



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

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

**Fagtún ehf.**

and

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

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

**I. Introduction**

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

**II. Facts and procedure**

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

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

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

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

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

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

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

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

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

### III. Questions

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

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

### IV. Legal background

#### EEA law

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

11. Article 4 EEA reads:

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

12. Article 11 EEA reads:

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

#### Icelandic law

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

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

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

“7.5.11.1 Roofs shall be designed and constructed in such a way that damaging humidity condensation does not occur in the roof structure or on its inner surface.

7.5.11.2. In roofs made of wood or wood materials, ventilation openings shall be inserted and placed so that ventilation is even above the upper surface of the roof insulation. Ventilation shall be described in special designs and by calculations, if necessary.

7.5.11.3 ...”

## V. Written Observations

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

- the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;
- the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsón, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;
- the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents.

### *The first question*

#### **The Appellant**

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

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

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

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

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

### **The Defendants**

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

### **The Government of Norway**

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

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

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

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

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

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

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

### **The EFTA Surveillance Authority**

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

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

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

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

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

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

## **The Commission of the European Communities**

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

### *The second question*

## **The Appellant**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **The Defendants**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **The Government of Norway**

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

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

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

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

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

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

## **The EFTA Surveillance Authority**

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

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

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

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

## **The Commission of the European Communities**

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

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

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

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

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

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

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

Carl Baudenbacher  
Judge-Rapporteur