



REPORT FOR THE HEARING
in Case E-5/96

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting lagmannsrett's (Borgarting Court of Appeal) for an advisory opinion in the case pending before it between

Ullensaker kommune and Others

and

Nille AS

on the interpretation of Article 11 and 13 of the EEA Agreement.

I. Introduction

1. By an order dated 21 June 1996, registered at the Court on 26 June 1996, Borgarting lagmannsrett, a Norwegian Court of Appeal, made a request for an advisory opinion in a case brought before it by Ullensaker municipality, Nes municipality, Eidsvoll municipality, Sørumsund municipality and Sunndal municipality (the appellants) against the respondent Nille AS (Nille). By a Ruling of 2 September 1996 the appeal on the part of Sunndal municipality was terminated.

II. Legal background

2. The questions submitted by the Norwegian court concern the interpretation of Article 11 and Article 13 of the EEA Agreement.

3. Article 11 EEA, which mirrors Article 30 of the EC Treaty provides:

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

4. Article 13 EEA provides a derogation from Article 11 EEA under the same conditions as Article 36 EC:

"The provisions of Article 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".

III. Facts and Procedure

5. The Case before the national Court concerns the validity of the refusal by four municipalities of applications for licences to sell videograms. According to the description of the requesting Court, the plaintiff, Nille, is a nation-wide chain of about 120 shops selling and renting out video films. Counsel for municipalities states that the sale of videos by Nille represent 3,5 % of the the total turnover of the shops. All shops have applied for a licence to sell videograms. Applications from seven shops situated in five different municipalities were refused in the autumn of 1994. The applications from the other shops were all granted. As grounds for their refusal four of the municipalities stated that the applicants did not fulfil a requirement regarding specialised dealers. In two of these municipalities, Nes and Eidsvoll, it had been expressed prior to the final administrative decisions that the requirement regarding specialised dealers was applicable to new establishments. Sunndal municipality stated that from a cultural and political point of view it must be an aim to build up local expert knowledge in the field of sale and rental of video films in the local firms that have already been granted a licence.

6. In a lawsuit before Indre Follo Herredsrett, Nille claimed that the refusals were invalid under national regulations and in conflict with Article 11 EEA .

7. The Norwegian *Act No. 21 of 15 May 1987* relating to Films provides in section 2, first paragraph:

"No commercial showing, sale or renting out of films or videograms may take place without a licence granted by the municipal council or whomever authorised by the municipal council. This does not apply to sale or renting out films and videograms for resale and rental."

Regarding the purpose of the provision, it is stated in *Proposition No. 20 (1986-87)* to the Odelsting *inter alia*:

"In the opinion of the Ministry such a licencing system scheme would, together with the regulations on the labelling and registration of videograms, be effective in preventing the sale or rental of illegal videograms. In addition, the licencing sheme would be an important measure in the cultural policy. The municipalities may, for example, require a certain diversity in the films and videograms supplied by the applicants for licences".

8. According to the description of the Norwegian licencing scheme given by the Norwegian Government, the system is based on two main considerations. First, the municipalities regard the sale and rental of videograms as part of the general cultural activities in the municipality. The public should be supplied with a reasonable selection of films and a certain amount of guidance. It must be noted that Norway has a very scattered population. Many parts of the country have no readily available alternatives to the local shops. Videograms are regarded as such important products that the authorities wish to encourage diversity. The other main consideration on which the licencing scheme is based, is to ensure that there is control of the retail stage of the sale and rental of videograms and that sanctions can be imposed if necessary. The purpose of introducing a municipal licencing requirement for the commercial sale and rental of videograms is closely linked and in accordance with the purpose of the labelling and registration scheme, which is to prevent the sale or rental of illegal videograms. In keeping with the principle of subsidiarity, the Norwegian authorities consider it important that the various municipal administrations are given a responsible role in the implementation of these objectives.

9. According to Nille, the appellants have chosen to amend their municipal regulations, such that there is no longer a requirement that businesses which are to sell videograms must be so-called "specialised" dealers. The shops which are the object of the present proceedings before the national Court have received permission to sell videograms. The municipalities have nonetheless maintained the action.

10. The municipalities claim that their administrative decisions do not represent any obstacle to trade. Alternatively they submit that the basic principles in the case-law of the ECJ do not prevent limitations in the selling arrangements from being allowed.

