



## JUDGMENT OF THE COURT

30 November 2012\*

*(Free movement of goods – Admissibility – Product coverage – Articles 11 and 16 EEA - State monopolies of a commercial character – Rules concerning the existence and operation of a monopoly – Product selection rules – Refusal to sell alcoholic beverages containing stimulants such as caffeine – Discrimination between domestic and imported products – Absence of domestic production)*

In Case E-19/11,

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 Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

**Vín Trío ehf.**

and

**the Icelandic State**

on whether Articles 11 and 16 of the EEA Agreement preclude a State monopoly on the retail of alcohol from refusing to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine,

THE COURT,

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

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- Vín Trío ehf. (“the plaintiff”), represented by Birgir Tjörvi Pétursson, District Court Attorney;
- the Icelandic State (“the defendant”), represented by Soffía Jónsdóttir, Supreme Court Attorney, Office of the Attorney General (Civil Affairs);

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\* Language of the request: Icelandic.

- the Belgian Government, represented by Tristan Materne and Jean-Christophe Halleux, Attachés, Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;
- the Norwegian Government, represented by Ketil Bøe Moen, Advocate, Office of the Attorney General of Civil Affairs, and Kari Eline Bjørndal Kloster, Adviser, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, and Florence Simonetti, Deputy Director, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Peter Oliver, Legal Advisor, and Günter Wilms, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Birgir Tjörvi Pétursson; the defendant, represented by Soffía Jónsdóttir and Björn L. Bergsson; the Norwegian Government, represented by Ketil Bøe Moen; ESA, represented by Florence Simonetti; and the Commission, represented by Peter Oliver and Günter Wilms, at the hearing on 3 July 2012,

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

1 Article 8(3) EEA reads:

*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.*

2 Heading 22.06 of the Harmonized Commodity Description and Coding System (“HS”) reads:

*Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and mixtures of*

*fermented beverages and non-alcoholic beverages, not elsewhere specified or included.*

3 Article 11 EEA provides as follows:

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

4 Article 13 EEA provides as follows:

*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.*

5 Article 16(1) EEA provides 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.*

#### *National law*

6 The Icelandic Alcoholic Beverages Act No 75/1998 (“Act No 75/1998”) lays down rules on the manufacture, importation and sale of alcohol as well as provisions concerning its handling and consumption. Article 1 states that the aim is to militate against the abuse of alcohol. Article 10 establishes the Icelandic State monopoly on the retail sale of alcohol (“ÁTVR”).

7 At the time of the adoption of the decisions challenged in the case before the national court, wholesale and retail sales of alcoholic beverages in Iceland were governed by the Alcoholic Beverages and Tobacco Trading Act No 63/1969 (“Act No 63/1969”). Article 7 of that act provided as follows:

*The State Alcohol and Tobacco Monopoly [ÁTVR] shall ensure that services to its customers are of a high quality; this shall also apply to information given to customers concerning the products on offer, in all instances conforming to this Act, the Alcoholic Beverages Act and other provisions made in legislation and regulations at any given time.*

8 Article 14 of Act No 63/1969 provided as follows:

*The Minister may set further provisions in a regulation on the application of this Act.*

9 At the time of the adoption of the decisions, Regulation No 883/2005 on the State Alcohol and Tobacco Monopoly (“the Regulation”), which had been adopted under the authorisation provided for in Article 14 of Act No 63/1969, was in force. Article 2 of the Regulation stated that ÁTVR was responsible for the following:

*a. The purchase of alcohol.*

*b. Stock control and distribution of alcoholic beverages to retail outlets.*

*c. Operation of retail outlets.*

*d. Purchasing, importation, wholesaling and distribution of tobacco.*

*e. The manufacture of snuff.*

10 Furthermore, Article 8 of the Regulation concerning ÁTVR’s product range provided as follows:

*Decisions on the purchasing of alcohol shall be based on the product selection rules ... which are set by ÁTVR. These rules shall, on the one hand, be designed to ensure a range of products which take account of customers’ demands, and on the other to ensure manufacturers and suppliers of alcoholic beverages the possibility of having products sold in the retail outlets.*

...

