REPORT FOR THE HEARING

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 Tríó 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.

I Introduction

1. By a letter of 16 December 2011, registered at the EFTA Court on 26 December 2011, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Vín Tríó ehf., a company registered in Iceland ("Vín Tríó" or "the Plaintiff"), and the Icelandic State ("the Defendant").

2. The case before the national court concerns two decisions by the Icelandic State monopoly on the retail sale of alcohol ("ÁTVR"), where, first, an application to accept an alcoholic beverage for sale in ÁTVR's retail outlets was rejected, and, second, a purchase contract for the sale of an alcoholic beverage was terminated, both on the basis that the beverages contained caffeine.

II Legal background

EEA law

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 Contacting 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.

6. Article 59(2) EEA provides as follows:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

National law[1]

7. The Icelandic Alcoholic Beverages 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 of the Act states that the aim of the Act is to militate against the abuse of alcohol. Article 10 of the Act confers a retail alcohol monopoly on ÁTVR.

8. However, 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. Article 7 of that Act provided as follows:

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

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.

9. 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.

10. At the material time, 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.

11. 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.

…

12. 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:

The 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. The 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.

13. 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.

14. 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.

15. 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.

III Facts and procedure

16. 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 sales. A company registered in Denmark manufactures the beverage in Germany. On the basis that the beverage contained caffeine, a total of 10 mg of caffeine per 100 ml, the application was rejected in an e-mail from ÁTVR on 15 September 2009.

17. 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.

18. 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 which ÁTVR has the right to refuse the sale of products which contain caffeine or other stimulants. Reference was also made to the fact that, in its selection of products, ÁTVR was bound to take account of the Icelandic Government's alcohol policy and of evident considerations of public health and individual health. The letter referred to indications from studies showing that the consumption of alcohol mixed with stimulants could lead to a higher degree of intoxication, particularly among young people. These stimulants, the letter stated, 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. It was

pointed out that the alcohol retail monopolies in Sweden and Norway, Systembolaget and Vinmonopolet respectively, had not accepted the beverages in question for sale, and had given the same reasons.

19. On 2 December 2009, the Plaintiff appealed against the decisions to the Ministry of Finance. This appeal was dismissed on 22 March 2010, with the Ministry upholding the decisions of ÁTVR.

20. The Plaintiff then brought the case at hand 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.

21. On 26 October 2011, Reykjavík District Court decided to seek an Advisory Opinion from the Court, as it was – in its view – evident that the interpretation of Articles 11, 13 and 16 EEA could be of substantial significance in relation to the Plaintiff's claims, and consequently for its ruling in the case. The Defendant brought an appeal against that decision before the Supreme Court of Iceland, which in a judgment of 8 December 2011 upheld the District Court's decision.

22. 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.**

IV Written observations

23. 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 Birgir Tjörvi Pétursson, District Court Attorney;
- the Defendant, represented by Soffía Jónsdóttir, Supreme Court Attorney, Office of the Attorney General (Civil Affairs);
- 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.

V Summary of the pleas and arguments submitted

The Plaintiff

Potential inaccuracies in the premises on which the questions are based

24. At the outset, the Plaintiff observes that a change has been recently made to the Icelandic rules on additives in food. Moreover, it stresses that no rules exist which prohibit the sale of caffeinated alcoholic beverages of any kind in restaurants, bars or cafés in Iceland.

The first question

- Whether the measure should be examined under Article 16 or Article 11 EEA

25. At the outset, the Plaintiff observes that it is undisputed that the products in question, "Mokai Cider" and "Cult Shaker", are lawfully manufactured within the EEA and marketed in several EEA countries. Furthermore, the Plaintiff observes that the measures at issue concern product requirements.

26. The Plaintiff submits that the measures in question must be assessed under Articles 11 and 13 EEA, not Article 16 EEA.

27. 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.[2]

28. In the context of a State monopoly on the retail sale of alcohol, the existence and operation of the monopoly is restricted to "the methods of retail sale of alcoholic beverages".[3] In the Plaintiff's view, it follows from the judgment of the European Court of Justice ("ECJ") in *Cassis de Dijon* that national provisions introducing measures such as a prohibition on the sale of a product containing a particular ingredient apply in a general manner to the production and marketing of alcoholic beverages, entailing, therefore, that Article 16 EEA is irrelevant.[4] Consequently, according to the Plaintiff, the effect on intra-EEA trade of a measure such as the one enacted in Iceland must be examined solely in relation to Article 11 EEA and not Article 16 EEA.

29. The Plaintiff contrasts the case at hand with the ECJ's judgment in *Franzén*.[5] In that case, the ECJ assessed the general features of the State monopoly, that is, the exercise of the monopoly's exclusive rights, and, consequently, according to the Plaintiff, those features were examined solely in relation to Article 31 EC (now Article 37 TFEU). In contrast, the case at hand does not focus on the general features of the product selection system of ÁTVR. The measure in question is a particular provision aimed at a very specific ingredient only applicable to certain products on the market, none of which are manufactured in Iceland. According to the Plaintiff, it is impossible to view such a product requirement, which affects the production in another Member State, as being part of the specific function of ÁTVR, that is, the exercise of its exclusive right to the retail sale of alcoholic beverages. The product requirement applied in the case at hand, containment of caffeine, is without any doubt separable from the operation of the monopoly.[6]

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[2] Reference is made to Cases C-189/95 *Franzén* [1997] ECR I-5909, paragraphs 35 to 36; E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 108, paragraphs 17 to 18; E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 15 and 22; and E-4/05 *HOB-vín* [2006] EFTA Ct. Rep. 4, paragraph 24.

[3] Reference is made to Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paragraph 24.

[4] Reference is made to Case 120/78 *Rewe-Zentral* ("Cassis de Dijon") [1979] ECR 649, paragraph 7.

[5] Cited above.

[6] In this regard, the Plaintiff contrasts the case at hand with *HOB-vín*, cited above, paragraph 25, which concerned statutory requirements that only applied to ÁTVR (to supply goods on pallets and to include the pallet price in the price of the goods), and thus were considered inseparable from the operation of the monopoly.

