JUDGMENT OF THE COURT

9 October 2002[*]

(Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee)

In Case E-6/01,

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

CIBA Speciality Chemicals Water Treatment Ltd and Others

and

The Norwegian State, represented by the Ministry of Labour and Government Administration

on the interpretation of:

- Articles 92, 93, 98 and 102 of the EEA Agreement;

- Article 97 of the Rules of Procedure of the Court;

- Articles 1 and 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter, the "Surveillance and Court Agreement");

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[*] Language of the Request for an Advisory Opinion: English.

- Annex II, Chapter XV (Dangerous substances), Point 1, in particular the statement concerning possible derogations by an EFTA State from the Community acts relating to classification and labelling of dangerous substances;

- Joint Statement by the EEA Joint Committee adopted on 22 June 1995, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances (OJ 1996 C 6, p. 7) (hereinafter, the "1995 Joint Statement"), in particular Annex II to that Joint Statement, providing for certain derogations by Norway; and,

- Joint Statement by the EEA Joint Committee adopted on 26 March 1999, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances (OJ 1999 C 185, p. 6) (hereinafter, the "1999 Joint Statement"), in particular the Annex to that Joint Statement, providing for certain derogations by Norway,

THE COURT,

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

Registrar: Lucien Dedichen,

having considered the written observations submitted on behalf of:

– the Plaintiffs, CIBA Speciality Chemicals Water Treatment Ltd and Others, represented by Wilhelm Matheson, advokat;

– the Defendant, the Norwegian State, represented by Thomas Nordby, advokat, Office of the Attorney General (Civil Affairs);

– the Government of Iceland, represented by Magnús K. Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs, acting as Agent, assisted by Bjarnveig Eiríksdóttir, Senior Officer, and Per Andreas Bjørgan, Officer, Legal and Executive Affairs;

– the Commission of the European Communities, represented by John Forman, Legal Adviser, Legal Service, acting as Agent;

having regard to the Report for the Hearing; and,

having heard the oral argument of the Plaintiff, represented by Wilhelm Matheson; the Defendant, represented by Thomas Nordby; the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir; and the Commission of the European Communities, represented by John Forman, at the hearing on 30 May 2002;

gives the following

Judgment

I Facts and procedure

1 By a reference dated 22 August 2001, registered at the Court on 31 August 2001, Oslo byrett made a request for an advisory opinion in a case pending before it between CIBA Speciality Chemicals Water Treatment Ltd and Others (hereinafter, the "Plaintiffs") and the Norwegian State, represented by the Ministry of Labour and Government Administration (hereinafter, the "Defendant").

2 The dispute before the national court involves the issue of whether the EEA Agreement prevents the Defendant from requiring the Plaintiffs to label the substance polyacrylamide as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by weight.

3 The Court has previously dealt with a request for an advisory opinion from Oslo byrett in the same case, Case E-2/00 *Allied Colloids and Others* v *The Norwegian State*, judgment of 14 July 2000, not yet reported (hereinafter, "*Allied Colloids*"). Allied Colloids have meanwhile been succeeded by CIBA Speciality Chemicals Water Treatment Ltd.

4 In *Allied Colloids*, Oslo byrett referred the following question to the EFTA Court:

> *Does the Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV, Annex II with subsequent amendments, to the EEA Agreement give Norway the power to introduce a labelling requirement for polyacrylamide that contains a concentration of the residual substance acrylamide which is lower than 0.1%, cf. Council Directive 67/548/EEC of 27 June 1967 with subsequent amendments and Council Directive 88/379/EEC of 7 June 1988, with subsequent amendments?*

5 The advisory opinion in *Allied Colloids* reads as follows:

> *Annex II to the Joint Statement adopted at the meeting of the EEA Joint Committee on 22 June 1995 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as not giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by total volume.*
>
> *The Annex to the Joint Statement adopted at the meeting of the EEA Joint Committee on 26 March 1999 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of equal to or greater than 0.01% by total volume.*

6 In the subsequent proceedings before Oslo byrett, the Plaintiffs have argued that the Court's judgment (advisory opinion) regarding the interpretation of the 1999 Joint Statement gives rise to a supplementary question concerning the legal basis for that Statement. The Plaintiffs have argued that the EEA Joint Committee lacked the competence to adopt for Norway any derogation that is wider in scope than that provided for in the 1995 Joint Statement.

7 Against this background, Oslo byrett decided to submit a second Request for an Advisory Opinion on the following question:

> *Is the EEA Joint Committee after the adoption of the Joint Statement of 22 June 1995, empowered to decide that Norway may adopt derogations from existing Community acquis, such as the derogations contained in the Joint Statement of 26 March 1999 of the EEA Committee as interpreted by the EFTA Court in Allied Colloids?*

8 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 EFTA Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

II Findings of the Court

9 By its question, Oslo byrett seeks to ascertain whether, in view of the 1995 Joint Statement as interpreted by the Court in *Allied Colloids*, the EEA Joint Committee was competent to adopt the 1999 Joint Statement authorising certain derogations for Norway in respect of the relevant Community rules on the classification and labelling of dangerous substances.