11. The County Court ruled in favour of Nille. All five municipalities appealed against this judgment to Borgarting lagmannsrett. In a written plea dated 3 June 1996, Sunndal municipality withdrew its appeal.

IV. Question

12. The following question was referred to the EFTA Court:

"Is Article 11 of the EEA Agreement, in conjunction with Article 13, to be understood to mean that it prohibits a municipality from refusing a permission for the retail sale of recorded video cassettes (videograms) on the grounds that such permission should only be granted to shops which can be characterised as specialised dealers (speciality shops) for videograms and/or that experts knowledge should be built up by established dealers ?"

V. Written observations

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

- The appellants, Ullensaker municipality and others, represented by Counsel Morten F. Arnesen;
- Nille, represented by Counsel Morten Steenstrup;
- The Government of the Kingdom of Norway, represented by Hege M. Hoff, legal adviser at the Royal Ministry of Foreign Affairs, acting as agent for the Norwegian Government;
- The EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, assisted by Ms. Bjarnveig Eiriksdóttir, Officer of that Department, acting as agent;
- The European Commission, represented by Richard B. Wainwright, Principal Legal Adviser, and Hans Støvlbæk, Member of its Legal Service, acting as agent.

A. *Admissibility of the second part of the question referred to the Court*

14. The Counsel of the Sunndal municipality withdrew its appeal to the Borgarting Lagmannsrett before the national Court requested the EFTA Court to give an advisory opinion. The appeal case on the part of Sunndal municipality was terminated by a ruling of 2 September 1996.

The appellants

15. Counsel for the *appellants* states that the last part of the question referred by Borgarting lagmannsrett to the EFTA Court is without current legal interest, since it concerns a hypothetical question. Sunndal municipality was the only one among the appellants which, *inter alia*, stated as a ground for its refusal that expert knowledge should be built up by established dealers. There is no relevant legal basis for giving an opinion regarding this part of the question.

The Norwegian Government

16. The *Norwegian Government* supports this legal opinion and requests the EFTA Court to dismiss the second part of the question as to whether Article 11 in conjunction with Article 13 EEA prohibits a municipality from refusing permission on the ground that expert knowledge should be built up by established dealers.

17. The Norwegian Government refers to *Foglia*¹, according to which the European Court of Justice (the ECJ) has dismissed questions from the national courts in cases where no real dispute exists and the question is purely hypothetical.

B. *Article 11 EEA*

The appellants

18. The *appellants* do not agree that the Norwegian licencing scheme must be regarded as a measure having equivalent effect to quantitative restrictions on import under Article 11 EEA. The national law does neither prohibit nor impede import and sale of video cassettes. Neither does it demand that the goods meet certain requirements as to quality.

19. In the appellants' view the *Dassonville*² judgment does not give any guidance for the case at hand. According to this opinion, the licensing scheme is not aimed at hindering inter - state trade. Neither does the scheme and the appellants' application of it have an effect which impedes trade in the EEA. In this connection the appellants refer to the judgment in the case of

¹ Case C-104/79 *Foglia I* [1980] ECR 745.

² Case C-8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

*Keck and Mithouard*³, which lays down that national provisions regarding "certain selling arrangements" may be enacted without coming into conflict with Article 11 EEA (Article 30 EC).

20. The appellants further submit that the licencing scheme does not concern the nature of products. Reference is made to the ruling of the ECJ in the case *Commission v. Greece*⁴. In this case the ECJ has confirmed that the expression "certain selling arrangements" applies to legislation which allocates the sale to certain outlets. The licencing scheme and the appellants' application of it should therefore be treated in the same way as the scheme which implies that a product may only be sold in a pharmacy, and thus be categorised as a selling arrangement. Reference is also made to the *Quietlynn and Richards*⁵ judgment.

21. Furthermore, the appellants state that the licencing scheme does not reduce the import of video films so that trade within the EEA is impeded in such ways as prohibited by Article 11 EEA. The licencing scheme and the municipalities' application of it applies to all involved in the business. It has an equal influence, both practical and legal, on domestic and foreign video cassettes. The appellants refer to the judgments *Commission v. Greece*⁶, *Bassano del Grappa*⁷ and *Leclerc-Siplec*⁸.

22. The appellants are of the opinion that the municipalities' application of the licencing system is a pure regulation of selling methods and not a regulation of video as a product. As a pure market regulation, which applies to anyone in the business, it may have the same influence on the sale of domestic products as foreign products.

