

⁴⁷ Council of Europe, European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992 (ETS No. 148).

The EFTA Surveillance Authority

Questions 1 and 2

105. Referring to the judgment in *IGAV v ENCC*,⁴⁸ the EFTA Surveillance Authority contends that Articles 10 and 14 EEA cannot be applied simultaneously.

106. According to the EFTA Surveillance Authority, it follows from the case-law⁴⁹ of the Court of Justice of the European Communities that a pecuniary charge constitutes internal taxation within the meaning of Article 14 EEA if the charge is part of a general system of internal dues applicable systematically in accordance with the same criteria to domestic products and imported products alike. Even in cases where a pecuniary charge is levied on imported products but not on identical or similar domestic product, it constitutes internal taxation if it is a part of such a general system of internal dues.

107. The VAT system at issue is a general system of internal dues, applied to categories of products on objective criteria without regard to country of origin. Thus, the lower tax rate in respect of books in the Icelandic language must be examined on the basis of Article 14 EEA, not of Article 10 EEA.

108. In dealing with Article 14 EEA, the EFTA Surveillance Authority begins by recapitulating the interpretation applied to the corresponding Article 90 EC in case-law.⁵⁰ The Court of Justice of the European Communities has emphasised that the complete neutrality of internal taxation as regards competition between domestic and imported products must be guaranteed under that provision. Furthermore, it must be interpreted widely so as to cover all taxation procedures which conflict with the principle of equality of treatment of domestic and imported products. Moreover, the concept of “similar products” must be interpreted with flexibility. Products must be considered as similar if they have similar characteristics and meet the same needs from the point of view of the consumer.

⁴⁸ See footnote 30.

⁴⁹ Joined Cases 2 and 3/69 *Diamantarbeiders v Brachfeld* [1969] ECR 211; Case 29/72 *Marimex v Amministrazione Funanziaria Italiana* [1972] ECR 1309; Case 15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

⁵⁰ Case 169/78 *Commission v Italy* [1980] ECR 385; Case 15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409; Case 148/77 *Hansen v Hauptzollamt de Flensburg* [1978] ECR 1787; Case 168/78 *Commission v France* [1980] ECR 347; Case 45/75 *Rewe v Hauptzollamt Landau* [1976] ECR 181; Case 106/84 *Commission v Denmark* [1986] ECR 833; Case C-265/99 *Commission v France*, judgment of 15 March 2001, not yet reported; Case 216/81 *COGIS v Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Case 243/84 *Walker v Ministeriet for Skatter og avgifter* [1986] ECR 875.

109. As regards the question of whether books in Icelandic and books in foreign languages are “similar” products for the purposes of the first paragraph of Article 14 EEA, the EFTA Surveillance Authority states that books may be viewed as economic goods, but it is at least equally important that books are individual, artistic or intellectual creations. According to the EFTA Surveillance Authority, it is *prima facie* hard to claim that books in one language are similar to books in other languages. This observation is supported *inter alia* by the fact that book markets in Europe are generally segregated along language lines: trade in foreign-language books is often served by specialised bookshops. The EFTA Surveillance Authority concludes that, in general, language is an essential distinguishing feature of books.

110. It is further noted that cultural and linguistic diversity has been accorded greater importance by Community institutions.

111. The EFTA Surveillance Authority hesitates to conclude that VAT rates differentiated according to the language of books would *per se* fall under the first paragraph of Article 14 EEA. However, the tax at issue in the present case creates an obstacle to market access, which would be greater for a publisher of books in foreign languages than for a publisher of books in Icelandic. In this respect, the differentiated VAT appears to be discriminatory. One may also view this differentiation as an imposition of an unequal burden on consumers, based on their ability to read foreign languages.

112. When looking at the market from the point of view of a multilingual consumer, there may be a likely preference to read literary works in their original language. In this respect, books in foreign languages and books in Icelandic may be considered as similar, or at least competing, products. As regards other types of books, such as textbooks used by professionals or popular fiction, the similarity of the products seems to be even more evident.

113. Against this background, the EFTA Surveillance Authority concludes that the first paragraph of Article 14 EEA should be interpreted as prohibiting the contested VAT system for books.

114. The EFTA Surveillance Authority notes that Article 4 EEA is not applicable in the case at hand, since the principle of non-discrimination has been given effect in the field of internal taxation by Article 14 EEA.