Admissibility

10 The Defendant has argued that the question from Oslo byrett should be declared inadmissible. Referring to Case 69/85 *Wünsche* v *Germany* [1986] ECR 947, at paragraph 15, the Defendant contends that the answer to that question is already implied in *Allied Colloids* and therefore the question essentially contests the validity of that opinion.

11 As grounds for submitting a second request for an advisory opinion in the case before it, Oslo byrett explains that the parties disagree as to whether the EEA Joint Committee was competent to adopt the 1999 Joint Statement; Oslo byrett has found no guidance on this point in *Allied Colloids*.

12 The issue of whether a national court, having received an advisory opinion, may make a further reference to the Court in the same case, has not previously been dealt with by the Court. The Court of Justice of the European Communities has held that under Community law, a further reference to that Court may be justified, *inter alia*, when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier; however, it is not permissible to use the right to refer questions as a means of contesting the validity of the earlier judgment (*Wünsche* v *Germany*, paragraph 15). The Court finds that this line of reasoning also applies in relation to the advisory opinion procedure under Article 34 of the Surveillance and Court Agreement.

13 In *Allied Colloids*, the Court drew a specific and operative conclusion based on an interpretation of the 1999 Joint Statement, thereby implicitly providing guidance on the issue of the competence of the EEA Joint Committee to adopt that Joint Statement. The advisory opinion does not discuss separately the issue of competence, or explicitly pronounce thereon. The issue of the competence of the EEA Joint Committee has become a central issue in the subsequent national proceedings, and has caused the national court to submit the current request for an advisory opinion. Since the Court did not explicitly discuss the matter in *Allied Colloids*, the present request must be considered as raising a fresh question of law. The question submitted cannot be considered as contesting the validity of the advisory opinion in *Allied Colloids*.

14 Based on the above, the Court concludes that the question is admissible.

Form of the opinion of the Court

15 The Defendant has further argued, with reference to Article 97(3) of the Rules of Procedure of the Court, that the Court should give its response to the second request for an advisory opinion from Oslo byrett by way of a reasoned order simply referring to the judgment (advisory opinion) in *Allied Colloids*.

16 Article 97(3) of the Rules of Procedure provides that where a question referred to the Court for an advisory opinion is manifestly identical to a question on which the Court has already ruled or given an opinion, the Court may give its decision by way of a reasoned order in which reference is made to its previous judgment or opinion.

17 Article 97(3) of the Rules of Procedure largely corresponds with Article 104(3) of the Rules of Procedure of the Court of Justice of the European Communities. It follows from the latter provision that questions may be answered by way of a reasoned order where, *inter alia*, the answer may be clearly deduced from existing case law.

18 As already stated, the advisory opinion given in *Allied Colloids* does not expressly deal with the competence of the EEA Joint Committee to adopt the 1999 Joint Statement. The question addressed in *Allied Colloids* can therefore not be said to be manifestly identical to the question at hand. In any event, the Court has the discretion to render its decision by way of an advisory opinion.

19 Based on the above, the Court will give its response to Oslo byrett by way of an advisory opinion.

The jurisdiction of the Court

20 The Defendant has also contended that Articles 31, 32, 34 to 37 and 39 to 41 of the Surveillance and Court Agreement, establishing the jurisdiction of the EFTA Court, are exhaustive and do not confer the competence to rule on the validity of a decision by the EEA Joint Committee; and, consequently that the Court may not rule on the question referred by Oslo byrett, as that question concerns the competence of the EEA Joint Committee to adopt the 1999 Joint Statement and consequently the validity of that Joint Statement.

21 The Court finds that the question referred by Oslo byrett relates to the interpretation of the provisions of the EEA Agreement concerning the competences of the EEA Joint Committee and to the interpretation of the provision contained in Annex II Chapter XV, Point 1. The Court has not been asked to rule on the validity of the 1999 Joint Statement of the EEA Joint Committee.

22 According to Article 34 of the Surveillance and Court Agreement, the Court has jurisdiction to give advisory opinions on the "interpretation of the EEA Agreement." Pursuant to Article 1(a) of the Surveillance and Court Agreement, the term "EEA Agreement" includes "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein." Nothing in the EEA Agreement, the Surveillance and Court Agreement or other relevant legal instruments suggests that any provision governing the functioning of the EEA

Joint Committee is excluded from the jurisdiction of the Court under Article 34 of the Surveillance and Court Agreement.

23 It follows from the above that the Court has jurisdiction to give advisory opinions on the interpretation of provisions of the EEA Agreement concerning the functioning of the EEA Joint Committee. The Court will therefore answer the question referred by Oslo byrett on the competence of the EEA Joint Committee to adopt the 1999 Joint Statement.

The question

24 The Plaintiffs have argued that the EEA Joint Committee did not have the competence to adopt the 1999 Joint Statement, since that decision provides for a derogation from the relevant Community rules on the classification and labelling of dangerous substances that is wider in scope than the derogation provided for in the 1995 Joint Statement. In the Plaintiffs' view, the Joint Committee's competence is, according to Article 102 EEA, limited to taking decisions on the amendment of Annexes to the EEA Agreement as closely as possible to new Community legislation.