23. Counsel for the appellants states that under any circumstances, the licencing scheme and the municipalities' application of it will be a mandatory requirement in the meaning of *Cassis de Dijon*⁹ judgment on the grounds of cultural considerations and cultural aims. Within the expression "specialised dealer" lies the demand for selection, wide range, diversity, representativity, also of quality movies, and a demand for expert knowledge among, and guidance from, the staff. Reference is also made to the *Cinéthèque v. Fédération nationale de cinémas français*¹⁰ judgment.

Nille AS

24. According to the *respondent*, the appellants have given identical explanations as to why they now no longer refuse a licence to businesses which only have videograms as part of their assortment. The respondent presents a quotation taken from the minutes of the executive

³ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁴ Case C-391/92 *Commission v. Greece* [1995] ECR I-1621.

⁵ Case C-23/89 *Quietlynn and Richards* [1990] ECR I-3059.

⁶ See footnote 4.

⁷ Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257.

⁸ Case C-412/93 *Leclerc-Siplec v. TF1 Publicité and M6 Publicité* [1995] ECR I-179.

⁹ Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

¹⁰ Joined Cases C-60/84 and 61/84 *Cinéthèque v. Fédération nationale de cinémas français* [1985] ECR 2605.

committee for culture in Ullensaker kommune in which is stated, *inter alia*, that videogram hire no longer controls the market. Videograms for sale have made their entry on the market and have radically modified the distribution channels. In the light of the changes which have taken place on the market, proposals for changes have now been tabled recommending the abolition of the specialised trade principle. The consequences of the change to the licensing rules are that they will open the door to "everyone" being able to get a licence, including those types of businesses which were not able to earlier. Thus a right of control which formed part of the earlier rules will be lost. From the point of view of cultural policy, this is not a desirable development.

25. Even though some municipalities have now modified their practice, there are still some others which refuse to grant licences to businesses if, for example, they are unable to have a selection of at least 500 titles.

26. The current licencing scheme limits the number of sales outlets for videograms and thereby places restrictions on the sale of videograms. Since many of the videograms sold in Norway are imported from abroad, this leads to import being reduced.

27. The main contention of the respondents is that the municipal licencing scheme is, in its entirety, contrary to Article 11 EEA .

28. According to the respondents, ESA is currently dealing with a complaint concerning the municipal licencing scheme. A letter of formal notice concerning importation and marketing of videograms in Norway was sent out on 7 April 1995. In April 1996 the Norwegian Ministry of Culture sent out a consultation paper on amendments to the act relating films and videograms. The Ministry gave as its reasons for the consultation paper with proposals for amendments *inter alia* the fact that ESA had inquired as to whether the rules governing sales of videograms complied with obligations Norway had undertaken pursuant to the EEA Agreement.

29. In any case a practice of the licencing scheme which only extends to businesses which may be characterised as specialised dealers for videograms and/or a condition to the effect that specialised knowledge should be developed at already established dealers is contrary to the EEA Agreement. This is also true according to the *Keck*¹¹ judgment in which the ECJ established a distinction between national "requirements to be met by such goods" and "certain selling arrangements".

30. Reference is made to an article by Nina Holst Christensen¹².

31. The licencing scheme at issue here links national requirements as to the good itself by prohibiting videograms from being sold unless through businesses which have obtained special permission from the municipality. The use of a prohibition or limitation on sales of the good itself - the medium as a carrier of culture and information - will thus be a national requirement imposed on the product which is be contrary to Article 11 of the EEA Agreement.

32. The licencing scheme leads to many shops which would have taken in videograms as a minor part of their assortment now refraining from doing so, due to the extra work required to obtain a licence to sell videograms, as well as the ongoing extra work imposed on the businesses by having to collect a 2.5 per cent special tax on all videograms.

¹¹ See footnote 3.

¹² EU-ret & Menneskeret, 1995, 116.

33. Reference is made to the fact that a number of businesses refrain from applying for a licence because they believe that they will not get a licence to sell videograms anyway. Furthermore it is a fact that when businesses which apply for a licence are turned down, sales for videograms are further reduced.

34. A municipal licencing scheme for videograms or conditions to the effect that videograms may only be sold through specialised trade cannot be said to be necessary for reasons of the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of the consumer.

35. Further reference is made to the fact that in the vast majority of municipalities, licences are granted to everyone who applies. This implies that the scheme is merely bureaucratic, a source of delay and impediment, and almost a registration system without being a "mandatory requirement". There is thus no proportionality between the scheme and the achievement of the intended objectives.

