ADVISORY OPINION OF THE COURT
3 December 1997*

(Alcohol sales – State monopolies of a commercial character – Free movement of goods)

In Case E-1/97

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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

Fridtjof Frank Gundersen

and

Oslo kommune

Supported by the **Government of the Kingdom of Norway**

on the interpretation of Articles 4, 11, 13 and 16 of the EEA Agreement.

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson and Carl Baudenbacher (Rapporteur), Judges,

Registrar: Per Christiansen,

* Language of the request for an Advisory Opinion: Norwegian.

after considering the written observations submitted on behalf of:

– the Government of the Kingdom of Norway, represented by Ingvald Falch, Office of the Attorney General (Civil Affairs);

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal & Executive Affairs Department, assisted by Rolf Helmich Pedersen, Officer of that Department, acting as Agents;

– the EC Commission, represented by Richard Wainwright, Principal Legal Adviser and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, Fridtjof Frank Gundersen, the Norwegian Government, the EFTA Surveillance Authority and the EC Commission at the hearing on 4 November 1997,

gives the following

Advisory Opinion

1 By an order dated 22 April 1997, registered at the Court on 29 April 1997, Oslo byrett, a Norwegian City Court, made a request for an Advisory Opinion in a case brought before it by Fridtjof Frank Gundersen against Oslo kommune (the Municipality of Oslo), supported by the Government of Norway, intervener on behalf of Oslo kommune, concerning the validity of a refusal by Oslo kommune to process the application for a licence to sell wine.

2 Under the Norwegian legislation, the retail sale of alcoholic beverages containing more than 2.5% alcohol by volume is governed by a licensing system which leaves it up to the respective municipalities to decide whether alcoholic beverages may be sold in the municipality, how many licences are to be granted, who is to receive such a licence, etc. However, according to section 3-1, first paragraph, of Act No. 27 of 2 June 1989 on the sale of alcoholic beverages (the “Alcohol Act”), licences to sell spirits, wine and strong beer may only be granted to Vinmonopolet A/S ("Vinmonopolet"), a wholly State-owned company. Thus, Vinmonopolet has an exclusive right for the retail sale of such products through its outlets, which currently number 112. By contrast, alcoholic beverages with less than 2.5% alcohol by volume may be sold freely, while licences to sell beer containing between 2.5% and 4.75% alcohol by volume (“medium-strength beer”) may,

according to section 3-1, second paragraph of the Alcohol Act, be granted to anyone who is entitled to trade under Norwegian trade legislation. Medium-strength beer is sold in approximately 4500 stores.

3 In December 1994, the plaintiff, Fridtjof Frank Gundersen, applied for a municipal sales licence for wine. The application was rejected as inadmissible on the grounds that the Alcohol Act does not allow municipalities to grant licences for the sale of wine to any party other than Vinmonopolet. The legality of this refusal was challenged by the plaintiff on grounds of differential treatment of wine and beer. In the plaintiff's opinion, Articles 4, 11 and 16 EEA are violated by these licensing rules. While wine, according to the plaintiff, is only allowed to be sold through approximately 100 sales outlets of Vinmonopolet, beer containing up to 4.75% alcohol per volume may be sold in over 4000 grocery shops and other outlets. Almost all of the wine sold is imported, mostly from EEA countries, while the beer sold is mainly produced in Norway.

4 The defendant argues that the action should be dismissed. The Norwegian Government, as intervener, claims that Articles 4 and 11 are not applicable to the present case. With regard to Article 16 EEA, it argues that a comparison between wine and beer cannot be made. There is furthermore no discrimination since the system is based on objective criteria not related to the origin of the products concerned. Subsidiarily, if there is discrimination, it can be justified on health-related grounds.

5 Considering that it was necessary to interpret provisions of the EEA Agreement in order to reach a decision and pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Surveillance and Court Agreement”), Oslo byrett submitted a request to the EFTA Court for an Advisory Opinion on the following questions:

1. *Is there "discrimination ... between nationals of EC Member States and EFTA States" contrary to Article 16 EEA if a national is refused the right to market red wine, white wine and rosé wine (wine) at the retail level, on the grounds that wine may only be sold at the retail level through a State commercial monopoly, in a situation where beer with an alcohol content of lower than 4.75% alcohol by volume (medium-strength beer) may be sold outside the commercial monopoly by parties who obtain a municipal licence?*

2. *If question 1) is answered in the affirmative, can alcohol policy and/or health considerations - first and foremost the wish to reduce the availability and consumption of alcohol - be grounds for the differential treatment in marketing for wine and medium-strength beer as referred to in question 1) falling outside the scope of Article 16 EEA?*

3. *(a) Does Article 4 and/or Article 11 apply to the retail sale of wine?*

(b) If question 3) (a) is answered wholly or in part in the affirmative, is the differential treatment in marketing referred to in question 1) in violation of Article 4 and/or Article 11?