- Assessment under Article 11 EEA

30. According to the Plaintiff, it is settled case-law that the prohibition established by Article 11 EEA applies to all trading rules enacted by EEA States which are capable of hindering, directly or indirectly, actually or potentially, trade within the EEA.[7] It notes that a prohibition on the marketing of energy drinks containing caffeine in excess of a certain limit, which are lawfully produced and marketed in other Member States, has been found to impede intra-Community trade, and thereby constitutes, in principle, a measure having an effect equivalent to a quantitative restriction.[8] In the Plaintiff's view, it is thus self-evident that an absolute prohibition on access to a retail market restricts trade and constitutes a measure of the kind specified in Article 11 EEA.

31. The Plaintiff submits that, according to settled case-law, Article 11 EEA must be understood as an obligation to comply with the EEA principle of mutual recognition of products lawfully manufactured and marketed in other EEA States, and the principle of free access of EEA products to national markets.[9] A product which has been lawfully produced and marketed in an EEA State must normally be allowed unimpeded access throughout the EEA, unless a restriction is deemed necessary to meet a mandatory requirement.

32. According to settled case-law, the Plaintiff continues, national measures that lay down requirements to be met by imported goods constitute restrictions within the meaning of Article 11 EEA *per se* regardless of whether or not they are considered discriminatory as a matter of EEA law. According to the Plaintiff, this is in contrast to measures concerning selling arrangements, which contravene Article 11 EEA only insofar as they are discriminatory.[10]

33. The Plaintiff considers it a matter of fact that quantitative restrictions or measures having an equivalent effect were enacted and enforced by the Defendant in this case. These restrictions are unlawful unless they can be justified as necessary in order to satisfy mandatory requirements or on the basis of Article 13 EEA.[11]

- In the alternative: assessment under Article 16 EEA

34. If the Court concludes that the measures fall within the scope of Article 16 EEA, the Plaintiff asserts that to prohibit the access of alcoholic beverages on the

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[7] Reference is made to Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 39, and the case-law cited, and Case 8/74 *Dassonville* [1974] ECR 837.

[8] Reference is made to Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 28.

[9] Reference is made to *Philip Morris*, cited above, paragraph 41, and the case-law cited, and *Cassis de Dijon*, cited above.

[10] Reference is made to *Philip Morris*, cited above, paragraphs 43 to 44, and the case-law cited.

[11] Reference is made to *Commission* v *Italy*, cited above, paragraph 29.

basis that they contain caffeine is discriminatory and contravenes Article 16(1) EEA.

35. The Plaintiff submits that national authorities are required to ensure that a State monopoly on the retail sale of alcohol is organised and operated so that no discrimination regarding conditions under which goods are produced or marketed exists between nationals of the EEA States. Trade in goods from other EEA States must not be put at a disadvantage, in law or in fact, in comparison with trade in domestic goods.[12]

36. According to the Plaintiff, it follows from the Court's case-law that there is competition between alcopops such as the ones imported by the Plaintiff, on the one hand, and beers, on the other.[13] It maintains that 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 the Plaintiff's view, the restriction on trade in the form of a total prohibition on retail sale is, in effect, discriminatory as it imposes additional restrictions on imported products in contrast to those domestically produced which are in competition with the former. According to the Plaintiff, it is obvious that, from the point of view of producers in other Member States producing alcopops containing caffeine, local products, whether beers or alcopops, will enjoy an advantage. In the Plaintiff's view, measures allowing a set of domestic producers 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, must be deemed discriminatory.[14]

The second question

37. The Plaintiff submits that, according to settled case-law, the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. Within the limits imposed by the EEA Agreement, it is for Member States to decide what degree of protection they wish to assure.[15] However, national rules or practices which restrict a fundamental freedom under the EEA Agreement, such as the free movement of goods, or are capable of doing so, can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to do so.[16]

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[12] Reference is made to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 63 et seq.; *ESA* v *Norway*, cited above, paragraph 36; *Wilhelmsen*, cited above, paragraph 96 and 97; and *Gundersen*, cited above, paragraph 21.

[13] Reference is made to *ESA* v *Norway*, cited above, paragraphs 31 and 39.

[14] Reference is made to *ESA* v *Norway*, cited above.

[15] Reference is made to *Philip Morris*, cited above, paragraph 77.

[16] Reference is made to *Philip Morris*, cited above, paragraph 80, and Case C-333/08 *Commission* v *France* [2010] ECR I-757, paragraph 89, and the case-law cited.

38. The Defendant's justification of the prohibition has primarily been based on the alleged harmful effects of products containing caffeine on consumers, especially young consumers. The Plaintiff maintains, however, that there is no basis for stating that the sale of such beverages through the retail monopoly poses a real risk to public health, which is sufficiently established on the basis of the scientific data available at the time when the restrictions were imposed or at any time since. According to the Plaintiff, no such scientific data has been presented. The fact that the abuse of alcohol can have harmful effects is undisputed. However, in its view, the Defendant must show that there is a "real risk for public health" in the retail sale of the products which goes beyond the risk for public health that may be inherent in alcohol consumption in general.

39. The Plaintiff observes that there is no limit in Icelandic law on the quantity of caffeine in beverages. Moreover, it continues, the Defendant's assertions are seriously undermined by the fact that all beverages lawfully manufactured in other Member States containing both alcohol and caffeine in all kinds of proportions can be lawfully imported to Iceland and sold in restaurants, bars and cafés, even if the same products are banned from retail sale in ÁTVR's outlets. In addition, mixtures of alcohol and energy drinks containing high levels of caffeine can easily be prepared at home by young and old alike, since spirits and beers can be lawfully accessed at ÁTVR's outlets, and the energy drinks at any convenient store, kiosk or gas-station.

40. The Plaintiff fails to grasp the logic in imposing a prohibition on the sale in ÁTVR's outlets of products which have to be viewed as less harmful – in the event that a mixture of alcohol and caffeine is considered in any way harmful – than a wide range of products available on the market, such as spirits. The Plaintiff submits that, in light of the contradictory national provisions in the field, the Defendant does not appear to have a clear objective in relation to the sale of alcoholic beverages containing caffeine.

41. Furthermore, the Plaintiff contends that an absolute prohibition on the sale of alcoholic beverages containing caffeine on the retail market goes far beyond what is necessary for the attainment of the objectives the Defendant has specified. The sale of alcoholic beverages to people under 20 years of age is illegal in Iceland, and the task of enforcing those rules lies with the Defendant. It is therefore quite unreasonable to impose an absolute prohibition on the retail sale of the imported products in ÁTVR's outlets on the ground that they are consumed by people under 20 years of age.