36. Even if the licencing system is to be deemed to "forbid certain selling arrangements", the provision will not fall outside the scope of Article 11 EEA. Reference is made to the *Keck* judgment in which the ECJ sets out an additional requirement from which follows that "the national provision on certain selling arrangements" applies to all affected traders operating within the national territory. This condition is not met by the licencing scheme, even less so by a condition to the effect that only specialised trade (speciality shops) may sell videograms, or that shops are not to be allowed to sell videograms so that sales may be concentrated in a few shops so that they may develop their expertise on videograms.

37. The requirement that "certain selling arrangements" must be applied to all affected traders within the national territory is not met, because the licencing scheme allows each municipality to determine arbitrarily who may sell videograms. The current scheme, containing no objective criteria for when a business may sell videograms, leads to specific discrimination, both within some municipalities and in different municipalities.

The Norwegian Government

38. The *Norwegian Government* submits that Article 11 EEA does not prohibit a municipality from refusing permission for the retail of videograms on the grounds that such permission should only be granted to shops which can be characterised as specialised dealers.

39. The provision requiring sales of videograms to take place through specialised dealers falls outside the scope of Article 11 EEA. The restrictions with respect to sales channels apply to all traders operating within the municipalities in question, and therefore do not favour domestic products. The fact that videograms sold in Norway are to a large extent imported products does not undermine the non-discriminatory character of this arrangement.

40. Reference is made to *Dassonville*¹³, *Cassis de Dijon*¹⁴, *Keck and Mithouard*¹⁵, *Hünermund*¹⁶, *Punto Casa*¹⁷, *Leclerc-Siplec*¹⁸, *Commission v. Greece*¹⁹ and *Quietlynn*²⁰

¹³ See footnote 2.

¹⁴ See footnote 9.

judgments. From these rulings can be deduced that national restrictions on outlets for certain products fall outside the scope of Article 11, provided that the following criteria are fulfilled: (1) they must affect domestic products and those from other Member States in the same manner, and (2) they must apply to all traders operating within the national territory.

41. The Norwegian Government contends that the provision that videograms must be sold through a specialised dealer fulfils these criteria.

42. The national provision requiring sales of videograms to take place through specialised dealers is not designed to regulate or hinder trade between Member States. The purpose of the scheme is to ensure that sales of videograms to consumers take place through dealers who can provide a reasonable selection of films and a certain level of expert guidance by the staff. The municipalities in question have only regulated where videograms may be sold. The regulations apply neither to sales of the product nor to the product itself. There is reason to interpret the practice of the ECJ as being based on the desire to prevent unnecessary interference with the legislation of a Member State where the access to the market in question is not affected.

43. A national provision laying down that videograms may only be sold by a particular type of dealer must be considered to be "a national provision restricting or prohibiting certain selling arrangements" since it regulates where, how and by whom videograms may be sold.

44. As a non-discriminatory provision, it can be justified by a public interest objective relating to cultural policy which takes precedence over the free movement of goods. In cases where a national arrangement can be regarded as restriction on imports, the practise of the ECJ is that such measures can be accepted if they are based on public interest and if they are necessary and proportionate in order to achieve a public interest objective.

45. A special reference is made to the ECJ's judgment *Cinéthèque*²¹ where it was found that the prohibition in Article 30 EC would in principle apply to a prohibition on the sale of films recorded on video cassettes before a specified time had elapsed since the film was shown at cinemas. In this case the ECJ held that the prohibition was not intended to favour domestic production over production in other Member States, but to encourage cinematographic production as such, and that this justified a mandatory requirement. Correspondingly, the provision that videograms must be sold by specialised dealers applies equally to Norwegian and imported videograms. The requirement has not been introduced to protect Norwegian production, but to ensure the best possible implementation of cultural policy objectives in individual municipalities. Sales of videograms should be viewed as part of the general cultural activities in a municipality.

¹⁵ See footnote 3.

¹⁶ Case C-292/92 *Hünernund v. Landesapothekerkammer* [1993] ECR I-6787.

¹⁷ Joined Cases C-69/93 and C-258/93 *Punto Casa SpA v. Sindaco del Comune and others* [1994] ECR I-2355.

¹⁸ See footnote 8.

¹⁹ See footnote 4.

²⁰ See footnote 5.

²¹ See footnote 10.

46. In the opinion of the Norwegian authorities, it is an important consequence of the subsidiarity principle that individual municipalities should, within certain limits, be free to determine how to provide the best possible range of cultural products for their inhabitants.

