

Case

E-17/15

Ferskar kjötvörur ehf.



The Icelandic State

*(Jurisdiction – Article 8 EEA – Import of raw meat – Directive 89/662/EEC –
Harmonisation of the regulatory regime for veterinary checks)*

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Report for the Hearing

Summary of the Judgment

- 1 Raw meat products fall outside the scope of the rules on the free movement on goods as defined in Article 8 EEA, unless otherwise provided for in the Agreement. Certain legal acts dealing with aspects of trade in agricultural and fish products have been incorporated in the EEA Agreement. For example, Directive 89/662/EEC has been included in Annex I.
- 2 Following the adoption of EEA Joint Committee Decision No 133/2007, the acts included in Chapter I of Annex I apply to Iceland unless an adaption text states otherwise. In relation to the Directive no adaptation text has been agreed. As a result, the Directive fully applies to Iceland.
- 3 The Directive seeks to ensure that veterinary checks are carried out at the place of dispatch only, and the objective of the Directive is to safeguard public and animal health. Under Article 5 of the Directive, veterinary checks in the State of destination are only allowed as veterinary spot-checks or, in the event of a serious presumption of irregularity, while the goods are in transit. The import requirements at issue in the present case go beyond these limits, since they are regular and systematic. They are therefore incompatible with the Directive.
- 4 Iceland's argument that its geographical isolation and the immunological vulnerability of its animal population should be taken into account when interpreting the Directive must be rejected. As opposed to the import of live animals, no adaptation for import of raw meat has been made.

- 5 Therefore, it is not compatible with the Directive that an EEA State require an importer of raw meat products to apply for a special import permit before the products are imported, including the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

Judgment of the Court

1 February 2016¹

*(Jurisdiction – Article 8 EEA – Import of raw meat – Directive 89/662/EEC –
Harmonisation of the regulatory regime for veterinary checks)*

In Case E-17/15,

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in the case between

Ferskar kjötvörur ehf.

≡and≡

The Icelandic State,

concerning the applicability of the provisions of the Agreement on the European Economic Area to the import to Iceland of raw meat products,

1 Language of the request: Icelandic

The Court

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Ferskar kjötvörur ehf. (“the plaintiff”), represented by Arnar Þór Stefánsson, Supreme Court Attorney, acting as Counsel;
- The Icelandic State (“the defendant”), represented by Kristján Andri Stefánsson, Director General, Ministry of Foreign Affairs, and Einar Karl Hallvarðsson, State Attorney General and Supreme Court Attorney, acting as Agents, and Jóhannes Karl Sveinsson and Gizur Bergsteinsson, Supreme Court Attorneys, acting as Counsel;
- the Government of Norway, represented by Janne Tysnes Kaasin, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali, Officer, and Írís Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission (“the Commission”), represented by Daniele Bianchi, member of its Legal Service, and Kathleen Skelly, a national civil servant on secondment to the Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Arnar Þór Stefánsson; the defendant, represented by Kristján Andri Stefánsson and

Jóhannes Karl Sveinsson; the Government of Norway, represented by Janne Tysnes Kaasin; ESA, represented by Maria Moustakali and Írís Ísberg; and the Commission, represented by Daniele Bianchi and Kathleen Skelly, at the hearing on 2 December 2015,

gives the following

Judgment

I INTRODUCTION

- 1 The plaintiff imported 83 kg of raw beef fillets from the Netherlands via Denmark to Iceland in February 2014. The import permit was granted, *inter alia*, on the condition that the meat was stored at a temperature of at least -18°C for one month before customs clearance. The plaintiff objected to that condition, but this was to no avail. As a consequence, the meat was discarded. In the case before the national court, the plaintiff seeks compensation from the defendant for the expenses incurred. In the context of those proceedings, the national court has decided to refer several questions concerning the compatibility of the system for import permits with the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”).

II LEGAL BACKGROUND

EEA LAW

- 2 The fourth recital of the preamble to the EEA Agreement reads:

CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and

equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;

3 Article 1(1) EEA reads:

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

4 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

5 Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

- (a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
- (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

6 Article 8 EEA reads:

1. *Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
2. *Unless otherwise specified, Articles 10 to 15, 19, 20 and 25 to 27 shall apply only to products originating in the Contracting Parties.*
3. *Unless otherwise specified, the provisions of this Agreement shall apply only to:*
 - (a) *products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
 - (b) *products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

7 Article 13 EEA reads:

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

8 Article 17 EEA reads:

Annex I contains specific provisions and arrangements concerning veterinary and phytosanitary matters.

9 Article 18 EEA reads:

Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.

10 Article 19(2) EEA reads:

The Contracting Parties undertake to continue their efforts with a view to achieving progressive liberalization of agricultural trade.

11 Article 23 EEA reads:

Specific provisions and arrangements are laid down in:

(a) Protocol 12 and Annex II in relation to technical regulations, standards, testing and certification;

(b) ...

(c) ...

They shall apply to all products unless otherwise specified.

12 Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. Following the adoption of EEA Joint Committee Decision No 69/98 of 17 July 1998 (OJ 1999 L 158, p. 1, and EEA Supplement 1999 No 27, p. 1), the first paragraph of point 2 of the introductory part made clear that the acts referred to in the Chapter should apply to Iceland where it was so stated in relation to a specific act. By EEA Joint Committee Decision No 133/2007 of 26 October 2007 (OJ 2008 L 100, p. 27, and EEA Supplement 2008 No 19, p. 34), the Contracting Parties reviewed the situation and several changes were made to Annex I with regard to Iceland. The first paragraph of point 2 of the introductory part of Chapter I was replaced by the following two paragraphs:

The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.

Iceland shall implement the provisions contained in this Chapter, in the areas which did not apply to Iceland prior to the review of this Chapter by Decision of the EEA Joint Committee No 133/2007, no later than 18 months after the entry into force of this Decision.

- 13 Under heading 1.1 in Chapter I, which sets out the basic texts concerning control matters, point 1 refers to Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) (“the Directive”), and to subsequent amendments to that directive. That point does not provide for any special arrangements concerning Iceland.
- 14 The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community’s internal frontiers;

...

[7] Whereas in the State of destination spot veterinary checks could be carried out at the place of destination; whereas, however, in the event of a serious presumption of irregularity, the veterinary check could be carried out while the goods are in transit;

15 Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out ... at frontiers but are carried out in accordance with this Directive.

16 Article 2(1) of the Directive contains the following definition:

‘Veterinary check’ means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;

17 Chapter I of the Directive is concerned with checks at origin and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

18 The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

- 19 Chapter II of the Directive contains rules on checks on arrival at the destination. Article 5(1)(a) requires EEA States to implement the following measure:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

- 20 Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, protective measures provided for in Article 9 may be applied.

NATIONAL LAW

- 21 Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them (*lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim*) (“the Icelandic Act”) reads:

To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:

- a. Raw and lightly salted slaughter products, both processed and non-processed ...*

Despite the provisions of paragraph 1 the Minister [of Fisheries and Agriculture] is authorized to allow the import of products mentioned in items a-e, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause animal diseases. The Minister can decide by regulation that paragraph 1 shall not apply to certain categories of those mentioned if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, production and disinfection. The Minister is authorized to prohibit by notice the import of products which carry the risk of transmitting contamination agents that could cause danger to the health of animals.

...

- 22 Regulation No 448/2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products (*reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins*) (“the Icelandic Regulation”) sets out detailed provisions on the implementation of Article 10 of the Act. Article 3 of the Icelandic Regulation reads:

The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:

- a. *Raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating, so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.*

...

23 Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilized product as referred to in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

24 Article 5 of the Icelandic Regulation reads:

Imported foods which are listed under [Combined Nomenclature Codes] 0202 ... which the Minister has authorised for import to the country as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:

- a. ...
- b. ...
- c. *a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;*
- d. ...

- e. *an official certificate confirming that the products are free of salmonella bacteria;*
- f. *animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;*
- g. *the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.*

The Combined Nomenclature is established on the basis of the Harmonized System.

- 25 In relation to this legislation, ESA submitted a reasoned opinion on 8 October 2014 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”). In that opinion, ESA alleged that Iceland had failed to fulfil its obligations under the Directive, in particular Article 5, by maintaining in force the authorisation system for fresh meat and meat products provided for in Article 10 of the Icelandic Act and Articles 3 to 5 of the Icelandic Regulation. Alternatively, ESA considered the authorisation system to be in breach of Article 18 EEA. It appears from its written observations to the Court that ESA has decided to postpone further handling of the infringement case until the Court has given its Advisory Opinion in the present case.

III FACTS AND PROCEDURE

- 26 The plaintiff ordered 83 kg of beef fillets from a Dutch company for EUR 1 909. On 26 February 2014, the plaintiff applied to the Icelandic Minister of Fisheries and Agriculture for permission to import the meat to Iceland. The day after, the meat was transported by air from Denmark to Iceland. The freight costs amounted to ISK 80 606. The

meat was stored at the customs office in Keflavík pending an import permit.

- 27 On 6 March 2014, acting on behalf of the Minister of Fisheries and Agriculture, the Minister of Industries and Innovation authorised the import, provided that the conditions in Article 5(c), (e) and (g) of the Icelandic Regulation were met.
- 28 On 11 March 2014, the plaintiff requested the Food and Veterinary Authority to process a request to allow the import and to permit customs clearance of the fresh meat without requiring it to be frozen. The plaintiff stated that the purpose of the import was to offer consumers in Iceland fresh meat that had not been frozen.
- 29 On 14 March 2014, the Food and Veterinary Authority replied that it was not in a position to grant the request and that the conditions imposed were in accordance with the Icelandic Regulation. Following this, the Directorate of Customs stopped clearance of the meat, and the meat was discarded at the request of the plaintiff.
- 30 In April 2014, the plaintiff brought a case before Reykjavík District Court, claiming compensation for the costs of the meat and its transport. The plaintiff claims that the defendant's refusal to grant permission to import fresh meat violates Icelandic law and EEA law, in particular Article 18 EEA, the Directive and Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law.
- 31 By order of 24 February 2015, Reykjavík District Court, upon the request of the plaintiff, decided to refer certain questions to the Court. Following an appeal from the defendant, the Supreme Court of Iceland (*Hæstirettur Íslands*) rephrased and amended the questions by judgment of 27 April 2015. Accordingly, by letter of 22 May 2015,

registered at the Court on 16 June 2015, the District Court referred the following questions to the Court:

1. *Does the field of application of the EEA Agreement, as defined in Article 8 thereof, entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products and is, in this respect, not bound by the provisions of the Agreement and the acts based thereon?*
2. *If the answer to the first question is in the negative, then the question arises whether it is compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.*
3. *The national court requests the opinion of the Court whether the provisions of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law are relevant in answering the second question.*
4. *Following on from the second and third questions, an answer is requested to the question of whether it constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.*
5. *An opinion is requested on whether it affects the answer to the fourth question, if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.*

6. *If the answer to the fourth and/or fifth question is in the affirmative, an answer is then requested to the question of in which cases such a prohibition on the importation of raw meat products taking into account, as appropriate, the circumstances described in the fifth question, could be considered justifiable with reference to Article 13 EEA. Also, an answer is requested to the question of what requirements should be made regarding proof in this connection, particularly in the light of the precautionary principle of EEA law.*
- 32 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed only insofar as is necessary for the reasoning of the Court.