(c) If question 3) (b) is answered wholly or in part in the affirmative, can alcohol policy and/or health considerations as referred to in question 2) be grounds for applying the exception rule as set out in Article 13 EEA?

6 Reference is made to the Report for the Hearing for a more complete account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 For the sake of convenience, the Court will address the third question before turning to the first and the second questions.

The third question

8 Having regard to the case law of the Court (Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 17 (hereinafter "*Restamark*")) and the provisions concerning the product coverage of the EEA Agreement (see Article 8 EEA, Article 23(b), Protocol 8 and Protocol 47) it is clear that wine does not fall within the general scope of the EEA Agreement, nor are there any other specific provisions leading to a conclusion that Article 11 EEA in particular applies.

9 With this finding, it also becomes unnecessary to examine Article 13 EEA.

10 Concerning the relationship between Articles 4 and 16 EEA, the Court notes that the latter provision is a *lex specialis* regarding the prohibition of discrimination by State monopolies.

11 Consequently, Articles 4, 11 and 13 EEA do not apply to the retail sale of wine.

The first question

12 By its first question, the national court seeks essentially to ascertain whether the criteria chosen by Norwegian authorities for determining the scope of the exclusive right of the retail monopoly for wine and beer, respectively, constitute discrimination between nationals of EC Member States and EFTA States contrary to Article 16 EEA.

13 Article 16(1) EEA reads as follows:

> *"The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States."*

14 The Court notes that the questions do not call for a general assessment of the Norwegian monopoly for the retail sale of alcoholic beverages in relation to Article 16 EEA, such as the way in which the retail monopoly is operated, etc. The questions submitted to the Court concern only the criteria chosen for having certain, but not all, alcoholic beverages sold through Vinmonopolet.

15 The *Norwegian Government* argues that Article 16 EEA is inapplicable because this provision should only apply to national rules which concern the "exercise" of Vinmonopolet's exclusive right and not to provisions that determine products over which Vinmonopolet may exercise its exclusive right.

16 In their oral observations, the *EFTA Surveillance Authority* and the *EC Commission* stated *inter alia* that the national rules establishing the scope of the exclusive right of the retail monopoly do not concern only the exercise of that exclusive right. The provisions also form part of the very foundation on which Vinmonopolet operates.

17 The *Court* notes that the ECJ has recently held that the rules relating to the existence and operation of a monopoly must be examined with reference to Article 37 EC, which is specifically applicable to the exercise by a domestic commercial monopoly of its exclusive right. On the other hand, the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, fall to be examined under Article 30 EC (see Case C-189/95, *Franzén*, not yet reported, paragraphs 35 and 36 (hereinafter "*Franzén*")).

18 The ECJ has furthermore stated that the purpose of Article 37 EC is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. It aims at eliminating obstacles to the free movement of goods, save for restrictions on trade which are inherent in the existence of the monopolies in question (see *Franzén,* paragraph 39).

19 Following this approach, it must be pointed out that Vinmonopolet enjoys and exercises the exclusive right for the retail sale of wine and strong beer. As pointed out by the EFTA Surveillance Authority, the provisions at issue define the scope and product coverage of that exclusive right. Consequently, these provisions, which define the scope of the exclusive right, are to be considered according to Article 16 EEA.

20 Before answering the question from Oslo byrett concerning Article 16, the Court notes that, as a starting point, each Member State enjoys wide freedom in formulating and implementing its chosen alcohol policies. This freedom includes broad discretion as to how restrictive the policies generally should be and the choice of criteria for restricting the retail sale of specified products. Furthermore, it is established that a Member State may restrict the retail sale of alcoholic beverages, including the availability thereof.

21 It follows from what is said in paragraph 17 above that such policies may be pursued through the use of a State retail sale monopoly. However, Article 16 EEA requires that the organization and operation of the monopoly be arranged so as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, as compared to trade in domestic goods, and so that competition between the economies of the Member States is not distorted (see the Advisory Opinions of the EFTA Court in Cases E-1/94 *Restamark* [1994-95] EFTA Court Report 17, paragraphs 63 *et seq.*; and E-6/96 *Wilhelmsen*, not yet reported, paragraphs 96 and 97 (hereinafter "*Wilhelmsen*"); and the judgment of the ECJ in *Franzén*, paragraph 40).

22 The central question in the case at hand then becomes whether the dividing lines chosen to determine which alcoholic beverages are to be sold through Vinmonopolet constitute discrimination in the sense indicated above.

23 First, the Court notes that the fact that wine containing more than 2.5% alcohol by volume may only be sold through Vinmonopolet's 112 outlets, whereas medium-strength beer containing up to 4.75% alcohol by volume is sold through more than 4500 outlets, gives sufficient grounds to conclude that there are impediments to the marketing of wine which do not exist in respect of medium-strength beer.