11 Also in force at the relevant time were ÁTVR’s product selection rules and terms covering its dealings with suppliers No 631/2009 (“the product selection rules”), which were adopted under Article 8 of the Regulation. Article 1 of the product selection rules, concerning ÁTVR’s selection policy, provided as follows:

*ÁTVR shall aim at variety and quality in its product range and determine the product range in its retail outlets with consideration to customer demand and expectations. ÁTVR shall observe equality in its treatment of alcoholic beverage suppliers in its selection of products and decisions on sales and distribution, and promote, through its product range, responsible consumption of alcohol and responsible handling of alcohol.*

12 Article 1.1 of the product selection rules, which contained an express reference to ÁTVR’s social responsibility, provided, *inter alia*, that ÁTVR must avoid the sale of products which may be expected to encourage, in particular, consumption by younger age groups.

13 Article 5.11 of the product selection rules provided as follows:

*ÁTVR reserves the right to refuse the sale of products which contain caffeine or other stimulants.*

14 On 30 June 2011, after the commencement of the proceedings in the present case before the Icelandic courts, a new Alcoholic Beverages and Tobacco Trading Act No 86/2011 took effect. This enactment also contains a provision, Article 11(6), which empowers ÁTVR to reject products containing caffeine or other stimulants.

## **II Facts and procedure**

15 The plaintiff is a company that imports alcoholic beverages into Iceland. In 2009, it applied to have ÁTVR accept the alcoholic beverage “Mokai Cider” for trial sale. A company registered in Denmark manufactures the beverage in Germany. On the basis that the beverage contained a total of 10 mg of caffeine per 100 ml, the application was rejected in an e-mail from ÁTVR on 15 September 2009.

16 Moreover, in an e-mail of 16 June 2009, ÁTVR terminated its product purchase contract with the plaintiff for the sale of the alcoholic beverage “Cult Shaker” which had been available in its retail outlets since 2006. This decision was also made on the grounds that the beverage contained caffeine; in this case, a total of 15 mg per 100 ml.

17 In October 2009, the plaintiff requested that these decisions be revoked. This request was rejected by ÁTVR in a letter of 17 November 2009. The letter referred to Article 5.11 of the product selection rules. Under that provision, ÁTVR has the right to refuse the sale of products which contain caffeine or other stimulants. Reference was made to the fact that when selecting products ÁTVR was required to take account of the Icelandic Government’s alcohol policy and of considerations of public and individual health. The letter referred to studies indicating that the consumption of alcohol mixed with stimulants could lead to a higher degree of intoxication, particularly among young people. The letter further stated that these stimulants had the effect of making the consumer less aware of being intoxicated and more likely to consume a greater quantity of alcohol, with an additional risk of serious consequences.

18 On 2 December 2009, the plaintiff appealed against the decisions to the Ministry of Finance. The appeal was dismissed on 22 March 2010.

19 The plaintiff then brought a lawsuit before Reykjavík District Court. It requests that the ruling by the Ministry of Finance upholding ÁTVR’s decisions be set aside. Furthermore, the plaintiff seeks compensation and damages from the defendant.

20 On 26 October 2011, Reykjavík District Court decided to seek an Advisory Opinion from the Court. In its view, it was evident that the interpretation of

Articles 11, 13 and 16 EEA could be of substantial significance in relation to the Plaintiff's claims, and for the ruling in the case. The defendant brought an appeal against that decision before the Supreme Court of Iceland. In a judgment of 8 December 2011, the District Court's decision was upheld.

21 Reykjavík District Court has referred the following questions to the Court:

*1. Does it contravene Article 11 or the first paragraph of Article 16 of the Agreement on the European Economic Area if a Contracting Party provides in legislation, or through administrative acts, that a body exercising a State monopoly on the retail of alcohol may refuse to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine.*

*2. If the EFTA Court considers that an arrangement such as that described in the first question constitutes a quantitative restriction on imports, or a measure having equivalent effects, in the sense of Article 11 of the Agreement on the European Economic Area, then an answer is requested to the question of whether such an arrangement may nevertheless be regarded as justified with reference to Article 13 of the Agreement?*

*3. If an arrangement such as that described in the first question is regarded as being in contravention of Article 11 or the first paragraph of Article 16 of the Agreement on the European Economic Area, then an answer is requested to the question of whether the EFTA Court considers (to the extent to which it assesses such questions) that the conditions which the Plaintiff must fulfil in order to acquire a right to compensation from the EFTA State due to a violation of the Agreement are met?*

22 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 hereinafter only insofar as is necessary for the reasoning of the Court.