IV ANSWERS OF THE COURT

THE FIRST QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

- 33 The plaintiff, ESA and the Commission submit that agricultural products and foodstuffs are subject to the provisions of Chapters 2 and 4 of Part II of the EEA Agreement. Article 17 EEA refers to Annex I, which contains specific provisions and arrangements regarding veterinary and phytosanitary matters. This includes the Directive as well as other foodstuffs legislation and relevant animal health and welfare rules applicable in the EEA. These legal acts harmonise the conditions under which products of animal origin are produced, placed on the market and circulated in the EEA. Furthermore, Article 23(a) EEA refers to Annex II on technical regulations, standards, testing and certification, which contains a specific chapter related to foodstuffs. These provisions limit the discretion of the EEA States when enacting rules on the import of raw meat products.

- 34 ESA and the Commission contend that the inclusion of Chapters 2 and 4 and of the legal acts referred to in Annexes I and II would be devoid of any meaning and effectiveness if EEA States were free not to apply those provisions. Pursuant to Article 7 EEA, Iceland is bound to ensure the full implementation of the relevant acts. Thus, any national measure related to veterinary checks on raw meat has to be compatible with the Directive and related legislation on animal products.
- 35 The plaintiff and the Commission further argue that Article 18 EEA prohibits any technical barriers to trade other than those included in Annexes I and II. National rules concerning import of fresh meat and meat products must thus be assessed under Article 18 EEA.
- 36 The defendant submits that it follows from Article 8 EEA that EEA States have discretion to regulate the import of raw meat, unless otherwise specified in the Agreement. The Directive has different legal effects in the EU and in Iceland. Iceland is not part of the EU Common Agricultural Policy, and is thus unable to adjust to the EU rules to the same extent as would be the case within the EU. For this reason, unrestricted trade in agricultural products cannot be required of Iceland. This was to a large extent the reason for the negotiation of the EEA Agreement, and in particular Article 17. Furthermore, the application and the objective of the Directive are completely different in the EU in comparison with the situation in the EEA. The Directive aims at the completion of the internal market for agricultural products, yet no such market exists in the EEA context.
- 37 The defendant continues that, by agreeing to the Directive, Iceland merely contributed to ensuring that certain procedures and formalities in terms of health standards would apply to facilitate trade in agricultural products. However, the agricultural system falls in its entirety outside the scope of the EEA Agreement. Iceland can

therefore adopt the required safety measures concerning the protection of livestock and public health.

- 38 The Government of Norway observes that the EEA States have agreed to the common regulation of some aspects of trade in agricultural and fishery products. This is shown, in particular, in Article 17 EEA with its reference to Annex I on veterinary and phytosanitary matters. Annex I largely reflects the unique expansion of the EEA Agreement that took place from 1999, with the inclusion of the veterinary rules in accordance with EEA Joint Committee Decision No 69/98. The legal acts in Annex I therefore apply both to agricultural and fishery products. Article 18 EEA is intended to ensure that the effects of the harmonised legal acts in Annex I are not counteracted by technical barriers to trade not foreseen in those acts. It is clear from its wording that this provision is not meant to bring agricultural products within the general scope of the EEA Agreement.
- 39 The Government of Norway argues that EEA law and EU law are not fully harmonised as regards agricultural products. Thus, a difference in the interpretation of the two agreements cannot be excluded. Accordingly, it must be assessed on a case-by-case basis to what extent the EEA regulatory framework leaves discretion for the EEA States to enact specific national regulations.

FINDINGS OF THE COURT

- 40 By its first question, the national court essentially asks if raw meat products fall outside the scope of the EEA Agreement, as defined in Article 8, such that an EEA State has discretion when setting the rules for importation of raw meat, since it is not bound by the provisions of the Agreement or acts incorporated therein.

- 41 The Court notes that the EEA Agreement has established a homogeneous and dynamic European Economic Area for the benefit of businesses, workers and consumers. The aim of the Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties, achieved in particular on the basis of equality and reciprocity concerning rights and obligations. The EEA shall provide for the fullest possible realisation of the free movement of goods. At the same time, it aims at guaranteeing a high level of health protection and at promoting the interests of consumers. These goals are reflected in the preamble to the Agreement and laid down in various provisions.
- 42 The defendant has argued that Iceland is not part of the EU Agricultural Policy. That is true. However, the Agreement does contain specific arrangements concerning agricultural products.
- 43 Article 8(1) EEA provides that free movement of goods between the Contracting Parties shall be established in conformity with the provisions of the Agreement. Article 8(3)(a) limits free movement to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (“Harmonized System”), unless otherwise provided for in the EEA Agreement. As raw bovine meat does not fall within the said chapters of the Harmonized System, it falls outside the scope of the EEA Agreement, unless otherwise provided for in the Agreement.
- 44 The Court notes that certain legal acts dealing with specific aspects of trade in agricultural and fish products have been incorporated in the EEA Agreement. This extension of the scope of the EEA is intended to further a continuous and balanced strengthening of trade and economic relations between the Contracting Parties in a homogeneous and dynamic EEA.
- 45 According to Article 17 EEA, provisions and arrangements concerning veterinary and phytosanitary matters are to be

incorporated in Annex I. The Directive has been included in Annex I. Similarly, Article 23 incorporates specific provisions and arrangements that apply to all products, unless otherwise specified. Moreover, the Contracting Parties have undertaken to make efforts to achieve progressive liberalisation of agricultural trade (see Article 19(2) EEA). These provisions provide for the regulation of agricultural matters in the EEA context.

- 46 As regards the regulation of veterinary and phytosanitary matters, EEA law is not fully homogeneous with EU law. For example, Annex I only applied to Iceland with regard to aquaculture animals and fisheries products until EEA Joint Committee Decision No 133/2007 was adopted. In that decision, the Contracting Parties reviewed the situation and declared that “Iceland will take over the acts referred to in Chapter I of Annex I, except for the provisions that concern live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen” and that “[w]hen an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act”. The points are included in Chapter I of Annex I to the Agreement.
- 47 The acts included in Chapter I of Annex I therefore apply to Iceland, unless an adaptation text states otherwise (for a similar situation regarding acts included in Annex II compare Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 46). In relation to the Directive no adaptation has been agreed. As a result, the Directive fully applies to Iceland.
- 48 According to Article 7 EEA, a Contracting Party is bound by and must ensure full implementation of acts included in the Annexes. Moreover, the EEA/EFTA States are obliged under Article 3 EEA to take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement and they must abstain from measures that could jeopardise the attainment of its objectives.

- 49 It follows that in so far as the Contracting Parties have agreed to extend the scope of the Agreement such an extension may limit, as in this case, an EEA/EFTA State's discretion in setting rules on trade in goods.
- 50 The answer to the first question must thus be that the field of application of the EEA Agreement, as defined in Article 8 EEA, does not entail that an EEA State has discretion to set rules on the importation of raw meat products unbound by relevant provisions incorporated into the Annexes to the EEA Agreement.

THE SECOND QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

- 51 The plaintiff, ESA and the Commission argue that the Directive has introduced a detailed and harmonised system of veterinary inspections of fresh meat to replace existing inspection systems within the country of destination. In the context of such a harmonised system, the scope for an EEA State to impose additional controls or requirements with respect to products being imported into its territory is strictly limited. The Commission adds that any such discretion to impose additional rules or requirements would be contrary to the aim of the Directive, expressed in the fourth recital of its preamble.
- 52 The plaintiff, ESA and the Commission submit that the checks that may be carried out at the place of destination are described in Article 5 of the Directive. EEA States cannot impose more rigorous measures, save for protective measures which are temporary in nature and required for the control of an outbreak of a zoonosis or disease or a cause likely to constitute a serious health hazard to animals or humans. Furthermore, as the Directive has exhaustively harmonised the regulatory regime for veterinary checks for animal

products, the imposition of additional requirements or rules by the EEA State of destination cannot be justified under Article 13 EEA.

- 53 In the view of the plaintiff, ESA and the Commission, the administrative requirements referred to in the question from the national court constitute veterinary checks within the meaning of Article 2 of the Directive. They do not appear to fall within the type of checks permitted by Article 5 of the Directive. Insofar as the requirements are systematic, they cannot be described as spot-checks, and as such go beyond what is permissible pursuant to Article 5. In particular, the so-called freezing requirement is beyond what is permitted under the Directive or any act to which it refers.
- 54 The plaintiff, ESA and the Commission contend that a prior notification system is not in line with the requirements of the Directive. Thus, it must be all the more clear that a prior authorisation system, such as the one at issue, is incompatible with the Directive.
- 55 The plaintiff and ESA submit further that the Icelandic administrative formalities require importers to fulfil certain substantive conditions. That is not permitted under Article 5 of the Directive. Veterinary checks in the State of destination can only aim at verifying, by means of non-discriminatory examination, that the requirements of Article 3 of the Directive have been complied with. This means whether the product has been obtained, checked, marked and labelled in accordance with EEA rules. EEA States thus cannot impose checks that do not find their basis in EEA rules. In the plaintiff's view, this applies to the requirement of the Icelandic Regulation to demonstrate that products have been stored frozen for a certain period of time prior to customs clearance.
- 56 ESA goes on to challenge Article 5(e), (f) and (g) of the Icelandic Regulation. As to the salmonella certificate required under its Article

5(e), ESA contends that such additional guarantees, which are provided for under Regulation (EC) No 853/2004, may not be applied when the EEA State in question does not have an approved control programme.