42. In those circumstances, the Plaintiff concludes that the measures imposed are neither proportionate nor appropriate.

43. Even if the Court finds that the national provisions enacted and enforced are justified under Article 13 EEA, the Plaintiff submits that the measures contravene Article 13 EEA all the same as they are discriminatory.

44. Finally, the Plaintiff adds that Article 5.11 of the product selection rules, on which the prohibition was initially based, was without foundation in law. In that regard, the Plaintiff submits that, inevitably, a major derogation from the principles of the EEA Agreement must be based on a clear legislative provision, if at all to be applied.

The third question

45. The Plaintiff contends that an EEA State can be held responsible for breaches of its obligations under EEA law where three conditions are met. First, the rule of law infringed must be intended to confer rights on individuals; second, the breach must be sufficiently serious; and, third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.[17]

46. As regards the condition that the rule of law infringed must be intended to confer rights on individuals, the Plaintiff submits that such is the case when the relevant provision is unconditional and sufficiently precise,[18] and that this requirement is fulfilled as regards Articles 11 and 16 EEA.[19]

47. As regards the condition that the breach must be sufficiently serious, the Plaintiff submits that this depends on whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers. In order to determine whether this condition is met, the national court hearing a claim for compensation must take into account, inter alia, the clarity and precision of the rule infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable.[20] Finally, a breach will be regarded sufficiently serious if it has persisted despite settled case-law from which it is clear that the conduct in question constituted an infringement.[21]

48. According to the Plaintiff, Articles 11 and 16 EEA must be viewed as both clear and precise, also as regards the scope of discretion left to national authorities, especially with regard to product requirements. The Defendant's intent is evident, that is, to prohibit the sale of products belonging to a certain category of beverages, containing a particular ingredient. Moreover, the case at hand concerns an infringement of the core principles of EU law. The Plaintiff

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[17] Reference is made to Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 62, and *Karlsson*, cited above, paragraph 32.

[18] Reference is made to *Karlsson*, paragraph 37, and *Restamark*, paragraph 77, both cited above.

[19] Reference is made to *Karlsson*, paragraph 37, and *Sveinbjörnsdóttir*, paragraphs 57 to 58, both cited above.

[20] Reference is made to *Karlsson*, paragraph 38, and *Sveinbjörnsdóttir*, paragraphs 68 to 69, both cited above.

[21] Reference is made to *Karlsson*, cited above, paragraph 40.

concludes, therefore, that the provision established by the Icelandic Government concerning alcoholic beverages containing caffeine entails a sufficiently serious breach of EEA law to trigger State liability.

49. As regards the third condition, the Plaintiff contends that this is a matter to be determined by the national court.[22] However, according to the Plaintiff, it is self-evident that the infringement which hinders a product from the retail market is directly linked to the damage sustained by the Plaintiff, other importers and potential importers.

50. The Plaintiff proposes that the Court should answer the questions as follows:

> *The first question:*
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> *A legislative or administrative act of a Contracting Party which provides that a body exercising a State monopoly on the retail sale of alcohol may refuse to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine constitutes a quantitative restriction or a restriction having equivalent effect in the sense of Article 11 of the Agreement on the European Economic Area, and is contrary to Article 11 of the Agreement unless it can be justified under Article 13 of the Agreement.*
>
> *The second question:*
>
> *An arrangement as that described in the first question cannot be regarded as justified with reference to Article 13 of the Agreement on the European Economic Area as the arrangement is neither necessary nor proportionate in relation to the objective of safeguarding public health under Article 13 of the Agreement.*

The Defendant

The first question

51. The Defendant observes that from 1912 production, consumption and importation of alcoholic beverages was prohibited in Iceland following a referendum. This prohibition was partially cancelled in 1922, when the State alcohol monopoly was established. Ever since the establishment of the monopoly, the stated goal of the Icelandic Parliament and Government has been to reduce consumption of alcoholic beverages and thus to limit their detrimental effects for human health and happiness. Moreover, when the EEA Agreement was signed in 1992, the Icelandic Government, jointly with the Finnish, Norwegian and Swedish Governments, reiterated that their State alcohol

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[22] Reference is made to *Karlsson*, cited above, paragraph 47, and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 30.

monopolies were based on important considerations that related to their public health and social policies.

- Whether the measure should be examined under Article 16 or Article 11 EEA

52. The Defendant argues that Articles 11 and 16 EEA are to be understood as applying exclusively rather than cumulatively. Thus, each Article covers different aspects of State monopolies of a commercial character.[23]

53. The Defendant submits that impartial product selection criteria, such as those at issue, exclusively regulate ÁTVR's contractual relationships. There is, it continues, no general ban on the sale of alcoholic beverages containing stimulants in Iceland. Thus, the Defendant argues that product selection criteria must be considered inseparable from the operations of ÁTVR, and that, as a result, such rules must be assessed on the basis of Article 16 EEA, not Articles 11 and 13 EEA.

- Assessment under Article 16 EEA

54. The Defendant asserts that the test to be applied for the purposes of Article 16 EEA is purely an objective one, that is, whether the rules which allow for alcoholic beverages containing stimulants such as caffeine not to be accepted for sale in ÁTVR's retail outlets discriminate, in fact, against imported products.

55. In that regard, the Defendant stresses that the monopoly was established mainly for control purposes on grounds of public health, and not for trade policy reasons. According to the Defendant, the ECJ has held that national legislation serving the objective of limiting alcohol consumption and protecting public health and social well-being against its detrimental effects, thus curtailing excessive alcohol consumption, reflects concerns recognised by Article 30 EC, which are also relevant to Article 16 EEA.

56. The Defendant contends that research has shown that, when alcoholic beverages are mixed with energy drinks, the caffeine in these drinks can mask the depressant effects of alcohol.[24] Moreover, it continues, drinkers who consume alcohol mixed with energy drinks are more likely to binge drink, i.e. consume four or more drinks per occasion for women and five or more in the case of men.[25]

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[23] Reference is made to *HOB-vín*, cited above, paragraph 33.

[24] Reference is made to Kerr, JS and Hindmarch, J (1998), "Effects of alcohol alone or in combination with other drugs in information processing, task performance and subjective responses", Human Psychopharmacology, 13, 1-9.