47. The need for a municipal provision requiring sales of videograms to take place through specialised dealers must be seen in this light. Such a requirement is made on the assumption that it will ensure a reasonable selection and variety of films. Furthermore, it is made to ensure that the public can receive a certain amount of expert guidance from the staff. A "specialised dealer" is precisely the type of sales channel that can meet these requirements. Thus, the Norwegian Government does not consider that this arrangement has a greater impact than needed to achieve the cultural policy objectives underlying it. As in the *Cinéthèque*²² case, the arrangement is based on a mandatory requirement, which is necessary and proportionate.

48. To substantiate the statement that cultural policy objectives are recognised in Community law, the Norwegian Government refers to Council Directive 89/552/EEC (the TV Directive). This recognises the validity of cultural policy objectives in that it gives consideration to European production of television programmes and on the promotion of distribution and production of television programmes.

49. In the light of this, the Norwegian Government proposes the following answer to the question:

"Article 11 of the EEA Agreement does not prohibit a municipality from refusing permission for the retail sale of recorded video cassettes (videograms) on the grounds that such permission should only be granted to shops which can be characterised as specialised dealers for videograms".

The EFTA Surveillance Authority

50. ESA refers to a judgment of the EFTA Court²³ and to several judgments of the ECJ²⁴. It follows from these judgments that the case at hand calls for similar considerations to be made. Although the quoted judgments of the ECJ have been delivered after the signing of the EEA Agreement, the principles laid down in *Keck and Mithouard*²⁵ and the subsequent case law on the matter should also be applied in the context of the EEA. To take another view would imply opening the door to divergent policies in a field of vital importance for the achievement of the objectives of the EEA Agreement.

51. ESA notes that the system of requiring prior authorization for the retail sale of videograms, and of allowing for the granting of such authorization to be restricted to certain categories of dealers, cannot be seen as being designed to regulate trade between the EEA States.

²² See footnote 10.

²³ Case E-1/94 Restamark [1994-1995] EFTA Court Report 17.

²⁴ Case C-8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257; Case C-391/92 *Commission v. Greece* [1995] ECR I-1621.

²⁵ See footnote 24.

52. As the system is only concerned with the sale and renting out of the products in question, it does not imply any requirements to be met by the products themselves. In the view of ESA, the licencing scheme remains under these circumstances outside the scope of Article 11 EEA if the scheme is applicable to all traders affected in Norway and if it affects in the same manner, in law and fact, the marketing of domestic products and of those from other EEA States. On the basis of the facts contained in the reference to the EFTA Court, it would seem that the national legislation at stake applies to all traders affected on the Norwegian market, and that it applies without any formal distinction according to the origin of the products concerned. There is also nothing to indicate that, in their application in practice, the provisions would affect products originating in another EEA State any differently from Norwegian products. This being so, the licensing scheme does not prevent the access to the Norwegian market of products originating in another EEA State or impede such access any more than it impedes the access of domestic products.

53. ESA recalls that this conclusion must be seen in the light of the facts presented in the reference to the EFTA Court and that it will be for the national Court to establish all the facts necessary in order to rule on the case in accordance with the principles of the relevant case law.

54. ESA notes that, while the national legislation presented in the case would not in itself seem to imply any discrimination of traders or products of other EEA States, the legislation may well be implemented at local level, be this by means of municipal ordinances or through administrative practice, so as to afford protection to, or otherwise favour the marketing of, domestic products. If so, Article 11 EEA would be applicable in ESA's opinion .

The Commission of the European Communities

55. In the Opinion of the *Commission*, it follows from the relevant jurisprudence of the ECJ²⁶ that Article 30 EC does not apply where the effect on trade is too uncertain and indirect.

56. The Commission states that it does not follow explicitly from the questions put by the national court, in which way the licence system would affect trade between the contracting parties of the EEA Agreement and the EC Treaty. The Commission supposes the national Court's reason for referring to Article 11 EEA is that if the overall numbers of outlets for selling and renting out of video films are limited, the import of video films will also be affected. Given such a hypothesis, the Commission notes that although the national law relating to films may result in an overall limitation of trading licences, it does not necessarily produce a decrease in the number or value of goods imported and sold in Norway²⁷ .

57. Even though one of the municipalities, as a ground for the rejection of the application by Nille, refers to the need to protect the already established local shops that are selling or renting video films from competition, this consideration does not eo ipso imply a discrimination between imported and domestic video films.