Question 3

115. Based on the case-law⁵¹ of the Court of Justice of the European Communities, the EFTA Surveillance Authority contends that there are no

⁵¹ Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato v Essevi and Salengo* [1981] ECR 1413; Case C-68/96 *Grundig Italiana v Ministero delle Finanze* [1998] ECR I-3775; Case C-228/98 *Dounias* [2000] I-577.

available grounds for justification once a tax is caught by the prohibition contained in Article 14 EEA. This does not suggest that the aim of preserving a national language is contrary to the EEA Agreement, but that this aim must be pursued in conformity with its provisions.

Question 4

116. The EFTA Surveillance Authority observes that harmonisation of taxation falls outside the scope of the EEA Agreement. Referring to the case-law⁵² of the Court of Justice of the European Communities, the EFTA Surveillance Authority submits that the prohibition on discriminatory internal taxation does not restrict the freedom of each EEA State to establish the system of taxation which it considers the most suitable in relation to each product. However, in exercising their powers in fields falling outside the scope of the EEA Agreement, EEA States must nevertheless respect EEA law.

Question 5

117. The EFTA Surveillance Authority refers to Article 3 EEA and Protocol 35 to the EEA Agreement.

118. The EFTA Surveillance Authority further mentions the fourth and fifteenth recitals of the Preamble to the EEA Agreement, as well as the reference in the eighth recital to the role accorded to individuals and the exercise of rights conferred upon them, and the judicial defence of those rights.

119. The EFTA Surveillance Authority also refers to the findings of the EFTA Court in *Sveinbjörnsdóttir v Iceland*⁵³ and *Restamark*.⁵⁴

120. Referring to the judgment in *Lütticke v Hauptzollamt Saarlouis*,⁵⁵ the EFTA Surveillance Authority contends that Article 14 EEA is sufficiently precise and unconditional so as to enable individuals to rely on it before national courts.

121. The EFTA Surveillance Authority concludes that it follows from Protocol 35 to the EEA Agreement that, in case of conflict between national law and implemented rules deriving from the EEA Agreement, the latter must prevail.

⁵² Case 127/75 *Bobie v Hauptzollamt Aachen-Nord* [1976] ECR 1079; Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585; Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

⁵³ See footnote 18.

⁵⁴ Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15.

⁵⁵ Case 57/65 *Lütticke v Hauptzollamt Saarlouis* [1966] ECR 205.

The Commission of the European Communities

Questions 1 and 2

122. As a preliminary point, the Commission of the European Communities (hereinafter, the “Commission”), referring to the case-law of the EFTA Court,⁵⁶ submits that Article 4 EEA is inapplicable in the present case.

123. Moreover, the Commission submits that Articles 10 and 14 EEA are mutually exclusive, and that, on the basis of the case-law⁵⁷ of the Court of Justice of the European Communities, the applicable provision in this case is Article 14 EEA alone.

124. The Commission adds that even where, in a system of internal taxation, certain imported goods bear a heavier tax burden than comparable national goods, the difference cannot be regarded as a tax having equivalent effect contrary to Article 10 EEA: there is simply a difference in taxation which may be contrary to Article 14 EEA. On this point, the Commission refers to the judgments in *Lütticke v Hauptzollamt Saarlouis*⁵⁸ and *Officier van Justitie v Kortmann*.⁵⁹ According to the judgments in *Wöhrmann v Hauptzollamt Bad Reichenhall*⁶⁰ and *Outokumpu*,⁶¹ that reasoning is not affected by the fact that, in the case of imported goods, the taxable event is their importation. Importation is simply the point at which they enter the national market.

125. The Commission does not agree with the Defendant that the contested provision of the VAT Act is neutral as regards the origin of books. Books in Icelandic are generally published in Iceland and measures in their favour may be regarded as discrimination in favour of domestic products. The Commission contends that publication in the Icelandic language cannot be regarded as a neutral criterion.

126. From the judgment in *Socridis v Receveur Principal des Douanes*,⁶² the Commission observes that the general purpose of Article 14 EEA is to guarantee the free movement of goods under normal conditions of competition by eliminating all forms of protection which may result in the application of internal

⁵⁶ Case E-5/98 *Fagún* [1999] EFTA Court Report 51; Case E-1/00 *State Dept Management Agency v Íslandsbanki-FBA*, judgment of 14 July 2000, not yet reported.