[25] Reference is made to Thombs DL, O'Mara RJ, Tsukamoto M, Rossheim ME, Weiler RM, Merves ML, Goldberger BA (2010), "Event-level analyses of energy drink consumption and alcohol intoxication in bar patrons", Addictive Behaviors, 35, 325-330.

57. The Defendant asserts that ÁTVR's decision not to offer for sale alcoholic beverages containing caffeine applies to any beverages to which caffeine has been added. No distinction is made according to the place where the goods are lawfully produced, whether this is in Iceland, in EU States, in EFTA States, or in States outside those areas.[26]

58. According to the Defendant, there is no evidence to support the Plaintiff's contention that the products in question are in direct competition with comparable domestic products not subject to the rules in question. On the contrary, the rules apply without discrimination to all products regardless of origin. Thus, the rules must be considered non-discriminatory. Nothing suggests that importers or imported products are treated differently from domestic producers or domestic products as regards acceptance for sale in ÁTVR's retail outlets. Therefore, ÁTVR's refusal to sell "Cult Shaker" and "Mokai Cider" by reason of their caffeine content is not designed to prevent the market access of imported or domestic products.

59. The Defendant notes that no products such as the ones refused by ÁTVR are produced in Iceland. In its view, it is irrelevant in this context that no alcoholic beverages containing caffeine such as those at issue are produced in Iceland at the present time, a situation that may well change. If they were to be produced in Iceland, such products would not be accepted for sale by ÁTVR. It is irrelevant, therefore, that there are currently no domestic products similar to the ones not accepted for sale by ÁTVR in the case at hand. Consequently, there is no discrimination, whether in law or in fact, and, thus, no breach of Article 16 EEA.

- In the alternative: assessment under Articles 11 and 13 EEA

60. The Defendant asserts that an exception from the principle established by Article 11 EEA is justified, as alcoholic beverages can hardly be considered usual consumer goods. According to the Defendant, the ECJ has indicated in its judgments that particular rules of national law relating to consumer protection, sound commercial practices, tax law enforcement, environmental protection, safety in the workplace and cultural activities may be acknowledged, even if these affect trade.[27]

61. The Defendant submits that the hindrances entailed by the rules in question are justified, as their purpose is to protect public health and welfare. In its view, the hindrances are appropriate and do not go further than necessary in order to attain mandatory requirements. In that regard, the Defendant emphasises that importation of the products in question is not prohibited, and that the Plaintiff is free to sell them to parties that are licensed to produce, sell and serve alcoholic beverages commercially.

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[26] Reference is made to *Wilhelmsen*, paragraph 105; and *Franzén*, paragraph 40, both cited above.

[27] Reference is made to *Cassis de Dijon*, cited above.

The second question

62. The Defendant submits that, since the case should be dealt with under Article 16 EEA and not Article 11 EEA, it is unnecessary to reply to the second question.

63. However, for the sake of completeness, the Defendant argues that, if Article 11 EEA applies, and if the Court answers the first question in the affirmative, the restrictions are justified on grounds of protection of health and life of humans within the meaning of Article 13 EEA.

64. In the Defendant's view, it is settled in law that the health and life of humans rank foremost among the interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the Agreement, to decide on the degree of protection.[28] Furthermore, the combating of alcohol abuse constitutes a public interest ground under Article 13 EEA that may justify a restriction on the free movement of goods provided for in Article 11 EEA.[29] According to the Defendant, the State may limit the distribution of products the consumption of which can result in increased consumption of alcohol and thus involve health issues for the consumer.

65. The Defendant considers that the rules and practices in question constitute the least restrictive means of achieving the intended objectives. The restrictive effects do not go beyond what is necessary. In that regard, the Defendant points out that the refusal to sell these alcoholic beverages does not preclude their marketing in Iceland, but applies only to the retail outlets of ÁTVR.

66. In the Defendant's view, other potential means, such as requirements to label the products in question, are considered unlikely to have the necessary effect, as they would not provide sufficient deterrence. As regards labelling, the Defendant observes that alcoholic beverages are currently exempted from the obligation to list the ingredients in foodstuffs, including caffeine.

67. The Defendant adds that the refusal to sell "Cult Shaker" and "Mokai Cider" in ÁTVR's retail outlets by reference to the policy not to sell caffeinated alcoholic beverages and the fact that their marketing is aimed at young people affects in the same way, in fact and in law, the marketing of national products and products from other Member States, and consequently does not involve any discrimination.

The third question

68. The Defendant acknowledges that an EEA Member State may become liable to pay compensation on account of breaches of EEA law. However,

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[28] Reference is made to Case C-320/93 *Ortscheit* [1994] ECR I-5243, paragraph 16.

[29] Reference is made to *ESA* v *Norway*, cited above, paragraph 55.

according to the Defendant, the EEA legislation of which an interpretation is requested has not been breached. Even in the event of a breach of EEA law, it continues, it is for the national court to adjudicate on the question of State liability.

The Belgian Government

69. The Belgian Government limits its submissions to the second question. In the Belgian Government's view, the measure may be justified on the grounds of the protection of health and life of humans. It notes that, according to the ECJ, "the health and life of humans rank first among the property or interests protected by Article [36] and it is for Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure, and in particular how strict the checks to be carried out are to be".[30]

70. The Belgian Government submits that for a national measure to be justified on the ground of protection of health and life of humans, certain principal rules must be observed. First of all, the protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market. The Belgian Government notes that this point is disputed in the main proceedings. In that regard, it considers that the question whether complete equality is observed between domestic and foreign alcohol suppliers must first be examined and answered by the Court, before ascertaining if the other conditions are met.

71. Second, the measures adopted have to be proportionate, that is, restricted to what is necessary to attain the legitimate aim of protecting public health. In that connection, the Belgian Government submits that respect for the proportionality principle implies that there cannot be alternative measures that entail a lesser hindrance of trade. However, Member States are not obliged to prove that the measure they have chosen is the only one conceivable.[31] Moreover, the Belgian Government stresses that, in the absence of harmonised rules at European level, the Member States are free to decide on the level of protection they intend to provide for the legitimate interest pursued.