- 57 As regards the requirement in Article 5(f) of the Icelandic Regulation, that the products conform to the regulation on food contaminants, ESA observes that the EEA legislation on contaminants in food sets out maximum levels for certain contaminants (Regulation (EEC) No 315/93 and Regulation (EC) No 1881/2006). That legislation does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with the current legislation on food contaminants.
- 58 ESA understands Article 5(g) of the Icelandic Regulation to entail a systematic obligation for the importer to present to the Food and Veterinary Authority photographs/pdf documents illustrating the packaging. ESA notes that the EEA legislation on the labelling of foodstuffs (Regulation (EU) No 1169/2011) does not provide a legal basis for EEA States to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with legislation on labelling.
- 59 In ESA's view, the existence of customs controls on agricultural goods by EFTA States cannot justify the existence of additional veterinary checks, as argued by Iceland. Customs controls and veterinary checks serve different purposes and operate in different spheres of the EEA Agreement.
- 60 The defendant submits that the Directive was enacted with a view to completing the internal market and pursuing the common agricultural policy. In the EEA there is no internal market for the

products at issue and there is no common agricultural policy. The isolated geographical location of Iceland and the immunological vulnerability of the country's animal population are reflected by the numerous acts in Annex I to the EEA Agreement not applicable to Iceland. Thus, the specific EEA context of the Directive and the special circumstances of Iceland must be taken into account when interpreting the Directive.

- 61 The defendant observes that the matter in dispute in the main proceedings concerns the freezing certificate. In its view, it is not clear from the District Court's question why all the Icelandic rules concerning the import of raw meat should be reviewed in the light of the Directive in the present proceedings.
- 62 The defendant submits that the freezing certificate does not discourage imports of raw meat, as can be seen from the increasing volume of imported meat over the last ten years. Moreover, the certificate does not seek to double check compliance with requirements that have been controlled in the State of dispatch. Iceland has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The certificate only seeks to respond to the special situation of Iceland. That objective lies beyond the EEA rules. Consequently, the freezing certificate does not come within the scope of the Directive.

FINDINGS OF THE COURT

- 63 By its second question, the referring court asks whether the Icelandic rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period, prior to customs clearance, are compatible with the Directive.

- 64 As expressed in its preamble, the emphasis of the Directive is to ensure that veterinary checks are carried out at the place of dispatch only. This is an emanation of the country of origin principle. Article 1 of the Directive provides that veterinary checks for products of animal origin may no longer be carried out at the frontiers, but shall be carried out in accordance with the Directive. In particular, Article 3 of the Directive as adapted to the EEA Agreement requires that an EEA/EFTA State shall ensure that products of animal origin have been obtained, checked, marked and labelled in accordance with the relevant EEA rules for the destination in question and that the products are accompanied by a health certificate, animal-health certificate or any other document provided for by EEA veterinary rules. According to Article 5, veterinary checks may be carried out in the State of destination at the place of destination as veterinary spot-checks or, in the event of a serious presumption of irregularity, while the goods are in transit.
- 65 The objective of the Directive leads to the harmonisation of the basic requirements of veterinary control to safeguard public and animal health. The harmonised system of veterinary checks is based on full inspection of the goods in the EEA State of dispatch. The system is intended to replace, as a rule, inspection in the EEA State of destination. Considerations related to the need to protect public or animal health cannot justify additional specific constraints imposed by an EEA State when the frontier is crossed (see, for comparison, judgment in *Commission v Sweden*, C-111/03, EU:C:2005:619, paragraph 51).
- 66 The objective of the Directive could not be realised, nor its effectiveness achieved, if the EEA States were free to go beyond its requirements. Maintaining or adopting national measures other than those expressly provided for in the Directive must therefore be regarded as incompatible with the Directive's purpose (compare *Commission v Sweden*, cited above, paragraph 63).

- 67 To ensure that the requirements of Article 3 of the Directive have been complied with, Article 5 permits the State of destination to carry out veterinary spot-checks. However, the defendant has not argued that the requirements in question constitute spot-checks. On the contrary, it is undisputed that they are regular and systematic. They are thus incompatible with the Directive. The same goes for the exercise of veterinary checks by customs clearance at the frontier since checks must be made at the place of destination, unless a serious presumption of irregularity exists. Such a presumption has not been alleged.
- 68 The defendant has argued that the national rules do not discourage imports of raw meat, since the volume of imported meat to Iceland over the last ten years has increased. A distinction should be made between administrative formalities and substantive requirements. According to the defendant, the Directive contains requirements regarding administrative formalities, whereas the Icelandic legislation on importation of raw meat and, in particular, the freezing requirement is of a substantive nature.
- 69 However, the reference to import volumes cannot include raw meat, as illustrated by the present case. In any event, the existence of adverse effects on trade is not a requirement to establish a breach of an obligation under the EEA Agreement (see for comparison *Commission v Sweden*, cited above, paragraph 67).
- 70 Moreover, a distinction between administrative formalities and substantive requirements cannot be made in this case. The administrative formalities under the Directive serve to verify that substantive checks have been carried out to protect public and animal health.
- 71 A duty of prior notification imposed by national law on importers of products of animal origin from other Member States is incompatible

with the Directive (compare *Commission v Sweden*, cited above). An import permit requirement such as the one at issue is even more restrictive than a mere notification system.

- 72 Furthermore, the Directive makes no provisions for the freezing of meat as a legitimate trade rule for veterinary purposes between EEA States and does not allow for any such requirement to be made under national law. As a consequence, national law may not require a certificate to verify the freezing of meat.
- 73 The defendant's argument that Iceland's geographical isolation and the immunological vulnerability of Iceland's animal population and the potential consequences for the life and health of humans should be taken into account when interpreting the Directive must be rejected. Iceland averred that it has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The EEA Agreement recognises an adaptation for Iceland when live animals, other than fish and aquaculture animals, are concerned. However, the Agreement has no adaptation for import to Iceland of raw meat.
- 74 The present procedures have focused on the requirement of the freezing certificate. The observations submitted to the Court and the pleadings at the oral hearing do not provide a firm basis to examine the other conditions for obtaining an import permit mentioned in the second question from the national court.
- 75 ESA has stated that certificates concerning salmonella, food contaminants and labelling, as required under Article 5(e), (f) and (g) of the Icelandic Regulation, are dealt with in separate regulations under EEA law. The Court observes that in relation to the Directive such certificates must, in principle, be considered in the same manner as a freezing certificate.

- 76 The aim to protect human and animal health in EEA trade mentioned in Article 13 EEA cannot be invoked to justify measures banning or restricting imports when a Directive provides for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed (see, for comparison, judgment in *Commission v Portugal*, C-52/92, EU:C:1993:216, paragraph 17).
- 77 The answer to the second question must therefore be that it is not compatible with the provisions of the Directive for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.

THIRD TO SIXTH QUESTIONS

- 78 In light of the answer given to the second question, there is no need to address the remaining questions referred by the national court.

V COSTS

- 79 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

The Court

In answer to the questions referred to it by *Reykjavík District Court* hereby gives the following Advisory Opinion:

- 1. The field of application of the EEA Agreement as defined in Article 8 EEA does not entail that an EEA State has discretion to set rules on the importation of raw meat products, since that discretion may be limited by provisions incorporated into an Annex to the EEA Agreement.**
- 2. It is not compatible with the provisions of Directive 89/662/EEC for an EEA State to enact rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and requiring the submission of a certificate confirming that the meat has been stored frozen for a certain period prior to customs clearance.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

*Delivered in open court in Luxembourg on
1 February 2016.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Report for the Hearing

in Case E-17/15

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 Reykjavík District Court (*Héraðsdómur Reykjavíkur*) in the case between

Ferskar kjötvörur ehf.

≡and≡

The Icelandic State

concerning the applicability of the provisions of the Agreement on the European Economic Area to the import of raw meat products.

I INTRODUCTION

- 1 In 2014, the Icelandic meat distribution company Ferskar kjötvörur ehf. (“the plaintiff”) applied to the Icelandic Minister of Fisheries and Agriculture for permission to import 83 kg of raw beef fillets from the Netherlands via Denmark to Iceland. The permission was granted *inter alia* on the condition that the meat was stored at a temperature of at least -18°C for one month before customs clearance. The plaintiff objected to this, stating that the purpose of the import was to offer fresh meat to Icelandic consumers. The condition was nevertheless maintained. In the meantime, the meat had already been transported to Iceland and was being stored at the customs office. It was subsequently discarded.

- 2 In the case before Reykjavík District Court, the plaintiff claims payment from the Icelandic State (“the defendant”) of EUR 1 909 and ISK 80 606, which correspond to the price of the meat and its transport. In the context of those proceedings, the District Court has decided to refer to the Court several questions concerning the compatibility of the abovementioned condition with the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”).

II LEGAL BACKGROUND

EEA LAW

- 3 In Part II of the EEA Agreement (“Free Movement of Goods”) Chapter 1 is headed “Basic Principles”. The first provision of that chapter, Article 8, reads:
 1. *Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*
 2. ...
 3. *Unless otherwise specified, the provisions of this Agreement shall apply only to:*
 - (a) *products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
 - (b) *products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

- 4 Agricultural products and foodstuffs fall outside Chapters 25 to 97 of the Harmonized Commodity Description and Coding System. Furthermore, raw meat is not among the products specified in Protocol 3. The goods at issue in the main proceedings are therefore outside the scope of the EEA Agreement unless otherwise specified.
- 5 Article 18 EEA reads:

Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23(a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.

- 6 Article 17 EEA, which is included in Chapter 2 on “Agricultural and Fishery Products”, refers to Annex I concerning specific provisions and arrangements concerning veterinary and phytosanitary matters. Article 23(a) EEA, in Chapter 4 on “Other Rules relating to the Free Movement of Goods”, refers to specific provisions and arrangements laid down in Protocol 12 and Annex II in relation to technical regulations, standards, testing and certification. Article 23(b) EEA is not relevant for the present case. Article 13 EEA, which is referred to in the last sentence of Article 18 EEA, reads:

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

- 7 Chapter I of Annex I to the EEA Agreement contains provisions on veterinary issues. The first paragraph of point 2 of the introductory part reads:

The provisions contained in this Chapter shall apply to Iceland, except for the provisions concerning live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen. When an act is not to apply or is to apply partly to Iceland, it shall be stated in relation to the specific act.