### **III Admissibility**

23 Before dealing with the questions referred, the Court finds it necessary to address the rules which determine whether a specific product falls within the scope of the EEA Agreement.

24 Article 8(3) EEA provides that the Agreement, unless otherwise specified, applies only to (a) products falling within Chapters 25 to 97 of the HS, excluding the products listed in Protocol 2 to the EEA Agreement, and (b) products specified in Protocol 3 to the EEA Agreement, subject to the specified arrangements set out in that Protocol.

- 25 It is not clear from the request what the specific ingredients of the two alcoholic beverages “Mokai Cider” and “Cult Shaker” are. This is a factual issue to be assessed by the national court. However, based on the information made available to the Court in the present proceedings, it appears as if the two beverages are mixtures of fermented apple wine (cider) and non-alcoholic beverages, with an alcohol content of 4.5%. If the national court finds that this is correct, they are to be classified under heading 22.06 of the HS (cider, perry, mead). Since heading 22.06 is not mentioned in Protocol 3 to the EEA Agreement, products falling under that category are not covered by the EEA Agreement, unless otherwise provided.
- 26 Questions concerning EEA law posed by national courts under Article 34 of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) enjoy a presumption of relevance. Consequently, where the questions concern the interpretation of EEA law, the Court is in principle bound to give a ruling, unless it is obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Cases E-13/11 *Granville Establishment*, judgment of 25 April 2012, not yet reported, paragraph 20, and E-17/11 *Aresbank*, judgment of 22 November 2012, not yet reported, paragraph 44).
- 27 The presumption of relevance cannot be rebutted simply because facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of the main proceedings depend, are contested (see, for comparison, Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 65, and case law cited).
- 28 It follows that the questions referred by Reykjavík District Court are admissible.

#### **IV The first question**

- 29 By its first question, the national court seeks in essence to ascertain whether the rule in Iceland which allows ÁTVR to prohibit the sale in its retail outlets of alcoholic beverages containing stimulants such as caffeine, contravenes Article 11 or Article 16(1) EEA.

#### *Applicability of Article 11 or Article 16 EEA*

#### Observations submitted to the Court

- 30 The plaintiff and ESA submit that the measures in question must be assessed under Articles 11 and 13 EEA, not Article 16 EEA.
- 31 According to the plaintiff, Article 16 EEA applies to domestic rules relating to the existence and operation of the domestic commercial monopoly and to the exercise of its exclusive rights. In contrast, the effect on intra-EEA trade of other

provisions of domestic legislation, which are related to but separable from the operation of the monopoly, fall to be examined under Article 11 EEA.

- 32 The plaintiff contends that the existence and operation of a State monopoly on the retail sale of alcohol is restricted to the methods of retail sale of alcoholic beverages. However, national prohibitions on the sale of a product containing a particular ingredient apply in a general manner to the production and marketing of alcoholic beverages. Such product requirements are separable from the operation of the monopoly, entailing that Article 16 EEA is irrelevant. Consequently, the effect on intra-EEA trade of a measure such as that enacted in Iceland must be examined under Article 11 EEA.
- 33 ESA asserts that the issue of whether Article 16 or Article 11 EEA applies depends on whether the product selection rule at stake can be separated from the operation of the monopoly or not. ESA notes that the selection of products is not only based on commercial criteria. It may also be based on public health, consumer protection or ethical concerns. In granting a retail monopoly the right to refuse to sell certain products on public interest grounds, the State delegates its regulatory power to the monopoly. According to settled case law, when the power to adopt binding acts of a legislative or administrative nature is delegated by the State to a public or private body, those acts are attributable to the State for the purposes of Article 11 EEA.
- 34 ESA submits that product selection rules and day-to-day decisions which are based on purely commercial concerns such as quality, customer demand or any other business consideration are inherent to the existence and operation of retail monopolies. As a result, they must be examined under Article 16 EEA. In contrast, product selection rules and day-to-day decisions which are based on overriding public interests, such as health considerations, amount to State measures and must be examined under Article 11 EEA. A State measure must be assessed in the same way whether it is adopted by the State, or by the State monopoly or another public body following delegation.
- 35 The defendant, the Norwegian Government and the Commission argue that the measures in question must be assessed under Article 16 EEA, as a monopoly's product selection system relates to the existence and operation of the monopoly.