72. The Belgian Government contends that, in allowing the Icelandic alcoholic retail monopoly to refuse the sale of products which contain caffeine or other stimulants, the disputed measure tends to protect public health, particularly that of young people. The consumption of alcohol mixed with stimulants could lead to a higher degree of intoxication, particularly among young people. According to the Belgian Government, to protect the health of people, especially young people, there appears to be no other appropriate measure than a total ban on the selling of alcohol mixed with caffeine or other stimulants.

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30 Reference is made to Case 104/75 *De Peijper* [1976] ECR 613, paragraph 15, and *Philip Morris*, cited above.

31 Reference is made to Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 66.

73. Finally, the Belgian Government observes that the measures at issue have to be well-founded and supported by relevant evidence and data (technical, scientific, statistical, and nutritional) and other relevant information.[32]

The Norwegian Government

74. The Norwegian Government notes that it is stated in the request that alcohol-energy drinks containing caffeine or other stimulants are not available through the Norwegian retail monopoly. In that regard, it observes that the Norwegian retail monopoly has not yet determined whether to refuse to supply such beverages as no supplier of alcohol-energy drinks has sought hitherto to have such products included in the product range of the monopoly.

The first question

- Whether the measure should be examined under Article 16 or Article 11 EEA

75. The first question raises the issue whether a regulation such as the Icelandic provision contravenes Article 11 or Article 16 EEA. The Norwegian Government submits that the correct approach is to assess it under Article 16 EEA on State monopolies.

76. The Norwegian Government asserts that, according to established case-law, the existence and operation of State monopolies for the retail sale of alcoholic beverages should be assessed under Article 16 EEA. It has consistently been held, the Government argues, that the system of selection of goods to be sold, that is the product range of the monopoly, is among the central issues relating to the existence and operation of the monopoly.[33]

- Assessment under Article 16 EEA

77. The Norwegian Government submits that it follows directly from the wording of Article 16(1) EEA, and is confirmed by consistent case-law, that the decisive test under this provision is that of discrimination. Hence, the monopoly is compatible with EEA law as long as trade in goods from other EEA States is not disadvantaged, in law or in fact, in comparison with trade in domestic goods.[34]

78. The Norwegian Government asserts that the notion of discrimination for the purposes of Article 16 EEA must be interpreted in line with the general definition of discrimination under EU and EEA law, namely, that “comparable

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[32] Reference is made to Cases C-270/02 *Commission* v *Italy* [2004] ECR I-1559 and C-319/05 *Commission* v *Germany* [2007] ECR I-9811.

[33] Reference is made to *Franzén*, paragraph 35, *Gundersen*, paragraph 17, and *ESA* v *Norway*, paragraph 35, all cited above.

[34] Reference is made to *ESA* v *Norway*, cited above, paragraph 36, and the case-law cited.

situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified".[35]

79. Turning to the assessment of the relevant provisions in the present case, the Norwegian Government contends, first, that there is nothing to indicate that there is any kind of discrimination in law. The rule enabling the monopoly to refuse alcohol-energy drinks applies in the same way irrespective of the origin of the drinks. In its view, therefore, the question is simply whether there are any elements of discrimination in fact.

80. The Norwegian Government submits that this issue should primarily be for the national court to assess, as it must be decided on the basis of the facts of the case.[36] The Court could, however, provide guidance to the national court. In that regard, the Norwegian Government asserts that relevant differences do indeed 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.

81. In that regard, the Norwegian Government contends that the selection of products on the basis of their differing "adverse effects on human health" has been held by the ECJ to be compatible with EC law.[37] It observes that alcohol-energy beverages are relatively new on European markets. They have, however, caused considerable worries in other parts of the world, in particular in the United States. In the Norwegian Government's view, there are sufficient grounds to conclude that alcohol-energy beverages do indeed pose particular public health risks.[38] Moreover, it seems to be acknowledged within the European Union that certain types of beverages, in particular alcopops, are indeed in a different situation to other types of beverages. Some EU Member States, including Germany and France, have, for instance, chosen to tax alcopops more heavily than other beverages that may be potential competitors.[39]

82. According to the Norwegian Government, 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. Even though it is beyond doubt that

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[35] Reference is made to Cases 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and C-127/07 *Société Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23.

[36] Reference is made to Case E-5/96 *Ullensaker kommune and Others* [1997] EFTA Ct. Rep. 30, paragraph 27, and *Philip Morris*, cited above, paragraph 87.

[37] Reference is made to *Franzén*, cited above, paragraphs 44 and 52.

[38] Reference is made, for example, to US Food and Drug Administration, "Serious Concerns over Alcoholic Beverages with Added Caffeine", http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm233987.htm, and several other studies.

[39] Reference is made to the 2006 report prepared for the European Commission, *Alcohol in Europe*, Chapter 9. On page 373, it states, for example, "Four countries have also introduced a targeted tax on alcopops since 2004, which appears to have reduced alcopops consumption since". Available at http://ec.europa.eu/health-eu/news_alcoholineurope_en.htm.

excessive use of alcohol is detrimental to public health, States must also be able to implement concrete public health measures without having to wait until it is fully clarified that a certain measure will be effective or that a certain type of product is indeed more detrimental to health than other products.[40] A more stringent application of the precautionary principle would make it very difficult to perform a proactive, public health policy.

83. Finally, the Norwegian Government submits that 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.[41]

- In the alternative: assessment under Article 11 EEA

84. If, contrary to the submission of the Norwegian Government, the Court were to find that the right to refuse alcoholic beverages containing caffeine should be assessed under Article 11 EEA and not Article 16 EEA, the Norwegian Government submits that, for the purposes of Article 11 EEA, no restriction on imports exists.

85. According to the Norwegian Government, the product selection rules of the retail monopoly regulate the products which may be sold in the retail outlets. Thus, in accordance with settled case-law, they represent a certain type of selling arrangement. Provided that the rules apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other EEA States in the same manner, both in law and in fact, they do not constitute an import restriction for the purposes of Article 11 EEA.[42]

86. The Norwegian Government submits that the test for discrimination under Article 11 EEA should not differ from the test which applies under Article 16 EEA. Hence, it submits that there is no indication of discrimination in the Icelandic provisions, whether in law or in fact.

The second question

87. Should the Court conclude that the relevant provision entails a restriction for the purposes of Article 11 EEA, according to the Norwegian Government, that restriction is justified as it constitutes a suitable and necessary measure to ensure public health.