- 8 In Chapter I of Annex I to the EEA Agreement under heading 1.1, which sets out the basic texts concerning control matters, point 1 refers to Council Directive 89/662/EC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market¹ (“the Directive”), and to subsequent amendments to that directive.

- 9 The preamble to the Directive includes the following recitals:

[3] Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

[4] Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

[5] Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community’s internal frontiers;

1 OJ 1989 L 395, p. 13.

10 Article 1 of the Directive reads:

Member States shall ensure that the veterinary checks to be carried out on products of animal origin covered by the acts referred to in Annex A or by Article 14 and which are intended for trade are no longer carried out ... at frontiers but are carried out in accordance with this Directive.

11 It is not disputed that the reference to Annex A covers products such as those at issue in the main proceedings.

12 Article 2(1) of the Directive contains the following definition:

‘Veterinary check’ means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;

13 Chapter I of the Directive is concerned with “Checks at origin”, and consists of Articles 3 and 4. The first subparagraph of Article 3(1) reads:

Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

14 The first sentence of Article 4(1) reads:

Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1.

15 Chapter II of the Directive contains rules on “Checks on arrival at the destination”. In that regard, Article 5(1)(a) requires EEA States to implement the following measure:

The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport.

- 16 Articles 7 and 8 of the Directive lay down the measures to be taken if the competent authority of the EEA State of destination establishes the presence of agents responsible for a disease named in Directive 82/894/EEC, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans. In such a case, protective measures provided for in Article 9 may be applied.
- 17 In Chapter I of Annex I to the EEA Agreement under heading 7.1, which sets out the basic texts concerning measures relating to many sectors, point 13 refers to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety² (“the Regulation”), and to subsequent amendments to that regulation. Point 13 also contains a number of adaptations of the Regulation for the purposes of the EEA Agreement.
- 18 Article 1(1) and (2) of the Regulation reads:
1. *This Regulation provides the basis for the assurance of a high level of protection of human health and consumers’ interest in relation to*

2 OJ 2002 L 31, p. 1, and Icelandic EEA Supplement 2011 No 59, p. 123.

food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

2. *For the purposes of paragraph 1, this Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at Community and national level.*

...

19 Article 5(1) and (2) of the Regulation, under Chapter II on “General food law”, reads:

1. *Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers’ interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.*
2. *Food law shall aim to achieve the free movement in the Community of food and feed manufactured or marketed according to the general principles and requirements in this Chapter.*

20 Article 6 of the Regulation reads:

1. *In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.*

2. *Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner.*
3. *Risk management shall take into account the results of risk assessment, and in particular, the opinions of the Authority referred to in Article 22, other factors legitimate to the matter under consideration and the precautionary principle where the conditions laid down in Article 7(1) are relevant, in order to achieve the general objectives of food law established in Article 5.*

21 Article 7 of the Regulation lays down the following “Precautionary principle”:

1. *In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.*
2. *Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.*

22 Article 14 of the Regulation on “Food safety requirements” reads:

1. *Food shall not be placed on the market if it is unsafe.*
- ...
7. *Food that complies with specific Community provisions governing food safety shall be deemed to be safe insofar as the aspects covered by the specific Community provisions are concerned.*
8. *Conformity of a food with specific provisions applicable to that food shall not bar the competent authorities from taking appropriate measures to impose restrictions on it being placed on the market or to require its withdrawal from the market where there are reasons to suspect that, despite such conformity, the food is unsafe.*
- ...

NATIONAL LAW

- 23 Since 1882, the import of horses, cattle and sheep to Iceland has been prohibited. There are therefore a number of diseases against which the Icelandic animal population has not developed immunity. Based on the finding that not only live animals, but also animal products such as raw meat can transmit pathogens, Iceland has for decades also banned the import of raw meat, allowing exceptions only if the meat has undergone heat treatment or freezing.
- 24 Article 10 of Act No 25/1993 on Animal Diseases and Preventive Measures against them³ (“the Act”) reads:
- To prevent animal diseases from reaching the country it is prohibited to import the following types of goods:*

³ Lög nr. 25/1993 um dýrasjúkdóma og varnir gegn þeim.

- a. *Raw and lightly salted slaughter products, both processed and non-processed ...*

Despite the provisions of paragraph 1 the Minister [of Fisheries and Agriculture] is authorized to allow the import of products mentioned in items a-e, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause animal diseases.⁴ The Minister can decide by regulation that paragraph 1 shall not apply to certain categories of those mentioned if the product is disinfected in production or a special disinfection is performed before importation and the product is accompanied with a satisfactory certificate of origin, production and disinfection. The Minister is authorized to prohibit by notice the import of products which carry the risk of transmitting contamination agents that could cause danger to the health of animals.

...

- 25 Regulation No 448/2012 on Measures to prevent the Introduction of Animal Diseases and Contaminated Products⁵ (“the Icelandic Regulation”) sets out detailed provisions on the implementation of Article 10 of the Act. Article 3 of the Icelandic Regulation reads:

The importation to Iceland of the following animal products and products that may carry infectious agents which cause diseases in animals and humans is not permitted; cf. however, further details in Chapter III:

- a. *Raw meat, processed or unprocessed, chilled or frozen, as well as offal and slaughter wastes, which have not been treated by heating,*

4 The second paragraph of Article 10 was amended by Act No 71/2015 which, *inter alia*, transferred the authority to permit the import of products mentioned in items (a) to (e) from the Minister to the Food and Veterinary Authority.

5 *Reglugerð nr. 448/2012 um varnir gegn því að dýrasjúkdómar og sýktar afurðir berist til landsins.*

so that the core temperature has reached 72°C for 15 seconds, or other comparable treatment in the assessment of the Food and Veterinary Authority.

...

26 Article 4 of the Icelandic Regulation reads:

The Minister of Fisheries and Agriculture is authorized to allow the import of products mentioned in Article 3, cf. Article 10 of [the Act] and subsequent amendments, having received recommendations from the Food and Veterinary Authority, if it is considered proven that they will not transmit infectious agents that can cause diseases in animals and humans, and the conditions imposed for the import have been fulfilled, see however Article 7.

When an application is submitted for the first time to import a raw or unsterilized product as referred in the first paragraph, an importer must provide the Ministry of Fisheries and Agriculture with the necessary information on the product for consideration and approval before the product is dispatched from the country of export.

An importer of raw products shall in all cases apply for a permit to the Minister of Fisheries and Agriculture and submit, for the consideration of the Food and Veterinary Authority, an import declaration, information on the country of origin and production, the type of product and producer, and the required certificates, as provided for in Article 5.

27 Article 5 of the Icelandic Regulation reads:

Imported foods which are listed under [Combined Nomenclature (CN) Codes] 0202 ... which the Minister has authorised for import to the country as referred to in Article 4 and which have not received satisfactory heat treatment must be accompanied by the following certificates:

a. ...

- b. ...
 - c. *a certificate confirming that the products have been stored at a temperature of at least -18°C for a month prior to customs clearance;*
 - d. ...
 - e. *an official certificate confirming that the products are free of salmonella bacteria;*
 - f. *animal meat products and by-products, dairy products and eggs shall conform to the appropriate provisions of the current regulation on food contaminants;*
 - g. *the product shall be labelled in conformity with current rules on labelling, advertising and promotion of foodstuffs.*
- 28 CN Code 0202, as referred to in Article 5 of the Icelandic Regulation, covers frozen meat of bovine animals. Fresh or chilled meat of bovine animals, on the other hand, is included under CN Code 0201.

INFRINGEMENT PROCEEDINGS AGAINST ICELAND

- 29 On 30 October 2013, the EFTA Surveillance Authority (“ESA”) sent a letter of formal notice to Iceland, concluding that Iceland had failed to fulfil its obligations under the Directive, in particular its Article 5, by maintaining in force the authorisation system for fresh meat and meat products provided for in Article 10 of the Act and Articles 3 to 5 of the Icelandic Regulation. Alternatively, ESA considered the authorisation system to be in breach of Article 18 EEA. That conclusion was maintained in a reasoned opinion submitted on 8 October 2014 in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”). However, it appears from

its written observations to the Court that ESA has decided to postpone further handling of the infringement case until the Court has given its Advisory Opinion in the present case.

III FACTS AND PROCEDURE

- 30 In February 2014, the plaintiff ordered 83 kg of beef fillets from a Dutch company for EUR 1 909. On 26 February 2014, the plaintiff applied to the Icelandic Minister of Fisheries and Agriculture for permission to import the meat to Iceland. The day after, the meat was transported by air from Denmark to Iceland. The freight costs amounted to ISK 80 606. The meat was stored at the customs office in Keflavík awaiting a decision on the application to permit the import.
- 31 On 6 March 2014, acting on behalf of the Minister of Fisheries and Agriculture, the Minister of Industries and Innovation authorised the import, provided that the conditions in Article 5(c), (e) and (g) of the Icelandic Regulation were met.
- 32 On 11 March 2014, stating that the purpose of the import was to offer consumers fresh meat that had not been frozen, the plaintiff requested the Food and Veterinary Authority to process a request to allow the import and to permit customs clearance of the fresh meat without requiring it to be frozen in accordance with Article 5(c).
- 33 On 14 March 2014, the Food and Veterinary Authority replied that it was not able to grant the request. It stated that the conditions imposed were in accordance with the Icelandic Regulation. It also stated that the authority to allow the import lay with the Ministry and that the role of the Food and Veterinary Authority was merely to give its comments.

- 34 Following this correspondence, the Directorate of Customs stopped clearance of the meat, and it was subsequently discarded at the request of the plaintiff.
- 35 In April 2014, the plaintiff brought a case before Reykjavík District Court, claiming compensation for the costs of the meat and its transport. The plaintiff claims that the defendant's refusal to grant permission to import fresh meat violates Icelandic law and EEA law, in particular Article 18 EEA, the Directive and the Regulation.
- 36 By order of 24 February 2015, Reykjavík District Court accepted the request of the plaintiff to refer certain questions to the Court. Following an appeal from the defendant, the Supreme Court of Iceland (*Hæstirettur Íslands*) decided by judgment of 27 April 2015 to rephrase and amend the questions. Accordingly, by letter of 22 May 2015, registered at the Court on 16 June 2015, the District Court referred the following questions to the Court:
- 1. Does the field of application of the EEA Agreement, as defined in Article 8 thereof, entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products and is, in this respect, not bound by the provisions of the Agreement and the acts based thereon?**
 - 2. If the answer to the first question is in the negative, then the question arises whether it is compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of product and**

the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.