⁵⁷ Case 57/65 *Lütticke v Hauptzollamt Saarlouis* [1966] ECR 205; Case C-213/96 *Outokumpu* [1998] ECR I-1777; Case 7/67 *Wöhrmann v Hauptzollamt Bad Reichenhall* [1968] ECR 177; Case 31/67 *Stier v Hauptzollamt Hamburg* [1968] ECR 235.

⁵⁸ See footnote 55.

⁵⁹ Case 32/80 *Officier van Justitie v Kortmann* [1981] ECR 251.

⁶⁰ Case 7/67 *Wöhrmann v Hauptzollamt Bad Reichenhall* [1968] ECR 177.

⁶¹ See footnote 41.

⁶² Case C-166/98 *Socridis v Receveur Principal des Douanes* [1999] ECR I-3791.

taxation which discriminates against products from other EEA States, and to guarantee that internal taxation is wholly neutral for the purposes of competition between domestic and imported products.

127. In considering whether the contested VAT system for books is contrary to the first paragraph of Article 14 EEA, the Commission refers to the definition of “similar” products found in *Rewe v Hauptzollamt Landau*⁶³ and *Commission v France*.⁶⁴ The Commission submits that books in Icelandic and books in other languages have similar characteristics, except for the language. They can be thought to meet the same consumer needs if they are used for the same purposes, that is to say, to read for information, diversion or intellectual enrichment.

128. The Commission disagrees with the Defendant that books in different languages cannot be regarded as similar products. That argument could be made where the population is largely monoglot, but seems untenable where people are highly educated, literate and competent in foreign languages.

129. The Commission therefore submits that, for the purposes of the first paragraph of Article 14 EEA, books in Icelandic and books in other languages – in Iceland, at least books in the other Scandinavian languages and in English – must be regarded as similar products. Accordingly, to charge a higher rate of VAT on books in foreign languages is contrary to the first paragraph of Article 14 EEA.

130. In the alternative, the Commission contends that there is a sufficient relationship of substitution between books in Icelandic and books in other languages that the higher rate of VAT levied on the latter is capable of affording indirect protection to books in Icelandic, contrary to the second paragraph of Article 14 EEA. Referring to the judgments in *Socridis v Receveur Principal des Douanes*⁶⁵ and *COGIS v Amministrazione delle Finanze dello Stato*,⁶⁶ the Commission submits that the two categories of books are, if not similar, then certainly in competition with each other, be it partially, indirectly or potentially. They are an alternative choice for consumers in some circumstances. This is admitted, states the Commission, by the Defendant when it seeks to justify the application of a lower rate to books in Icelandic by the need to protect Icelandic culture and literature.

131. The Commission adds that the avowed object of the different treatment in the VAT Act is to have an effect on consumer behaviour. Therefore, the Defendant cannot rely on the judgment in *Commission v Belgium*⁶⁷ and claim

⁶³ See footnote 4.

⁶⁴ Case C-265/99 *Commission v France*, judgment of 15 March 2001, not yet reported.

⁶⁵ See footnote 62.

⁶⁶ See footnote 26.

⁶⁷ See footnote 27.

that there is no protective effect since, even if the level of VAT were the same, books in some foreign languages would be cheaper than books in Icelandic.

132. The Commission concludes that the contested VAT system for books is incompatible with Article 14 EEA.

Question 3

133. The Commission submits that the VAT system at issue may not be objectively justified by the aim to enhance the position of the Icelandic language. It is established in Community law that Member States may maintain schemes of differential taxation, based on objective criteria, aimed at promoting legitimate objectives, so long as these schemes do not result in discrimination against imported goods. The provision at issue in the present case, on the contrary, creates precisely such discrimination. There is no exception to Article 14 EEA of the kind found, for example, in Article 13 EEA. On this point, the Commission refers to the judgment in *Grundig Italiana v Ministero delle Finanze*,⁶⁸ where the Court of Justice of the European Communities held that once discrimination has been established, Article 90 EC, corresponding to Article 14 EEA, does not provide any means of justification for the State concerned.

134. The Commission contends that the Defendant cannot rely on the judgment in *Groener v Minister for Education and the City of Dublin Vocational Educational Committee*⁶⁹ in the present case. In that case, the Court of Justice of the European Communities emphasised that the implementation of a language requirement must not be disproportionate to the aim pursued and must not result in discrimination. In the present case, by contrast, the avowed objective of the measure in question is discrimination against books in other languages.