88. The Norwegian Government reiterates that public health considerations should be accepted as integral elements of the assessment for the purposes of

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[40] Reference is made to *Philip Morris*, cited above, paragraph 82.

[41] Reference is made to Cases C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, paragraph 42, and C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 18.

[42] Reference is made, for example, to *Philip Morris*, cited above, paragraphs 44 and 46, and the case-law cited.

Article 16 EEA. Should the Court not share this view, the Norwegian Government argues, in the alternative, that Article 13 EEA and the relevant case-law must apply by analogy also in the context of Article 16 EEA. It fails to see any relevant arguments to support the view that the State's discretion to invoke important public health arguments is more limited for the purpose of Article 16 EEA than for that of Article 11 EEA.

89. In the Norwegian Government's view, it is beyond doubt that the objective of reducing alcohol consumption in general, and among young people in particular, represents a fundamental public health objective, as excessive alcohol use is detrimental to public health.

90. The Norwegian Government observes in that context that the health and life of humans rank foremost among the legitimate objectives a State may pursue, and that this influences the proportionality test. It is for each State not only to determine the level of protection opted for, but also the way in which this level is to be achieved, irrespective of different choices made by other EEA States.[43]

91. According to the Norwegian Government, in cases such as the present, States must be allowed to introduce public health measures even though there may at present be some scientific uncertainty as regards the suitability or necessity of the measure.[44] It submits further that, in cases where the State enjoys a wide margin of discretion, this implies that the State also has a margin of appreciation in establishing whether the measure in question will be suitable and necessary.[45]

92. As regards suitability, it suffices, according to the Norwegian Government, if the existing documentation indicates that it is "reasonable to assume that the measure would be able to contribute to the protection of human health".[46] In the case at hand, it submits that, on the basis of existing research, it is reasonable to assume that the refusal to stock alcohol-energy beverages in retail outlets will contribute to the protection of public health.

93. Finally, the Norwegian Government contends that the national measure is also necessary, as the same level of protection cannot be achieved equally effectively with less restrictive means. In that context, according to the Norwegian Government, it must be "apparent" that less restrictive means exist.[47]

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[43] Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 55, *Philip Morris*, cited above, paragraphs 77 and 80, and Case C-108/09 *Ker-Optika*, judgment of 2 December 2010, not yet reported, paragraph 58.

[44] Reference is made to *Philip Morris*, cited above, paragraphs 82 and 83.

[45] As regards suitability, reference is made to Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 43, the Opinion of Advocate General Saggio in the same case, point 32, and Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 32.

[46] Reference is made to *Philip Morris*, cited above, paragraph 83.

[47] Reference is made to *Pedicel*, cited above, paragraph 61.

As each EEA State is free to set its level of protection, the fact that other States have not prohibited alcohol-energy drinks – a new phenomenon in the EEA – is of no significance.

The third question

94. The Norwegian Government observes, first, that the third question is relevant only to the extent that Article 11 or 16 EEA is violated. Furthermore, it is for the national court to assess the facts of the case and to determine whether the conditions for State liability are met. The Court should thus confine itself to indicating the relevant circumstances and considerations that the national court may take into account.[48]

95. Moreover, the Norwegian Government wishes to stress that the EEA Agreement does not entail a transfer of legislative powers and that this implies, *inter alia*, that, under EEA law, directives do not have direct effect.[49] It acknowledges, however, that EEA EFTA States may be under an obligation none the less to provide compensation for loss and damage due to incorrect implementation of a directive if three conditions are met. First, the directive must be intended to confer rights on individuals, the content of which can be identified on the basis of the provisions of the directive; second, the breach on the part of the State concerned must be sufficiently serious; and third, there must be a direct causal link between this breach and the damage sustained by the injured party.[50]

96. Although those criteria are formulated in the same way as the criteria for State liability under EU law, the Norwegian Government stresses that the basis for State liability differs between EEA and EU law. Therefore, application of the criteria may not necessarily be in all respects identical.[51]

97. As regards the second condition for State liability – that the breach must be sufficiently serious – the Norwegian Government argues that the decisive test is whether the EEA State has "manifestly and gravely" disregarded the limits of its powers under the EEA Agreement.[52] Other, less serious mistakes or misunderstandings on the part of the State concerned do not lead to State liability under EEA law. In that regard, it continues, account must be taken, *inter alia*, of the clarity and the precision of the rule infringed; the measure of discretion left

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48 Reference is made to *Karlsson*, cited above, paragraph 36, Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224, paragraph 32, and Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraph 81.

49 Reference is made to Article 7 EEA and Protocol 35 to the EEA Agreement, *Karlsson*, cited above, paragraph 28, and Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 40.

50 Reference is made to *Sveinbjörnsdóttir*, paragraph 66, *Karlsson*, paragraph 32, and *Kolbeinsson*, paragraph 78, all cited above.

51 Reference is made to *Karlsson*, cited above, paragraph 30.

52 Reference is made to *Sveinbjörnsdóttir*, paragraph 68; *Karlsson*, cited above, paragraph 38; *Nguyen*, cited above, paragraph 33; and *Kolbeinsson*, cited above, paragraph 82, all cited above.

by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable.[53]

98. The Norwegian Government asserts that no relevant case-law is apparent to make it clear that EEA law has been applied incorrectly in the present case. Furthermore, Articles 11 and 16 EEA are very general in nature and leave considerable discretion to the States in adopting their own policies, in particular within the public health sphere with the additional margin of discretion mentioned above. In that regard, the Norwegian Government asserts that it is difficult to determine the boundaries of that discretion, that is, to establish the point at which the legitimate discretion turns into illegitimate regulation.[54]

99. The Norwegian Government proposes that the Court should answer the questions as follows:

> *1. It is compatible with Article 16 EEA for a State monopoly on the retail of alcohol to refuse to accept for sale alcoholic beverages containing stimulants such as caffeine, provided that it is not demonstrated before the national court that the criteria are discriminatory.*
>
> *2. Article 11 EEA is not applicable to the issue raised by the referring court.*
>
> *3. It is for the national court to decide whether the conditions for State liability are fulfilled should any mistakes have been made. These conditions are, first, that the directive provisions are intended to confer rights on individuals that are unconditional and sufficiently precise; second, that the breach is sufficiently serious; and, third, that there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party*

The EFTA Surveillance Authority

100. ESA assumes that the products in question fall within the material scope of the EEA Agreement, although it notes that the request from the national court lacks sufficient information on this point.