²⁶ Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257; Case C-379/92 *Peralta* [1994] ECR I-3453.

²⁷ Opinion of the Advocate General in Case C-142/94 *DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257 at point 68.

58. The Norwegian rules with regard to films and videograms do not lay down requirements concerning the goods as such by example, conditions with regard to size, composition or labelling of the video films. The rules do not discriminate in law between imported and domestic products. In the opinion of the Commission it is for the national Court to assess, based on the merits of the case, whether the rules may discriminate in fact. The objective of the measures is not to regulate trade in video films with other states, members of the EFTA or the European Communities.

59. In the view of the Commission the restrictive effect of a legislation requiring a licence by the municipal council in order to sell or rent out video films may not be regarded as being capable of hindering intra-Community trade in the sense of Article 11 EEA so long as, in law or in fact, it does not discriminate between imports and domestic products.

60. The Commission therefore proposes that the reply to the question submitted by the national Court should be as follows:

"Article 11 of the EEA Agreement is not to be interpreted as meaning that it prohibits a municipality from refusing a permission for the retail sale of recorded video cassettes (videograms) on the grounds that such permission should only be granted to shops which can be characterised as specialised dealers (speciality shops) for videograms and/or that expert knowledge should be built up by established dealers, so long as, in law or in fact, the national rules in question do not discriminate between domestic products and products imported from states member of the EFTA or the EU".

C. Article 13 of the EEA Agreement

The appellants

61. Counsel for *appellants* submits that Article 13 EEA is applicable if the licencing scheme and/or the municipalities' application should be regarded as being in conflict with Article 11 of the EEA Agreement. In the opinion of the appellants, the licencing scheme is a proportional measure. It is not used for arbitrary discrimination and does not represent a disguised restriction on trade. Furthermore it is justified on grounds of public morality and public policy.

62. The appellants propose the following answer to the question:

"Article 11 of the EEA Agreement, in conjunction with Article 13, does not prohibit a municipality from refusing permission for the retail sale of recored video cassettes (videograms) on the grounds that such permissions should only be granted to shops which can be characterised as specialised dealers (speciality shops) for videograms".

Nille AS

63. The *respondent* also refers to Article 13 EEA, to the effect that the restrictions must not constitute a means of arbitrary discrimination. By its nature, the existing licencing scheme allows for precisely this sort of discrimination, in that businesses are treated differently both within the same municipality, and from one municipality to another. This point is illustrated by the facts in

the case at hand pending before the national court. In case of discriminating measures, Article 13 EEA does not apply.

64. The Ministry of Culture in Norway itself states that the licencing scheme today is irrelevant in the prevention of sales of illegal videograms. This shows that the licencing scheme can not be justified on the base of Article 13 EEA .

65. The *respondent Nille* proposes the following answer to the question:

"It is contrary to Article 11 of the EEA Agreement, read in conjunction with Article 13, for a municipality to refuse to grant permission for retail sales of pre-recorded videogram cassettes (videograms) on the grounds that such permits should only be given to businesses which may be characterised as being specialised dealers (speciality shops) for videograms and/or on the grounds that expert knowledge should be built up by established dealers."

The EFTA Surveillance Authority

66. In the opinion of *ESA* there is no need to consider in general whether a licencing system of the kind involved could be justified under Article 13 EEA. Nevertheless the Authority notes that, should the national Court find the refusal of licences at stake in the present case to be tainted with discriminatory elements and, accordingly, find them to constitute measures which have an effect equivalent to quantitative restrictions within the meaning of Article 11 EEA, then the national Court would also have to find them incompatible with that provision. Thus, cultural policy not being referred to in Article 13 EEA, there would appear no ground on which the measures could be justified under that provision. Moreover, the discriminatory elements would exclude the possibility of the measures being justified by an mandatory requirement of the kind recognized by the ECJ in *Cassis de Dijon*.

67. *ESA* proposes that the question referred to the EFTA Court should be answered as follows:

"Article 11 of the EEA Agreement is to be interpreted as not applying to national legislation making the retail sale of videograms subject to prior authorization and allowing for such authorization to be restricted to dealers specialized in videograms and/or dealers possessing certain expert knowledge, provided that the legislation applies to all affected traders and that it is not designed or applied so as to hinder the marketing of products from other EEA States any more than it hinders the marketing of domestic products".

Carl Baudenbacher
Judge-Rapporteur