#### Findings of the Court

- 36 According to settled case law, Articles 11 and 16 EEA are to be understood as applying exclusively rather than cumulatively. Each provision covers different aspects of State monopolies of a commercial character. Measures relating to the existence and operation of State monopolies, and, more specifically, to the exercise by a domestic commercial monopoly of its exclusive rights, should be examined under Article 16(1) EEA. However, the effect on trade within the EEA of the other measures of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, should be



examined under Articles 11 and 13 EEA (see, to that effect, Case E-4/05 *HOB-vín* [2006] EFTA Ct. Rep. 4, paragraph 24, and case law cited).

- 37 Pursuant to Article 10 of Act No 75/1998, ÁTVR has been assigned in Iceland the exclusive right of retail sale of alcoholic beverages to consumers, whereas specific exceptions pursuant to other legislation apply to the retailing of alcohol by restaurants, hotels and catering services. Moreover, the exclusive right of ÁTVR does not extend to the importation of alcoholic beverages.
- 38 The measure in the case at hand concerns only ÁTVR's system of product selection, and must therefore be regarded as essential for and thus inseparably linked to the operation of the monopoly (see, for comparison, Case C-456/10 *ANETT*, judgment of 26 April 2012, not yet reported, paragraphs 29 and 30).
- 39 Consequently, national rules providing that a body exercising a State monopoly on the retail of alcohol may refuse to accept for sale in its outlets alcoholic beverages containing stimulants, such as those at issue in the main proceedings, must be assessed in the light of Article 16 EEA.

#### *Assessment under Article 16 EEA*

##### Observations submitted to the Court

- 40 The plaintiff asserts that to prohibit the access of alcoholic beverages on the basis that they contain caffeine is discriminatory and contravenes Article 16(1) EEA.
- 41 In the light of the Court's case law, the plaintiff asserts that there is competition between alcopops such as those imported by the plaintiff and beer. Domestically produced beer accounts for around a third of the total sales of alcoholic beverages in ÁTVR. Moreover, no domestically produced alcopops contain caffeine or other stimulants. Thus, in its view, the total prohibition on retail sale is discriminatory. It imposes additional restrictions on imported products in contrast to those domestically produced, which are in competition with the former. A set of domestic producers are allowed to market their product both in the State monopoly and the restaurant, bar and café market, while importers of foreign products are restricted to the latter.
- 42 The defendant asserts that there is no discrimination, whether in law or in fact, and, thus, no breach of Article 16 EEA. ÁTVR's decision not to offer for sale alcoholic beverages containing caffeine applies to any beverages to which caffeine has been added. There is no evidence to support the assertion that the products in question are in direct competition with comparable domestic products not subject to the rules at issue. On the contrary, the rules apply without discrimination to all products regardless of origin.
- 43 No products such as those refused by ÁTVR are produced in Iceland. Were it otherwise, such products would not be accepted for sale by ÁTVR. It is

irrelevant, therefore, that there are currently no domestic products similar to those not accepted for sale by ÁTVR in the case before the national court.