The first question

- Whether the measure should be examined under Article 16 or Article 11 EEA

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[53] Reference is made to *Sveinbjörnsdóttir*, paragraph 69; *Karlsson*, paragraph 38; *Nguyen*, paragraph 33; and *Kolbeinsson*, paragraph 82, all cited above.

[54] Reference is made to Cases C-278/05 *Robins and Others* [2007] ECR I-1053, paragraphs 72 to 73, and C-452/06 *Synthon* [2008] ECR I-7681, paragraph 39.

101. ESA submits that Articles 11 and 16 EFA are to be understood as applying exclusively rather than cumulatively.[55] Following that approach, each provision covers different aspects of State monopolies of a commercial character. ESA asserts that a distinction must be made between "rules relating to the existence and operation of the monopoly", on the one hand, and "other provisions of domestic legislation which are separable from the operation of the monopoly although they have a bearing on it", on the other.[56]

102. In ESA's view, a measure determining how ÁTVR may select the products that it will sell in its retail outlets is a rule relating to the operation of ÁTVR. Consequently, the relative applicability of Article 16 or Article 11 EEA depends on whether the product selection rule at stake is inseparably linked to the operation of the monopoly or can be separated from it.

103. In ESA's view, a retail monopoly does not only have a commercial character. It is also an instrument for the pursuit of public interests. The State delegates to this organisation the responsibility to adopt restrictive measures based on overriding public interests and, in particular in the case of alcohol and tobacco, public health concerns. As a consequence, the selection of products is not only based on commercial criteria. It may also be based on public health, consumer protection or ethical concerns. A monopoly can thus refuse to sell a particularly attractive product on public health grounds. These product selection rules are thus different from business-related product selection rules. Business-related product selection rules are inherent in the existence of the monopoly. On the other hand, product selection rules and decisions which are based on public interest considerations are, ESA submits, delegated State measures.

104. ESA contends that, 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. In this regard, it observes that, according to settled case-law, when the power to pass 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 purpose of Article 11 EEA.[57]

105. In support of its view that the measure should be assessed under Article 11 EEA, ESA highlights the consequence that would follow from an assessment under Article 16 EEA. Namely, had the Icelandic State adopted a regulation prohibiting the marketing of alcohol containing caffeine, for the purposes of Article 11 EEA, this regulation would be regarded as prima facie in breach of that provision but capable of justification, assuming that it pursues a legitimate

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55 Reference is made to *HOB-vín*, cited above, paragraphs 24 to 26.

56 Reference is made to *Franzén*, paragraphs 35 to 39, and *HOB-vín*, paragraphs 24 to 25, both cited above.

57 Reference is made to Joined Cases 266/87 and 267/87 *The Queen* v *Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers* [1989] ECR 1295 and Case C-292/92 *Hünermund and Others* [1993] ECR I-6787.

aim and is proportionate. Had the Icelandic State, instead, delegated to a public body other than the monopoly the power to prohibit the marketing of alcohol containing caffeine, this prohibition, too, would prima facie constitute a breach of Article 11 EEA, subject to any potential justification. However, if a ban on the sale of alcohol products containing caffeine on the Icelandic retail market results from a refusal by the retail monopoly to sell such products, this might be considered to fall under Article 16 EEA. In those circumstances, given that Article 16 EEA has been interpreted as prohibiting only discriminatory measures, an indistinctly applicable ban adopted by a monopoly could be found compatible with Article 16 EEA and, hence, would not be subject to a suitability and proportionality test.

106. In view of that analysis, ESA asserts 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 and, as a result, 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. ESA concludes, therefore, that the measure in question must be examined under Article 11 EEA and not Article 16 EEA.

107. For the sake of completeness, ESA acknowledges that the ECJ considered that the system of selection of goods of the Swedish alcohol retail monopoly Systembolaget concerned the monopoly's exercise and specific function and examined this provision under Article 37 TFEU.[58] However, ESA contends that, in that case, the ECJ scrutinised the rules governing the existence and operation of the Swedish monopoly as a whole. According to ESA, the ECJ did not need, in the circumstances of that case, to consider which selection rules were based on commercial grounds (and thus caught by Article 37 TFEU) and which, in contrast, were based on public interest grounds (and thus caught by Article 34 TFEU).

- Assessment under Article 11 EEA

108. ESA observes that Article 11 EEA covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-EEA trade.[59] The decision by ÁTVR to refuse to sell "Mokai Cider" and "Cult Shaker" amounts to a ban of these products on the Icelandic retail market. In ESA's view, the decisions adopted by ÁTVR to refuse to sell these products on the Icelandic market thus constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 11 EEA.[60]

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[58] Reference is made to *Franzén* and *Rosengren and Others*, paragraph 24, both cited above.

[59] Reference is made to *Dassonville*, cited above, paragraph 5.

[60] Reference is made to Case C-42/90 *Bellon* [1990] ECR I-4863, paragraph 10.

- In the alternative: assessment under Article 16 EEA

109. According to ESA, the case-law of the ECJ regarding the requirements of Article 37(1) TFEU contains contradictory answers.[61] Nevertheless, in view of the latest relevant judgments, the content of Article 37 TFEU and Article 16 EEA can be summarised as entailing a prohibition on discriminatory measures. Indistinctly applicable selection rules are not prohibited unless they are liable *de facto* to put imported goods at a disadvantage in comparison with domestic products.[62] Consequently, it must be determined whether the fact that ÁTVR reserves the right to refuse the sale of products which contain caffeine or other stimulants, or the actual application of this criterion, is discriminatory or likely to put imported products at a disadvantage.[63]

110. ESA submits that, in *Franzén*, the ECJ ruled that the selection system of a sales monopoly must be based on criteria that are independent from the origin of the products and must be transparent, in that there must be an obligation to state reasons and an independent monitoring procedure.[64]

111. According to ESA, it is for the national court to ascertain whether the selection rules at stake contain sufficient safeguards in order to ensure that all discrimination in their application is precluded. ESA submits that a 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. However, the provision gives ÁTVR total discretion whether or not to refuse alcoholic beverages containing stimulants 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 seems to be nothing to prevent exercise of the discretion in a disguised discriminatory fashion.[65]

112. ESA observes that, as there is no production of alcoholic beverages containing caffeine in Iceland, the refusal to sell alcoholic beverages containing caffeine constitutes in practice an obstacle only for imported products. In ESA's view, there might, as argued by the Plaintiff, be a domestic production of products that, although not strictly similar to the banned alcoholic beverages containing caffeine, 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

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61 Reference is made to the Opinion of Advocate General Léger in Case C-438/02 *Hanner* [2005] ECR I-4551, point 3.