3. The national court requests the opinion of the Court whether the provisions of [the Regulation] are relevant in answering the second question.
4. Following on from the second and third questions, an answer is requested to the question of whether it constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.
5. An opinion is requested on whether it affects the answer to the fourth question, if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.
6. If the answer to the fourth and/or fifth question is in the affirmative, an answer is then requested to the question of in which cases such a prohibition on the importation of raw meat products taking into account, as appropriate, the circumstances described in the fifth question, could be considered justifiable with reference to Article 13 EEA. Also, an answer is requested to the question of what requirements should be made regarding proof in this connection, particularly in the light of the precautionary principle of EEA law.

IV WRITTEN PROCEDURE BEFORE THE COURT

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

- the plaintiff, represented by Arnar Þór Stefánsson, Supreme Court Attorney, acting as Counsel;
- the defendant, represented by Kristján Andri Stefánsson, Director General, Ministry of Foreign Affairs, and Einar Karl Hallvarðsson, State Attorney General and Supreme Court Attorney, acting as Agents, and Jóhannes Karl Sveinsson and Gizur Bergsteinsson, Supreme Court Attorneys, acting as Counsel;
- the Government of Norway, represented by Janne Tysnes Kaasin, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- ESA, represented by Carsten Zatschler, Director, Maria Moustakali, Officer, and Írís Ísberg, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission (“the Commission”), represented by Daniele Bianchi, member of its Legal Service, and Kathleen Skelli, a national civil servant on secondment to the Legal Service, acting as Agents.

V SUMMARY OF THE OBSERVATIONS SUBMITTED TO THE COURT

QUESTION 1

- 38 By its first question, the referring court asks in essence whether an EEA State is bound by the provisions of the EEA Agreement and secondary legislation when setting rules on the import of raw meat products.
- 39 There is agreement between those who have submitted written observations that, pursuant to Article 8(3) EEA, the products at issue fall outside the scope of the EEA Agreement unless otherwise specified. However, there are different views on the significance of Articles 17, 18 and 23 EEA and the legal acts referred to in Annexes I and II.

THE PLAINTIFF

- 40 The plaintiff submits that the provisions of Chapters 2 and 4 of Part II to the EEA Agreement are applicable to the products at issue. Those provisions limit the discretion of the EEA States in setting rules on the import of raw meat products.
- 41 The plaintiff observes that there are specific provisions and arrangements concerning veterinary and phytosanitary matters in Annex I, and concerning technical regulations, standards, testing and certification in Annex II to the EEA Agreement. Article 18 EEA prohibits technical barriers to trade other than those laid down in those arrangements.⁶ Accordingly, rules which concern the import of fresh meat and meat products are subject to Article 18 EEA. The

⁶ Reference is made to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 42.

plaintiff considers that the rules at issue cannot be justified under Article 13 EEA.

- 42 Moreover, the plaintiff argues that the disputed rules must be in conformity with the Directive, which was incorporated into the EEA Agreement without any adaptation of relevance for this case. The Regulation is also of relevance in this regard.

THE DEFENDANT

- 43 The defendant submits that it follows from Article 8 EEA that an EEA State has discretion in establishing rules on the imports of raw meat, unless otherwise specified by the Agreement. Article 18 EEA and the arrangements referred to there do not alter that conclusion.
- 44 As regards the Directive, the defendant contends that the legal effects of it are different in the EU and in Iceland. First, Iceland is not part of the EU's agricultural policy, so it is unable to adjust to the EU rules in the manner expected within the EU. Therefore, unrestricted trade in agricultural products cannot be maintained for Iceland. This was the basis for the negotiation of the EEA Agreement and in particular its Article 17. Second, the application and objective of the Directive is completely different in the EU to what it is in the EEA. The Directive aims at the completion of the internal market for agricultural products, but there is no internal EEA market for such products.
- 45 Consequently, the defendant argues, by introducing the Directive into the EEA context, Iceland merely contributed to ensuring that certain procedures and formalities in terms of health standards would apply to facilitate trade in agricultural products. However, the point has always been maintained that the agricultural system falls in its entirety outside the scope of the EEA Agreement. Iceland can therefore adopt the required safety measures concerning protection of livestock and public health.

THE GOVERNMENT OF NORWAY

- 46 The Government of Norway observes that the EEA States have agreed to a common regulation of some aspects of trade in agricultural and fishery products. This is shown, in particular, in Article 17 EEA with its reference to Annex I on veterinary and phytosanitary matters. Annex I largely reflects the unique expansion of the EEA Agreement that took place from 1999, with the “veterinary agreement” adopted by EEA Joint Committee Decision No 69/98.⁷ This expansion was a result of the gradual acknowledgement of the need to ease especially the border controls of animal products to avoid unnecessary delays in the transport of such goods. The legal acts in Annex I therefore apply both to agricultural products and to fishery products.
- 47 In the view of the Norwegian Government, Article 18 EEA is intended to ensure that the effects of the harmonised legal acts in Annex I are not counteracted by technical barriers to trade not foreseen in those acts. It is clear from its wording that this provision is not meant to bring agricultural products within the general scope of the EEA Agreement. That is why Article 18 EEA refers specifically to Article 13 EEA to ensure the applicability of that provision.⁸
- 48 The Norwegian Government argues that the scope and purpose of the EEA Agreement as regards agricultural products is an example of an area where EEA law and EU law is not fully harmonised. Thus, a difference in the interpretation of the two agreements cannot be excluded.⁹ Accordingly, it must be assessed on a case-by-case basis to what extent the EEA regulatory framework leaves discretion for the EEA States to have specific national regulations.

7 OJ 1999 L 158, p. 1, and EEA Supplement 1999 No 27, p. 1.

8 Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 27.

9 Reference is made to Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259, paragraph 27.

- 49 The Government of Norway proposes that the first question should be answered as follows:

The regulatory discretion of the EEA States is limited by the provisions of the EEA Agreement, also as regards agricultural products, but only within the scope of the Agreement and to the extent that the relevant rules in the Agreement apply in the case at hand.

ESA

- 50 ESA submits that agricultural products and foodstuffs remain subject to the provisions of Chapter 2 and 4 of Part II of the Agreement. Article 17 EEA refers to Annex I, which includes the Directive as well as the foodstuffs legislation known as the “Hygiene Package” and relevant animal health and welfare rules applicable in the EEA.¹⁰ Those legal acts harmonised the conditions under which products of animal origin are produced and placed on the market and circulated in the EEA. Furthermore, Article 23(a) EEA refers to Annex II on technical regulations, standards, testing and certification, which contains a specific chapter related to foodstuffs.
- 51 ESA submits that the inclusion of Chapters 2 and 4 and the legal acts referred to in Annexes I and II would be devoid of any meaning and effectiveness if EEA States were free not to apply those provisions. Pursuant to Article 7 EEA, Iceland is bound to ensure the full implementation of the relevant acts.¹¹ Thus, any national measure related to veterinary checks on raw meat has to be compatible with the Directive and related legislation on animal products.

10 Reference is made to Regulation (EC) No 853/2004 and Regulation (EC) No 854/2004 forming part of the “Hygiene Package” and Regulation (EC) No 882/2004 on animal welfare, referred to at point 17 of subchapter 6.1, point 12 of subchapter 1.1 and point 11 of subchapter 1.1, respectively, of Chapter I of Annex I to the EEA Agreement.

11 Reference is made to Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 46.

52 ESA proposes that the Court should answer the first question as follows:

The field of application of the free movement of goods under the EEA Agreement, as it results from Articles 8, 17 and 23(a) and (b) thereof, entails that an EEA State is bound by the provisions of the EEA Agreement and the acts based thereon in setting rules on the importation of raw meat products.

THE COMMISSION

53 The Commission submits that Chapters 2 and 4 of Part II of the EEA Agreement extend the scope of the agreement to include agricultural and food products. Articles 17 and 23(a) refer to Annexes I and II, respectively, thereby giving effect to the Directive and related legislation. The inclusion of those articles of the EEA Agreement would be rendered ineffective and meaningless if the EEA States could elect not to apply them. It is in this context that the scope of Article 8(3) EEA must be understood.

54 Furthermore, the Commission continues, an uncertainty concerning the scope of those articles is dispelled by Article 18 EEA, which specifically provides that those articles apply to products other than those covered by Article 8(3) EEA, and that they shall not be compromised by other technical barriers to trade.

55 As the Commission understands it, it is therefore clear from the intention of the EEA Agreement that agricultural and food products may be captured by specific provisions incorporated into Part II of the EEA Agreement.¹² Consequently, an EEA State is obliged to fully apply and implement the provisions of Chapters 2 and 4 of Part II of

12 Reference is made to *HOB-vín*, cited above, paragraph 27.

the EEA Agreement and the legal acts referred to in Annexes I and II. With regard to veterinary checks on raw meat, the provisions of the Directive apply. An EEA State does not have discretion to substitute or supplement those provisions with its own national rules.

56 The Commission proposes the following answer to the first question:

The field of application of the EEA Agreement, as defined in Article 8 thereof, does not entail that a Member State of the Agreement has discretion regarding the setting of rules on the importation of raw meat products but is, in this respect bound by the provisions of the Agreement and the acts based thereon.

QUESTION 2

57 By its second question, which arises in the case of a negative answer to the first question, the referring court asks, in essence, whether requirements imposed on the importer of raw meat, such as those contained in Articles 3 to 5 of the Icelandic Regulation, are compatible with the Directive.

THE PLAINTIFF

58 The plaintiff argues that it is clear from the wording of the Directive and the consistent interpretation of its Article 5 that the Directive exhaustively harmonises the veterinary checks that can take place in the State of destination of the products covered by the Directive.¹³ The Directive does not contain any provision that would allow EEA

13 Reference is made to Cases C-186/88 *Commission v Germany* [1989] ECR 3997; C-102/96 *Commission v Germany* [1998] ECR I-6871; C-111/03 *Commission v Sweden* [2005] ECR I-8789; and C-455/06 *Danske Slagterier* [2009] ECR I-2119.