- 44 The Norwegian Government contends that it should primarily be for the national court to assess whether or not there is any discrimination in fact. However, it notes that relevant differences do exist, notably the differences in public health risks between the products in question – alcohol-energy beverages – and other alcoholic beverages with the same alcohol content. The selection of products on the basis of their differing “adverse effects on human health” has been held by the European Court of Justice to be compatible with EU law. Certain types of beverages, in particular alcopops, are in a different situation when compared to other types of beverages. When assessing whether the adverse public health effects of different products should lead to a different treatment, the State must be allowed a certain margin of discretion, in particular on the basis of the precautionary principle. Finally, the fact that there is no domestic production of alcohol-energy beverages in Iceland supports the conclusion that there is no discrimination under Article 16 EEA.
- 45 ESA submits that the selection system of a sales monopoly must have sufficient safeguards in order to ensure that all discrimination in its application is precluded. It must be based on criteria that are independent from the origin of the products and must be transparent. Moreover, there must be an obligation to state reasons and an independent monitoring procedure.
- 46 It is for the national court to ascertain whether the selection rules at stake fulfil these criteria. ESA notes, however, that the rule according to which ÁTVR may refuse to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine applies independently of the origin of the product. Nevertheless, the provision gives ÁTVR full discretion whether or not to refuse and in relation to the grounds for such refusal. Apart from the very general requirement to “observe equality in its treatment of alcoholic beverages suppliers”, there appears to be nothing to prevent exercise of the discretion in a disguised discriminatory fashion.
- 47 As there is no production of alcoholic beverages containing caffeine in Iceland, in ESA’s view, the refusal to sell alcoholic beverages containing caffeine constitutes in practice an obstacle only for imported products. There might be domestic products that, although not strictly similar to the alcoholic beverages containing caffeine which ÁTVR refuses to sell, are in competition with them, such as alcoholic beverages containing stimulants other than caffeine, or soft drinks containing caffeine which are usually mixed with alcohol. This is a matter for the national court to assess. Assuming that there is domestic production of competing products, ESA submits that a measure that prevents foreign-produced alcoholic beverages containing caffeine from accessing the Icelandic retail market confers an advantage on domestic products.
- 48 The Commission submits that Article 16 EEA requires State monopolies to have a public interest objective, and to ensure that no discrimination regarding the

conditions under which goods are procured and marketed exists between nationals of the Member States. Moreover, the organisation and operation of the monopoly must 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, in relation to that in domestic goods and that competition between the economies of the Member States is not distorted.

- 49 According to the Commission, the protection of public health is indisputably a public interest objective which can justify the maintenance of a State monopoly. Alcoholic beverages which contain caffeine are targeted at young people who are generally not drawn to traditional alcoholic beverages such as beer or wine. Therefore, not to accept such beverages for sale may be regarded as based on overriding reasons relating to the public interest.
- 50 Furthermore, the Commission adds, nothing in the national court's request indicates the existence of any discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed.

#### Findings of the Court

- 51 The purpose of Article 16 EEA is to reconcile the possibility for EEA States to maintain certain monopolies of a commercial nature as instruments for the pursuit of public interest aims with the requirements of the EEA internal market. It seeks to eliminate obstacles to the free movement of goods, save for restrictions on trade inherent in the existence of the monopolies in question (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 17, and case law cited).
- 52 Therefore, Article 16 EEA requires monopolies of a commercial character to be adjusted so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the EEA States. Consequently, an EEA State is under an obligation to ensure that operators and trade in goods from other EEA States are not put at a disadvantage, in law or in fact, as compared to domestic operators and trade in domestic goods respectively, and that competition between the economies of the EEA States is not distorted (see *HOB-vín*, cited above, paragraph 33, and case law cited).
- 53 To ensure the absence of such discrimination, the general principles of EEA law require that the selection system of a sales monopoly falling under Article 16 EEA must fulfil the necessary requirements of transparency, by providing, *inter alia*, for an obligation to state reasons for selection decisions.
- 54 It is not contested that in aiming to militate against the abuse of alcohol and to protect public health against the harm caused thereby, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on ÁTVR, pursues a public interest objective.