25 The Court notes at the outset that Annex II, Chapter XV, Point 1 to the EEA Agreement, provides *inter alia*:

> "The Contracting Parties agree on the objective that the provisions of the Community acts on dangerous substances and preparations should apply by 1 January 1995. […] If an EFTA State concludes that it will need any derogation from the Community acts relating to classification and labelling, the latter shall not apply to it unless the EEA Joint Committee agrees on another solution."

26 The Court referred to that provision in *Allied Colloids*, and confirmed that the applicability of the relevant Community acts on dangerous substances to the EFTA States is contingent upon a further decision of the EEA Joint Committee. The Court further observed that the Joint Statements of 1995 and 1999 were adopted on the basis of that provision (see *Allied Colloids*, at paragraph 25).

27 As stated in Annex II, Chapter XV, Point 1, an EFTA State may conclude that it will need a derogation from the Community acts relating to classification and labelling of dangerous substances. In that situation, those acts shall not apply to the EFTA State unless the EEA Joint Committee agrees on another solution. That solution may comprise an extension of the transitional period applicable for the relevant Community acts, or other appropriate modifications.

28 Annex II, Chapter XV, Point 1, on the function of the EEA Joint Committee in relation to possible derogations from the Community acts on the classification and labelling of dangerous substances, must be read in conjunction with the general provisions of the main part of the EEA Agreement relating to the competence of the EEA Joint Committee.

29 Article 92(1) EEA provides that the EEA Joint Committee shall ensure the effective implementation and operation of the EEA Agreement. To this end, the EEA Joint Committee shall, *inter alia*, take decisions in the cases provided for in the EEA Agreement. Decisions shall, pursuant to Article 93(2) EEA be taken by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other.

30 Article 98 EEA provides that the Annexes to the EEA Agreement and several of the Protocols may be amended by a decision of the EEA Joint Committee in accordance with the procedure laid down in Articles 93(2), 99, 100, 102 and 103 EEA.

31 With regard to amendments to the Annexes to the EEA Agreement, Article 102(1) EEA provides that the EEA Joint Committee shall take timely decisions with a view to simultaneous application of the amendments of the Annexes and of the corresponding new Community legislation. Article 102(3) EEA further provides that the Contracting Parties shall make all efforts to agree on matters relevant to the EEA Agreement. Moreover, Article 102(4) envisages that in the event an agreement cannot be reached, the EEA Joint Committee shall take any decision necessary to maintain the good functioning of the EEA Agreement.

32 The mandate of the EEA Joint Committee under Article 92(1) EEA includes the taking of decisions in "cases provided for in this Agreement." Contrary to the Plaintiffs' contention, the wording of that provision must not be interpreted as constituting a narrow definition of the competence of the EEA Joint Committee. It cannot be assumed that the powers of the EEA Joint Committee are limited to those matters where specific powers or functions have been set out. The Court finds support for this finding, *inter alia*, in Article 102(3) EEA. The reference in that provision to "matters relevant to this Agreement" must also cover matters that are not specifically dealt with in the texts of the EEA main Agreement, its Protocols and Annexes, but nevertheless are capable of affecting the good functioning of the EEA Agreement. The operative goal under Article 102(3) EEA is to "arrive at an agreement." For this to carry any practical meaning in relation to the effective implementation and operation of the EEA Agreement, such an agreement cannot be restricted to a mere adoption of secondary Community legislation.

33 The EEA Joint Committee is designed to function as an institution working in the pursuit of the common interest of the Community side and the EFTA side. As pointed out by the Commission of the European Communities at the oral hearing, a decision of the EEA Joint Committee may constitute a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other. This supports the finding that the competence of the EEA Joint Committee cannot be restricted to adopting the relevant Community acts into the EEA legal order. The Court notes in this context that the maintenance of homogeneity within the EEA market and securing the protection of the rights of individuals and economic operators in that market constitute fundamental policy objectives of the

Contracting Parties. To attain these objectives, the competence of the EEA Joint Committee must not be overly restricted. However, the competence of the EEA Joint Committee is not unlimited. It must, in particular, be exercised within the boundaries of the EEA Agreement and with due respect for essential procedural requirements.

34 From the above considerations, the Court concludes that the EEA Joint Committee had the competence to adopt the contested decision.

35 The answer to the question asked by Oslo byrett must therefore be that the EEA Joint Committee was competent to adopt the Joint Statement of 26 March 1999, authorising certain derogations for Norway in respect of the relevant Community rules concerning classification and labelling of dangerous substances.

III Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by Oslo byrett by an order of 22 August 2001, hereby gives the following Advisory Opinion:

The EEA Joint Committee was competent to adopt the Joint Statement of 26 March 1999, authorising certain derogations for Norway in respect of the relevant Community rules concerning classification and labelling of dangerous substances.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 9 October 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President