Question 4

135. The Commission states that Iceland is at liberty to levy whatever taxes it wishes, be it VAT or other forms of taxation, but subject always to compliance with its obligations under the EEA Agreement. Thus, in formulating the detailed provisions of its VAT system, Iceland must have regard to the requirements of the EEA Agreement, in particular Article 14 EEA.

136. The Commission adds that, contrary to what is stated by the Defendant, Community law provides for refunds by Member States in cases where taxes or other charges levied have been found to be contrary to the provisions of the Treaty. Member States are required to take such measures as are necessary in order to cure the incompatibility of a national measure with the Community legal

⁶⁸ Case C-68/96 *Grundig Italiana v Ministero delle Finanze* [1998] ECR I-3775.

⁶⁹ See footnote 31.

order. That includes repayment of charges levied contrary to Community law. In supporting that view, the Commission refers to the judgment in *Amministrazione delle Finanze dello Stato v San Giorgio*.⁷⁰

Question 5

137. The Commission expresses the view that this question of the national court raises the issue of direct effect under the EEA Agreement and primacy of its provisions over national law. In the present case, it must be determined whether the provisions of the EEA Agreement itself should be considered to take precedence over inconsistent national law, whether previous or subsequent to the entry into force of the EEA Agreement. Viewed from another angle, the issue to be considered is whether the provisions of the EEA Agreement, in particular Article 14 EEA, are intended to give rights to individuals on which they can rely before the national courts.

138. The Commission notes that the Court of First Instance of the European Communities has attributed direct effect, within the Community, to Article 10 EEA in its judgment in *Opel Austria v Council*.⁷¹

139. Furthermore, the Commission observes that, in Community law, the principle of direct effect was first established in the judgment in *Van Gend en Loos*.⁷² In that case, the Court of Justice of the European Communities, when determining whether it had jurisdiction, held that it was not called upon to rule on the application of the EC Treaty according to the principles of national law, which remained the concern of the national courts, but only to interpret the scope of a provision of the EC Treaty within the context of Community law and with reference to its effect on individuals.

140. Moreover, the Commission notes that Article 90 EC, which corresponds to Article 14 EEA, was held to have direct effect in Community law in the judgment in *Lütticke v Hauptzollamt Saarlouis*.⁷³

141. The Commission also observes that the concept of primacy of Community law was established in the judgment in *Costa v ENEL*,⁷⁴ where it was held that variations in the effect of Community law in deference to subsequent national laws would jeopardise the attainment of the objectives of the Treaty, contrary to the Member States' obligations under Article 10 EC, the equivalent of Article 3 EEA.

⁷⁰ Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595.

⁷¹ Case T-115/94 *Opel Austria v Council* [1997] ECR II-39.

⁷² Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁷³ See footnote 55.

⁷⁴ See footnote 20.

142. The Commission contends that the EFTA Court, in *Sveinbjörnsdóttir v Iceland*,⁷⁵ used reasoning similar to that in *Van Gend en Loos*⁷⁶ when arriving at the conclusion that an EEA State must be obliged to provide for compensation for loss caused to an individual by incorrect implementation of a directive. The Commission submits that the reasoning of the EFTA Court in that case applies *a fortiori* in a case such as the present one, which concerns not a provision of a directive but a provision of the main part of the EEA Agreement, not the granting of a secondary right to compensation, but a direct right to compliance with the EEA Agreement.

143. The Commission acknowledges that the EEA Agreement does not entail a transfer of powers of the kind which is an important part of the EC Treaty. Protocol 35 provides that the EEA Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA. However, it states that the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in case of conflict between implemented EEA rules and other statutory provisions. The protocol thus requires the EFTA States to give primacy to the provisions of the EEA Agreement, and may be taken to reinforce the obligations of EEA States under Article 3 EEA.

144. The Commission concludes that, without going so far as to import into the EEA Agreement a general principle of direct effect and primacy analogous to the position in Community law, the objectives and structure of the EEA Agreement require that its provisions, in particular those relating to the fundamental freedoms, be given precedence over inconsistent national law. That is the case in the absence of any specific and express derogation laid down in the EEA Agreement or in a provision of national law.

Per Tresselt
Judge-Rapporteur

⁷⁵ See footnote 18.

⁷⁶ See footnote 72.