- 55 Accordingly, it is necessary to consider whether the specific rule that ÁTVR may prohibit the sale in its retail outlets of alcoholic beverages containing stimulants such as caffeine does so in fact (see *HOB-vín*, cited above, paragraph 34, and, for comparison, Case C-438/02 *Hanner* [2005] ECR I-4551, paragraph 38).
- 56 The Court notes that the product selection rules and terms covering ÁTVR's dealings with suppliers require ÁTVR to aim at variety and quality in its product range. The monopoly must determine the product range in its retail outlets with consideration to customer demand and expectations. Moreover, ÁTVR is required to observe equality in its treatment of alcoholic beverage suppliers in its selection of products and decisions on sales and distribution, and promote, through its product range, responsible consumption of alcohol and responsible handling of alcohol.
- 57 These rules, including Article 5.11, which states that ÁTVR reserves the right to refuse the sale of products which contain caffeine or other stimulants, appear to be based on objective criteria independent of the origin of the products.
- 58 With regard to the question whether Article 5.11 is discriminatory or likely to put imported alcoholic beverages at a disadvantage, the Court notes that according to the request, there is no domestic production of alcoholic beverages containing caffeine. Neither does it appear that there is any domestic production of other alcoholic beverages containing other stimulants. Thus, ÁTVR's refusal to sell such products constitutes in practice an obstacle only for imported products. However, the lack of domestic production cannot in itself entail that a measure is discriminatory. If it did, this would have the unreasonable consequence that the same measure would be discriminatory in certain EEA States but not necessarily in others (see Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 48, and, for comparison, Case C-391/92 *Commission v Greece* [1995] ECR I-1621, paragraph 17).
- 59 If there is no domestic production of the products in question, there cannot, as a rule, be any factual discrimination between domestic and imported products. An exception has to be made where there has been domestic production of the products in question until recently, and the measure affects the marketing of products from other EEA States to a greater degree than that of imported goods for which there has been domestic production until recently (see *Philip Morris*, cited above, paragraphs 48 to 49). However, this situation appears not to exist in the present case.
- 60 Furthermore, in the absence of domestic production of the products in question a measure will nevertheless be discriminatory if it is apparent that it protects domestic products which are similar to products covered by the contested rules or which are in competition with those products (see, for comparison, *Commission v Greece*, cited above, paragraph 18).
- 61 In this regard, the plaintiff and ESA have argued that beer and other alcopops without stimulants, and soft drinks containing caffeine which are usually mixed

with alcohol, respectively, are all in competition with alcoholic beverages containing stimulants.

- 62 For a competitive relationship to exist, at least partially, it is sufficient that two products are to some extent capable of meeting the same consumer needs (see Case E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 108, paragraph 26, and Case E-9/00 *ESA v Norway* [2002] EFTA Ct. Rep. 72, paragraph 38).
- 63 As regards the argument that beer and alcopops without stimulants are in competition with alcoholic beverages such as those in question in the case before the national court, it must be noted that the latter products cater to a different audience. Moreover, the added caffeine means that the products in question have a different target group, that is, consumers seeking an additional effect of the beverage in question. Consequently, beer and alcopops without stimulants do not meet the same consumer needs as the products in question, and as a result the argument must be rejected.
- 64 Moreover, soft drinks containing caffeine cater to a different, wider audience than alcoholic beverages containing caffeine do. Also, soft drinks are not in competition with alcoholic beverages, in particular where the retail of alcoholic beverages is subject to a state monopoly such as ÁTVR. As a result, these products do not warrant equal treatment within the scope of Article 16 EEA.
- 65 Accordingly, a rule such as Article 5.11 of ÁTVR's product selection rules does not appear either to be discriminatory or apt to put imported products at a disadvantage.
- 66 The answer to the first question must therefore be that it does not contravene Article 16(1) EEA if an EEA State provides in legislation, or through administrative acts, that a body exercising a State monopoly on the retail of alcohol may refuse to accept for sale in its outlets alcoholic beverages containing stimulants such as caffeine. However, such a selection rule must apply in the same manner to domestic and imported alcoholic beverages containing stimulants. If, as in the present case, there is no domestic production, and the selection rule does not aim to protect domestic production of similar products, it cannot be deemed to place operators or products from other EEA States at a disadvantage.

## **V The second and third questions**

- 67 In light of the Court's reply to the first question, it is unnecessary to answer the second and third questions.

## **VI Costs**

- 68 The costs incurred by the Belgian and Norwegian Governments, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before

Reykjavík District 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 question referred to it by Reykjavík District Court hereby gives the following Advisory Opinion:

**It does not contravene Article 16(1) EEA if an EEA State provides in legislation, or through administrative acts, that a body exercising a State monopoly on the retail of alcohol may refuse to accept for sale in its outlets alcoholic beverages containing stimulants such as caffeine.**

**However, such a selection rule must apply in the same manner to domestic and imported alcoholic beverages containing stimulants. If, as in the present case, there is no domestic production, and the selection rule does not aim to protect domestic production of similar products, it cannot be deemed to place operators or products from other EEA States at a disadvantage.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 30 November 2012.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President