States to impose stricter rules, save “protective measures” which are temporary by nature and strictly circumscribed. Furthermore, the European Court of Justice (“the ECJ”) has held that a detailed and harmonised system of health inspections of fresh meat replaces all other inspection systems existing within the country of destination.¹⁴

- 59 In this regard, the plaintiff argues that, in areas where European legislation provides for harmonisation, recourse to justification under Article 36 of the Treaty on the Functioning of the European Union (“TFEU”), corresponding to Article 13 EEA, is not available.¹⁵
- 60 In the plaintiff’s view, the administrative formalities mentioned in the question referred constitute veterinary checks within the meaning of Article 2 of the Directive. As those requirements constitute obligations that go beyond the controls permitted at the place of destination under Article 5 of the Directive, they are not permitted.
- 61 The plaintiff contends that the ECJ has ruled that similar additional veterinary checks placed on imports of animal products are not compatible with harmonised rules on veterinary checks.¹⁶ The reasoning in those cases shows that even a prior notification system is not in line with the requirements of the Directive. Thus, it must be clear that a prior authorisation system, such as the one at issue, is incompatible with the Directive.
- 62 Moreover, the plaintiff submits that the administrative formalities require importers to fulfil certain substantive conditions. That is not

14 Reference is made to *Commission v Sweden*, cited above, and Joined Cases C-277/91, C-318/91 and C319/91 *Ligur Carni and Others* [1993] ECR I-6621.

15 Reference is made to Cases C-52/92 *Commission v Portugal* [1993] ECR I-2961, 251/78 *Denkavit Futtermittel* [1979] ECR 3369 and C-1/96 *Compassion in World Farming* [1998] ECR I-1251.

16 Reference is made to Case C-186/88 *Commission v Germany* and *Commission v Sweden*, both cited above.

permitted under Article 5 of the Directive, as veterinary checks in the State of destination can only aim at verifying, by means of non-discriminatory veterinary spot-checks, that the requirements of Article 3 of the Directive have been complied with, that is whether the product has been obtained, checked, marked and labelled in accordance with EEA rules. EEA States cannot therefore impose checks that do not find their basis in EEA rules. In the plaintiff's view, there is no basis in those rules for the requirement in Article 5(c) of the Icelandic Regulation to demonstrate that products have been stored frozen for a certain period of time prior to customs clearance.

- 63 Against that background, the plaintiff concludes that the administrative formalities at issue and the imposition of substantive requirements on the importers, such as the obligation to freeze raw meat, are in breach of Article 5 of the Directive.

THE DEFENDANT

- 64 The defendant submits that the Directive was enacted with a view to completing the internal market and pursuing the common agricultural policy.¹⁷ In the EEA there is no internal market for the products at issue and there is no common agricultural policy. The products at issue do not enjoy a right to free movement within the EEA. The isolated geographical location of Iceland and the immunological vulnerability of the country's animal population is also reflected by the numerous acts in Annex I to the EEA Agreement that are not applicable to Iceland. Thus, the specific EEA context of the Directive and the special circumstances of Iceland must be taken into account when interpreting the Directive.¹⁸

17 Reference is made to Case C-102/96 *Commission v Germany*, paragraph 27, and *Commission v Sweden*, paragraph 42, both cited above.

18 Reference is made to Case C-128/94 *Hönig* [1995] ECR I-3389, paragraph 9, and *L'Oréal*, cited above, paragraph 28.

- 65 The defendant observes that the matter in dispute in the main proceedings concerns the “freezing certificate”. However, it is not clear from the reference from the District Court for what reason all the Icelandic rules concerning the import of raw meat should be reviewed in the light of the Directive in the present proceedings.
- 66 As regards the “freezing certificate” at issue, the defendant submits that the certificate does not discourage imports of raw meat, as can be seen from the increasing volume of imported meat over the last ten years. Moreover, the certificate does not seek to double-check compliance with requirements that have been checked in the State of dispatch. Iceland has full trust in the veterinary checks that are conducted in other EEA States by virtue of the common EEA rules. The certificate only seeks to take care of the very special situation of Iceland. That objective lies beyond the EEA rules.
- 67 Against that background, the defendant submits that the requirement that a “freezing certificate” be presented at import does not come within the scope of the Directive.

ESA

- 68 ESA essentially shares the observations on the second question submitted by the plaintiff. In addition, it has submitted observations on the compatibility with the Directive of Article 5(e), (f) and (g) of the Icelandic Regulation.
- 69 In relation to the salmonella certificate required under Article 5(e) of the Icelandic Regulation, ESA observes that, according to Article 8 of Regulation (EC) No 853/2004, EEA States may impose additional guarantees in respect of salmonella only if they meet certain requirements. Such additional guarantees have been established for Finland and Sweden, and there is a possibility for other EEA States to apply them if they have a control programme recognised as equivalent to that approved in Finland and Sweden. Iceland has

submitted to ESA a national control programme for salmonella in poultry and poultry products, but it has not applied for a recognition of equivalence to that approved in Finland and Sweden. Iceland may therefore not apply the additional guarantees provided for in Article 8 of that regulation.

- 70 In relation to Article 5(f) of the Icelandic Regulation and the requirement that the products mentioned therein conform to the regulation on food contaminants, ESA notes that the EEA legislation on contaminants in food sets out maximum levels for certain contaminants.¹⁹ That legislation does not contain any provisions giving EEA States a legal basis to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with the current legislation on food contaminants.
- 71 ESA understands Article 5(g) of the Icelandic Regulation to the effect that this entails a systematic obligation for the importer to present to the Food and Veterinary Authority photographs/pdf documents illustrating the packaging. ESA notes that the EEA legislation on the labelling of foodstuffs²⁰ does not provide a legal basis for EEA States to impose on importers the completion of a systematic procedure to demonstrate that food products are in conformity with legislation on labelling.
- 72 Consequently, ESA submits that the substantive requirements imposed on the importer under Article 5(c), (e), (f) and (g) of the Icelandic Regulation do not find a legal basis in EEA law and go

19 Reference is made to Regulation (EEC) No 315/93 and Regulation (EC) No 1881/2006, referred to at points 54f and 54zzzz, respectively, of Chapter XII of Annex II to the EEA Agreement.

20 Reference is made to Regulation (EU) No 1169/2011, referred to at point 86 of Chapter XII of Annex II to the EEA Agreement.

beyond the veterinary checks allowed under Article 5 of the Directive.

- 73 ESA rejects Iceland's argument that, since there remain border controls in the EEA in the form of customs controls, the Directive cannot be read as excluding systematic border controls. In ESA's view, the existence of customs controls on agricultural goods by EFTA States cannot justify the existence of additional veterinary checks. Customs controls and veterinary checks follow different purposes and operate in different spheres of the EEA Agreement.
- 74 ESA proposes that the Court should answer the second question as follows:

It is not compatible with the provisions of [the Directive] that an EEA State requires an importer of raw meat products to apply for a special permit before the products are imported, and to submit, for this purpose, of an import declaration, information on the country of origin and production, the type of product and the producer, and certain certificates, including a certificate confirming that the products have been stored frozen for a certain period prior to customs clearance.

THE COMMISSION

- 75 The Commission submits that the rules and requirements in question fall within the definition of veterinary checks under Article 2 of the Directive. The Directive's aim, expressed in recital 4 of its preamble, to harmonise the basic requirements relating to the safeguarding of public health and animal health is incompatible with the notion that an EEA State has discretion to impose additional rules or alternative requirements on those trading in animal products.²¹

²¹ Reference is made to *Commission v Sweden*, cited above, paragraph 63.

- 76 In the Commission’s view, the Directive provides for a uniform, harmonised method for the application of EEA rules relating to veterinary checks of animal products traded within the area to which the EEA Agreement applies.²² Within the context of this harmonised system, the scope for an EEA State to impose additional controls or requirements with respect to products being imported into its territory is strictly limited.²³ The checks that may be carried out at the place of destination are described in Article 5 of the Directive. EEA States are given no discretion to impose more rigorous measures, save for “protective measures” which are temporary in nature and are required to control an established outbreak of a zoonosis or disease or a cause likely to constitute a serious hazard to animals or humans. Furthermore, as the Directive has exhaustively harmonised the regulatory regime for veterinary checks for animal products, the imposition of additional requirements or rules by the EEA State of destination cannot be justified under Article 13 EEA or Article 36 TFEU.²⁴
- 77 According to the Commission, the kind of rules and requirements described by the national court appear not to fall within the type of checks permitted by Article 5 of the Directive. Insofar as the requirements are systematic, they cannot be described as spot-checks, and as such go beyond what is permissible pursuant to Article 5. In particular, the requirement that the product must have been stored frozen for a certain period of time prior to customs clearance is wholly outside and beyond what is required under the Directive or any act to which it refers.

22 Reference is made to Cases C-186/88 *Commission v Germany*, C-102/96 *Commission v Germany*, paragraphs 26 and 27, and *Commission v Sweden*, paragraph 51, all cited above.

23 Reference is made to *Commission v Sweden*, cited above, paragraph 52.

24 Reference is made to *Commission v Portugal*, paragraph 17, *Denkavit Futtermittel*, paragraph 14 and *Compassion in World Farming*, paragraph 47, all cited above.

- 78 Furthermore, the Commission maintains that the ECJ has held that rules similar to those set out in the question referred are not compatible with harmonised rules on veterinary checks.²⁵
- 79 The Commission proposes that the second question should be answered as follows:

It is not compatible with the provisions of [the Directive] that a Member State of the EEA Agreement should set rules demanding that an importer of raw meat products applies for a special permit before the products are imported, and require the submission, for this purpose, of an import declaration, information on the country of origin and production, the type of products and the producer, and the required certificates, including a certificate confirming that the products have been stored frozen for a certain period of time prior to customs clearance.

QUESTION 3

- 80 By its third question, the referring court asks whether the provisions of the Regulation are relevant in answering the second question.

THE PLAINTIFF

- 81 The plaintiff submits that the disputed administrative formalities must be considered in the light of the aim of food law, laid down in Article 5(2) of the Regulation, that is to achieve the free movement in the EEA of food and feed manufactured or marketed according to the general principles and requirements in Chapter II of the Regulation. According to the plaintiff, the disputed measures fail to satisfy the requirements of risk analysis and risk assessment laid down in Article 6(1) and (2) of the Regulation.

25 Reference is made to *Commission v Sweden*, cited above, paragraphs 58 and 63.

- 82 The plaintiff also challenges the defendant's application of the precautionary principle in Article 7 of the Regulation. Neither the conditions in Article 7(1) for provisional risk management measures, nor the limits applying under Article 7(2) to the contents and duration of such measures, have been respected as regards the disputed measures.
- 83 Finally, the plaintiff refers to Chapter III of the Regulation, establishing the European Food Safety Authority ("EFSA"). In the plaintiff's view, the EFSA undoubtedly plays an important role in maintaining harmonisation concerning food safety and relevant criteria concerning food and feed safety in the internal market. Therefore, the responsibility concerning this matter rests with EFSA, not unilaterally with individual EEA States.