24 Secondly, the Court notes that almost all of the wine sold in Norway is imported, mostly from other EEA countries, while the beer sold is mostly domestically produced. It follows that the scope of the exclusive right of the Norwegian retail sale monopoly for alcoholic beverages leads in fact to a situation where producers of wine in other EEA States are adversely affected by Norwegian law compared to Norwegian producers of beer.

25 The question remains, however, whether this differential treatment constitutes discrimination within the meaning of Article 16 EEA. In order to answer that question, it is necessary to examine to what extent wine and beer are comparable products and thus entitled to equal treatment.

26 Following several rulings of the ECJ (Cases 170/78 *Commission* v *UK* [1983] ECR 2265; 124/76 and 20/77 *Moulins Pont-à-Mousson* [1977] ECR 1795; 152/78 *Commission* v *France* [1980] ECR 2299) it is not possible to exclude the existence of a competitive relationship between medium-strength beer and wine. Wine and medium-strength beer are to some extent capable of meeting identical needs and therefore are at least in partial competition with each other on the market. In the first-mentioned case, it was submitted by the Italian Government that it was inappropriate to compare beer with wines of average alcoholic strength or, *a fortiori*, with wines of greater alcoholic strength, as it was, in its opinion, the lightest wines with an alcoholic strength in the region of 9% alcohol by volume, that is to say the most popular and cheapest wines, which were genuinely in competition with beer. This observation was found to be pertinent by the ECJ, which went on to state that, in view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties.

27 Consequently, the Court is of the view that there exists, at least in part, a competitive relationship between and wines and medium-strength beer which warrants equal treatment.

28 Such equal treatment is ensured in the Norwegian legislation for all alcoholic beverages containing more than 4.75% alcohol by volume, inasmuch as all such beverages, including beer and wine, may only be sold at the retail level through Vinmonopolet. Consequently, provided that the dividing line is not set with a view to protecting domestic production (see also paragraph 30 below), restricting the retail sale of all alcoholic beverages containing more than 4.75% alcohol by volume to Vinmonopolet is not contrary to Article 16 EEA.

29 However, the Norwegian legislation institutes discriminatory measures with respect to products containing between 2.5% and 4.75% alcohol by volume, inasmuch as wine and wine products (as well as other products with an alcoholic content) are to be sold only through Vinmonopolet if they contain more than 2.5% alcohol by volume, whereas beer is only brought within the sphere of the retail monopoly if the alcoholic content exceeds 4.75% alcohol by volume.

30 It must, in the Court's opinion, lie within the discretion of the Member States to use the alcohol content of a product as a basis for differential treatment (see the Advisory Opinion of the EFTA Court in Case E-6/96, *Wilhelmsen*, paragraph 87). This is true even if the chosen dividing line affects domestic and foreign production differently, provided that the dividing line is not set with a view to protecting domestic production.

31 However, the fact that there are two dividing lines which determine where alcoholic beverages are to be sold at the retail level leads to a situation in which alcoholic beverages having the same alcohol content as, for example, wine

products and beer containing between 2.5% and 4.75% alcohol by volume, receive substantially different treatment by law. No comprehensive explanation has been offered in the present case as to the grounds for this differentiation. In the absence of any grounds for the differential treatment, the system of two dividing lines must be considered to be contrary to Article 16 EEA, and the conclusion must be drawn that wine or wine products containing between 2.5% and 4.75% alcohol by volume appear to be subject to arbitrary discrimination under the Norwegian legislation, which discrimination cannot be justified as being inherent in the existence or operation of the monopoly.

32 It is for the national court to establish the facts of the case before it which, according to the above, are relevant for the interpretation of EEA law.

The second question

33 As regards the possible justification of the system of two dividing lines under the Norwegian legislation, it is sufficient to recall that no comprehensive explanation has been offered to justify the differential treatment of beverages with the same alcoholic content.

34 For the rest of the second question submitted by the national court, the Court does not, based on the findings set out above, find it necessary to provide an answer.

Costs

35 The costs incurred by the Government of the Kingdom of Norway, 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 questions referred to it by Oslo byrett by the order of 22 April 1997, hereby gives the following Advisory Opinion:

1. **Article 16 of the EEA Agreement does not preclude national provisions according to which red wine, white wine and rosé wine containing more than 4.75% alcohol by volume may only be sold at the retail level through a State alcohol retail monopoly, whereas beer with an alcoholic content of less than 4.75% alcohol by volume (medium-strength beer) may be sold outside the State alcohol retail monopoly by parties who obtain a municipal licence. However, the system of maintaining two dividing lines under which wine or wine products with an alcohol content of between 2.5% and 4.75% alcohol by volume may only be sold through the State alcohol retail monopoly, while beer with the same alcoholic content may be sold outside the State alcohol retail monopoly, may lead to discrimination contrary to Article 16 EEA.**

2. **Articles 4, 11 and 13 EEA do not apply to the retail sale of wine.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 3 December 1997.

Per Christiansen
Registrar

Bjørn Haug
President