THE DEFENDANT

- 84 The defendant submits that the Regulation lays down general principles and requirements for food law with which Iceland complies. The requirement of a "freezing certificate" is nevertheless not affected by the Directive. Accordingly, the defendant submits that the Regulation does not alter the answer to the second question.

ESA

- 85 ESA submits that the Regulation sets out the general principles and requirements of food safety legislation, and that it relies on more specific EEA legislation setting requirements destined to ensure the safety of foodstuffs placed on the market in the EEA. It is primarily those specific rules, such as the Hygiene Package, which determine, as far as food safety is concerned, whether foods of animal origin can be placed on the market. That is confirmed by Article 14(7) of the Regulation. It also follows from case law that the Regulation is

inapplicable to the extent to which an EEA rule contains specific provisions for certain categories of foodstuffs.²⁶ ESA submits therefore that the Regulation is not relevant as such for the purpose of assessing the conformity of national measures with the Directive.

- 86 ESA proposes that the Court should answer the third question as follows:

The provisions of [the Regulation] are not relevant in answering the second question.

THE COMMISSION

- 87 The Commission submits that the Regulation is not intended to supersede more specific regulation. In fact it relies on more specific regulation to determine whether food meets the requisite standard in order to be placed on the market, cf. Article 14(7) of the Regulation.²⁷ Accordingly, any provision of the Regulation concerning checks on meat products is precluded to the extent to which a specific provision in the Directive applies.

- 88 The Commission proposes that the third question should be answered as follows:

The provisions of [the Regulation] are not relevant in answering the second question.

26 Reference is made to Joined Cases C-211/03, C-299/03 and C-316/13 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 39.

27 Reference is made to *HLH Warenvertrieb and Orthica*, cited above, paragraphs 38 and 39.

QUESTION 4

89 By its fourth question, the referring court asks, in essence, whether a national prohibition on the import of raw meat constitutes a technical barrier to trade under Article 18 EEA.

THE PLAINTIFF

90 The plaintiff submits that the requirement of a “freezing certificate” is in breach of Article 18 EEA, in that it constitutes a technical barrier to trade, in other words, it imposes a requirement of the same kind as the arrangements laid down in Annex I to the EEA Agreement.

91 Annex I contains numerous acts dealing with animal health protection, which serve the same purpose as the obligation to freeze all meat products. These acts constitute a coherent and harmonised approach to animal health protection so that individual EEA States do not need to adopt restrictive national measures. By maintaining the requirement of a “freezing certificate”, Iceland departs from this harmonised approach and compromises the objectives of this body of rules. The same applies to other additional requirements for importing meat to Iceland, for example the obligation to demonstrate that the imported product is free of salmonella, requirements concerning food contaminants and labelling, etc.

THE DEFENDANT

92 The defendant submits that a prohibition, or a conditional prohibition, on the import of raw meat must be assimilated to a quantitative restriction within the meaning of Article 11 EEA.²⁸

28 Reference is made to Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraphs 11 to 13.

However, the prohibition on technical barriers to trade laid down in Article 18 EEA cannot be equated with the terms of Article 11 EEA.²⁹ This means that the obligation under Article 18 EEA to refrain from technical barriers to trade is not relevant for the determination of Iceland's compliance with EEA law in the present case.

- 93 The defendant further submits that a ban on imports does not constitute a measure of the same kind as veterinary checks envisaged by the Directive. The import prohibition is not a veterinary check of any kind, as it relates to the protection of a unique status in the country of import, allowing ample time to prevent irreparable harm and not physically examining the imported goods. In the defendant's view, since Article 18 EEA deals with products which are not included within the scope of the free movement of goods, it allows EEA States to introduce other measures. In this context, Article 13 EEA is applicable.
- 94 According to the defendant, the term technical barriers to trade must primarily mean a situation where the State concerned uses remedies or measures to discriminate against the import of agricultural products for the benefit of domestic production of the same type. The defendant submits that this is not the case here, as the disputed measures are only adopted to protect animal populations and public and animal health.

ESA

- 95 ESA stresses its conclusion that the Icelandic legislation breaches the Directive and cannot be justified under Article 13 EEA. A response to the fourth, fifth and sixth question is therefore strictly not necessary and the observations related to Article 18 and 13 EEA should be considered only in the event that the Court were not to consider the

29 Reference is made to *Pedicel*, cited above, paragraph 27.

Directive to exhaustively harmonise veterinary checks and/or the Court were not to find a breach of Article 5 of the Directive. ESA furthermore considers the combination of the provisions referred to in the fourth and fifth questions to establish an authorisation procedure. It therefore provides a joint answer to those two questions.

- 96 ESA submits that the Icelandic measures are technical barriers to trade, in that they entail requirements of the same kind as those imposed in acts referred to in Annex I to the EEA Agreement.³⁰ The authorisation system constitutes veterinary checks for fresh meat which are additional to those provided for in the harmonised system for veterinary checks on products of animal origin traded in the EEA established by the Directive. Furthermore, the requirements laid down in Article 5(c), (e), (f) and (g) of the Icelandic Regulation all constitute additional requirements of the same kind as those provided for and implemented in the EEA legislation.
- 97 Consequently, ESA submits that the authorisation procedure and related requirements represent technical barriers to trade within the meaning of Article 18 EEA.
- 98 ESA proposes the following answer to the fourth and fifth questions:

A measure, such as that in Article 10 of [the Act] read in conjunction with Articles 3 to 5 of [the Icelandic Regulation] in place in Iceland, in the form of a systematic authorisation procedure for operators who want to import raw meat into Iceland, constitutes an obstacle to trade in the form of a “technical barrier” within the meaning of Article 18 EEA.

30 Reference is made to *Pedicel*, cited above, paragraph 27.

THE COMMISSION

99 The Commission submits that the reference in Article 18 EEA to other technical barriers to trade should be construed as any additional rules or requirements imposed of the same kind as the arrangements or acts cited in the relevant annexes.³¹ The Directive is such an arrangement referred to in Article 18 EEA. It provides a comprehensive and harmonised system for veterinary checks for products of animal origin traded within the EEA. It thus follows that rules or technical requirements imposed concerning veterinary checks for raw meat, which come in addition to those provided for in the Directive, should be considered as other technical barriers to trade.

100 The Commission proposes the following answer to the fourth question:

It constitutes a technical barrier to trade in the sense of Article 18 EEA if an EEA State sets rules under which the importation to that State of raw meat products is not permitted.

QUESTION 5

101 The essence of the fifth question referred is whether it affects the answer to the fourth question if the rules of the EEA State of destination permit the granting of exceptions from the general prohibition on the import of raw meat.

THE PLAINTIFF

102 The plaintiff maintains that applicable Icelandic law provides no exception from the prohibition on the import of raw meat products

³¹ Reference is made to *Pedidel*, cited above, paragraph 27.

to Iceland. Even if there were such an exception, the main rule of prohibition would still constitute a technical barrier to trade. Nevertheless, a case-by-case assessment would be necessary, and the scope of such exception or exceptions could influence that assessment.

THE DEFENDANT

103 For the purposes of the present case, the defendant interprets the fifth question as asking whether the requirement that a “freezing certificate” be presented at import amounts to a technical barrier to trade within the meaning of Article 18 EEA. Such a requirement would, in the defendant’s view, be a physical barrier to trade rather than a technical barrier, at least according to the terminology that was current when the EEA Agreement was negotiated.

THE COMMISSION

104 The Commission stresses the fact that any rule which imposes further requirements of the same kind as those requirements provided for under the acts set out in Annexes I or II, in so far as they relate to trade in raw meat, must be considered a technical barrier to trade pursuant to Article 18 EEA. In connection with Article 13 EEA, the Commission submits that the rules concerning veterinary checks of products of animal origin traded within the EEA have been fully harmonised by the Directive. Accordingly, an EEA State is not permitted to impose rules or requirements concerning the import of raw meat that go beyond the requirements under the Directive.³² An EEA State cannot circumvent the legal effects of

32 Reference is made to *Danske Slagterier*, cited above, paragraph 25.

harmonisation by invoking either the precautionary principle or Article 13 EEA.³³ A rule imposed by an EEA State of destination prohibiting the import of raw meat cannot therefore be justified on the grounds that it constitutes an exception to the general prohibition on technical barriers to trade.

105 The Commission proposes the following answer to the fifth question:

It does not affect the answer to the fourth question if it is permitted, under the rules of the EEA State of destination, to grant exceptions from the general prohibition referred to in that question.

QUESTION 6

106 By its sixth question, which arises if Article 18 EEA is considered to apply, the referring court asks, in essence, whether and under what circumstances a system such as that described in the fourth and fifth question could be justified under Article 13 EEA, and what the requirements of proof are in that regard, particularly in the light of the precautionary principle of EEA law.

THE PLAINTIFF

107 The plaintiff submits that even though EEA States may decide on the level of protection they intend to provide for the legitimate interest pursued, they must nevertheless comply with the principle of proportionality.³⁴ An EEA State imposing a national ban or an authorisation system for a particular product must therefore show that the restriction is limited to what is necessary to attain the

33 Reference is made to Case C-102/96 *Commission v Germany*, paragraphs 21 and 22, and *Commission v Sweden*, paragraph 51, both cited above.

34 Reference is made to Cases E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86 and C-41/02 *Commission v Netherlands* [2004] ECR I-11375.

legitimate aim of protection of public health, and that the aim cannot be achieved by any other means that would have a less restrictive effect on intra-EEA trade.³⁵ Furthermore, according to settled case law, decision makers may not base their decisions on a “zero risk” approach.³⁶

- 108 In the plaintiff’s view, the restrictions placed on the import of meat to Iceland, for example the “freezing requirement”, are not proportionate to the risk addressed. In relation to the pathogens identified in the risk assessments presented by Iceland, harmonised measures have already been laid down in current EEA legislation.³⁷ Those measures minimise the risk of products originating in the EEA introducing a number of the diseases identified in the risk assessment.
- 109 The plaintiff contends that restrictions imposed on the basis of the precautionary principle should only be of a provisional nature, pending the availability of more reliable scientific data.³⁸ However, the Icelandic rules on import of meat are not provisional in nature and do not depend on the development of scientific knowledge.
- 110 Finally, the plaintiff submits that the burden of proof regarding the legal and factual basis for measures under Article 13 EEA, is borne by

35 Reference is made to Cases C-270/02 *Commission v Italy* [2004] ECR I-1559 and 104/75 *de Peijper* [1976] ECR 613.

36 Reference is made to Cases T-257/07 *France v Commission* [2011] ECR II-5827, T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305 and T-70/99 *Alpharma v Council* [2002] ECR II-3495.

37 Reference is made by way of example to Regulation (EC) No 853/2004 and Regulation (EC) No 2160/2003 (as regards salmonella), Directive 2002/60/EC (as regards African swine fever), Directive 2001/89/EC (as regards classical swine fever), and Directive 2005/94/EC (as regards avian influenza), referred to at point 17 of subchapter 6.1, point 8b of subchapter 7.1, point 9b of subchapter 3.1, point 3 of subchapter 3.1 and point 5a of subchapter 3.1, respectively, of Chapter I of Annex I to the EEA Agreement.

38 Reference is made to Case C-504/04 *Agraproduktion Staebelow* [2006] ECR I-679.

the EEA State. An EEA State banning the import of raw meat must prove beyond any doubt that the import of such meat would seriously jeopardise human health and the wellbeing of animals. The plaintiff contends that Iceland has failed to demonstrate such a risk. Consequently, the plaintiff argues that the measures at issue are not justified under Article 13 EEA.

THE DEFENDANT

- 111 According to the defendant, an EEA State may aim at a very high level of protection of public and animal health and biodiversity.³⁹ The measures adopted must nevertheless be suitable and necessary for attaining that level of protection. As the referring court is closer to the matters of law and fact in the main proceedings, that court is in a better position to conduct the proportionality review.⁴⁰ This conclusion is also supported by the clear separation of functions on which Article 34 SCA is based.
- 112 The defendant contends that when applying Article 13 EEA concerning agricultural products, it must be kept in mind, first, that the EU agricultural policy does not as such fall within the scope of the EEA Agreement. The EEA Agreement was never intended nor drafted to reduce or concede the health requirements that apply to Iceland for specific reasons. Second, Article 13 EEA and related case law apply primarily to products for which there is an internal market in the EEA. In the defendant's view, Article 13 EEA cannot therefore be interpreted in the same stringent manner in the field of

39 Reference is made to Cases C-67/97 *Bluhme* [1998] ECR I-8033, paragraph 33, and E-16/10 *Philip Morris Norway* [2011] EFTA Ct. Rep. 330, paragraph 77.

40 Reference is made to *Philip Morris Norway*, cited above, paragraph 86, and Case C-405/98 *Gourmet* [2001] ECR I-1795, paragraph 33.

agricultural products as it is in relation to goods covered by the provisions on free movement.

- 113 The defendant argues further that where there is uncertainty as to the existence or extent of risks to public or animal health, an EEA State is entitled to take protective measures without having to wait until the reality of those risks become fully apparent. It suffices therefore to demonstrate that it is reasonable to assume that the measure can contribute to the protection of public and animal health.⁴¹
- 114 The defendant submits that when the harmonisation of rules is absent and there is scientific uncertainty with regard to the risk in question, it is for the EEA States to decide what degree of protection of human health they intend to assure, having regard to the fundamental requirements of EEA law, notably the free movement of goods. It is within the discretion of the EEA State to decide as to the level of risk it considers appropriate.⁴² The defendant argues that the discretion should be even wider where the principle of free movement of goods does not apply.
- 115 The defendant asserts therefore that it maintains all its rights to safeguard full public and animal health in conformity with Article 18 EEA read in conjunction with Article 13 EEA. Iceland is not obliged to bear the risk of incidents that may cause irreparable harm to the animal populations in Iceland and/or considerably undermine public and animal health. When there is scientific uncertainty concerning risk, the onus of proof is on the party causing the risk to show that Iceland has gone to unnecessary lengths in its decision to counteract the risk.

41 Reference is made to *Philip Morris Norway*, cited above, paragraphs 82 and 83.

42 Reference is made to Case E-3/00 *ESA v Norway* [2000-2001] EFTA Ct. Rep. 73.

- 116 According to the defendant, the measures at issue do not serve to ensure perfect absence of risk. However, Iceland can best safeguard its interests by maintaining protection in accordance with new scientific data on the causes of the dangers for animal populations and human health. The expert opinions obtained and submitted to ESA during the earlier infringement proceedings demonstrate that scientific research and evaluation support the measures taken by Iceland. However, this is for the national court to assess.
- 117 The defendant consequently submits that the objectives pursued by the requirement of a “freezing certificate” are fully justifiable under Article 13 EEA and that it is for the referring court to review the proportionality of the requirement.

ESA

- 118 ESA asserts that in harmonised fields of European legislation, recourse to justifications under Article 13 EEA is not available.⁴³ However, if the Directive is considered not to harmonise veterinary checks exhaustively, ESA submits that the Icelandic rules on the import of raw meat products cannot be justified under Article 13 EEA.
- 119 ESA notes that Article 13 EEA, being an exception from Article 18 EEA, should be interpreted narrowly, and the burden to prove that the measure is justified lies with the EEA State.⁴⁴ Although the EEA States can decide on the level of protection they intend to provide for the legitimate interest pursued,⁴⁵ they must comply with the

43 Reference is made to *Compassion in World Farming*, cited above, paragraph 47.

44 Reference is made to *Commission v Italy*, paragraph 22, and *Commission v Netherlands*, paragraph 47, both cited above.

45 Reference is made to *Ladbroke's*, cited above, paragraph 42.

principle of proportionality.⁴⁶ EEA States imposing a ban on a product or subjecting it to an authorisation system must show that the measure is appropriate and limited to what is necessary to attain the legitimate aim pursued, in this case the protection of public and animal health.⁴⁷ This includes an obligation to provide the relevant evidence.⁴⁸

120 ESA alleges that the two risk assessments submitted by Iceland during the infringement procedure, dealing with animal health and public health respectively, do not support the view that unrestricted import of meat and meat products causes a risk to the Icelandic livestock or to public health that ought to be controlled with a systematic authorisation procedure. As decisions may not be based on a “zero risk” approach, ESA maintains that the Icelandic measures are not proportionate to the objective pursued.⁴⁹

121 With regard to animal health, ESA submits that, according to the risk assessment, the main risk of spreading pathogens is linked to the keeping of hobby pigs or backyard poultry, which appears to be a growing trend in Iceland. On the other hand, the risk to the commercial herds is negligible. Furthermore, most of the pathogens posing a non-negligible risk would survive freezing for a 30-day period. Therefore, the “freezing requirement” does not appear to be suitable and necessary to eliminate the risk of infection of Icelandic livestock.

122 With regard to public health, ESA considers that, although the risk assessment concludes that the possibility cannot be excluded that

46 Reference is made to *Commission v Netherlands*, cited above, paragraph 46.

47 Reference is made to *de Peijper*, cited above, paragraph 17.

48 Reference is made to *Commission v Italy*, cited above.

49 Reference is made to *France v Commission*, paragraph 79, *Pfizer Animal Health v Council*, paragraphs 139 and 141, and *Alpharma v Council*, paragraphs 152 and 154, all cited above.

the import of raw beef, pork and broiler meat from the EU could have a negative impact on public health in Iceland, the report does not address the question of the necessity and appropriateness of a general and highly restrictive authorisation system such as the one at issue, nor the substantive requirements necessary in order to obtain an import authorisation.

123 ESA submits further that, as regards the pathogens identified in the risk assessments presented by Iceland, there are already harmonised measures laid down in current EEA legislation.⁵⁰ As also Iceland acknowledges, these measures minimise the risk that products originating in the EEA will introduce a number of the diseases identified in the risk assessment. However, Iceland has not provided information establishing that the freezing requirement is appropriate and necessary in this context and that no less restrictive measures are available.

124 ESA contends that resort to the precautionary principle is conditional upon an identification of the potentially negative consequences for health and a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research.⁵¹ Measures taken must be based on scientific evidence, and they must be proportionate, non-discriminatory, transparent and consistent with similar measures already taken.⁵²

125 In ESA's view, Iceland has not provided information in the present case that would establish a scientific uncertainty. The measures are based solely on the hypothesis that the possibility cannot be

50 Reference is made by way of example to Directive 2002/60/EC (as regards African swine fever), Directive 2001/89/EC (as regards classical swine fever) and Directive 2005/94/EC (as regards avian influenza).

51 Reference is made to Cases C-333/08 *Commission v France* [2010] ECR I-757, paragraph 92, and C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 60.

52 Reference is made to *ESA v Norway*, cited above, paragraphs 26, 30 and 32.

excluded that the import of fresh meat and meat products from the EEA could have a negative impact on the public and animal health in Iceland. However, a preventive measure cannot be based on a hypothetical approach, founded on a mere assumption which has not been scientifically verified.⁵³

126 Finally, ESA notes that there is nothing to indicate that the Icelandic rules on import of meat are provisional in nature and that maintenance of the measures depends on the development of scientific knowledge, as required in the case of measures adopted under the precautionary principle.⁵⁴

127 ESA concludes that, if Article 18 EEA is considered applicable, the information provided in the request for an Advisory Opinion as well as in the course of the infringement proceedings strongly indicates that the national measures fail to meet the proportionality test inherent in Article 13 EEA.

128 ESA proposes that the sixth question is answered in the following manner:

In case Article 18 EEA applies, a measure, such as that in Article 10 of [the Act] read in conjunction with Article 3 to 5 of [the Icelandic Regulation], as it is not suitable, necessary and proportionate to attain the aim of protecting public and animal health, cannot be regarded as being justified under Article 13 EEA.

53 Reference is made to *Pfizer Animal Health v Council*, paragraph 143, and *Commission v France*, paragraph 91, both cited above, and to Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 106.

54 Reference is made to *Agraproduktion Staebelow*, cited above, paragraph 40, Case C-601/11 P *France v Commission*, judgment of 11 July 2013, published electronically, paragraph 110, and Communication from the Commission of 2 February 2000 on the precautionary principle, COM(2000) 1 final, p. 1.

THE COMMISSION

129 The Commission considers the sixth question to be moot and suggests that it should not be considered by the Court.

Per Christiansen
Judge-Rapporteur