62 Reference is made to *Franzén*, paragraph 40, *Hanner*, paragraph 38, and *HOB-vín*, paragraphs 33 to 34, all cited above.

63 Reference is made, by analogy, to *Franzén*, cited above, paragraph 45.

64 Reference is made to *Franzén*, paragraphs 44 and 51, and *Hanner*, both cited above.

65 Reference is made to *Hanner*, cited above, paragraph 43.

submits that a measure that prevents foreign-produced alcoholic beverages containing caffeine from accessing the Icelandic retail market confers an advantage on domestic products.

113. ESA contends that even if the measure is not liable to advantage domestic production the measure must be regarded as contravening Article 16 EEA. In ESA's view, Article 16 EEA should be interpreted as precluding organisational measures of a retail monopoly which are indistinctly applicable but are likely to hinder the access to the market of imported products without advantaging domestic production. An interpretation of Article 16 EEA limited to a prohibition on measures putting, in law or in fact, the trade in imported products at a disadvantage in comparison with domestic goods results in the following illogical consequence. Namely, had the Icelandic State adopted a regulation prohibiting the marketing of alcohol containing caffeine, this regulation would clearly breach Article 11 EEA, but could be justified if it pursues a legitimate aim and is proportionate. However, if the retail monopoly refuses to sell alcohol products containing caffeine, this decision, which is based on an exclusive right, is not considered unlawful for the purposes of Article 16 EEA because it is not discriminatory. As a result, that decision would not be subject to a suitability and proportionality test.[66]

The second question

- Whether the measure can be justified under Article 13 EEA

114. ESA submits that measures of equivalent effect can only be justified if they are necessary on one of the public interest grounds set out in Article 13 EEA, such as the protection of health and life of humans, or in order to meet imperative requirements relating, for instance, to consumer protection. According to settled case-law, it is for the competent national authorities to show that the marketing of the products in question poses a risk to public health, that their rules or administrative practices are suitable to effectively protect the interests envisaged by Article 13 EEA or to meet imperative requirements and that no other less restrictive measure can ensure the same level of protection of public health.

115. ESA observes, however, that EEA States enjoy discretion regarding the extent to which they wish to protect, *inter alia*, public health.[67] Scientific uncertainty may justify a cautious policy.[68] ESA considers that the same

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[66] Reference is made to the Opinions of Advocates General Elmer and Léger in *Franzén* and *Hanner*, both cited above.

[67] Reference is made to *De Peijper*, cited above, paragraph 15, and Case C-24/00 *Commission* v *France* [2004] ECR I-1277, paragraph 49, and case-law cited.

[68] Reference is made to Cases C-24/00 *Commission* v *France*, cited above, paragraph 50; 174/82 *Sandoz* [1983] ECR 2445, paragraph 17; and C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 43.

reasoning can apply when assessing whether the criteria laid down in Article 59(2) EEA are fulfilled.

116. ESA observes that, according to a review by the US Food and Drug Administration (FDA), peer-reviewed studies suggest that the consumption of beverages containing added caffeine and alcohol is associated with risky behaviours that may lead to hazardous and life-threatening situations. For example, serious concerns are raised about whether the combination of alcohol and caffeine is associated with an increased risk of alcohol-related consequences, including alcohol poisoning, sexual assault, and riding with a driver who is under the influence of alcohol.

117. According to ESA, in view of the foregoing, the possibility cannot be excluded that alcoholic beverages containing caffeine may have a negative effect on public health and that, consequently, the Icelandic State and ÁTVR may adopt measures aimed at avoiding the consumption of these products.

118. As far as the suitability of the measure is concerned, ESA submits that one might question how the refusal to sell these beverages in retail outlets is adequate to achieve the stated aim.

119. In ESA's view, first, the consistency of this policy is questionable. The measure adopted by ÁTVR does not apply to the catering sector, including bars and nightclubs, which represents around 20% of alcohol consumption in Iceland. It concedes, however, that in order to be justified Article 13 EEA does not require that the measure is in itself sufficient to attain the legitimate objective(s) pursued. Instead, the aim can be reached through a combination of measures, including, for instance, information, labelling and taxation.

120. Second, ESA continues, it is possible and fairly easy for consumers to mix caffeine and alcohol themselves. Admittedly, however, the consumption of pre-mixed cans is certainly easier and more convenient than that of a home-made mix. As a comparison, it notes that the consumption of alcopops has been considered a serious health problem and notwithstanding the fact that the consumer can obtain the same mix by making or ordering cocktails very strict national measures have been adopted all the same.

121. As regards the issue of necessity, ESA notes that it could be argued that less restrictive measures such as a mandatory labelling requirement informing consumers of the health concerns would also be suitable in order to prevent the consumption of this kind of product. However, in view of the target audience (mainly young and often under-age drinkers), a label indicating that the product could enable them to become intoxicated rapidly might prove to be counterproductive. Another less restrictive measure could consist, ESA argues, in imposing an additional tax on these drinks. Many EU Member States, including Germany and France, have chosen this solution with regard to alcopops, with effective results on consumption.

- In the alternative: whether the measure can be justified under Article 59(2) EEA

122. ESA submits that it is clear that Article 106(2) TFEU (and, by analogy, Article 59(2) EEA) may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to Article 37(1) TFEU (Article 16(1) EEA), to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.[69]

123. According to ESA, for Article 59(2) EEA to apply, five conditions must be satisfied. First, the body concerned must be an undertaking within the meaning of competition law. Second, it must be entrusted with the operation of a service of general economic interest and be granted exclusive rights by an act of the public authority. In view of the aim of the retail monopoly enjoyed by ÁTVR, according to ESA, it is clear that ÁTVR operates a service of general economic interest. Third, the measure at issue, causing an obstacle to the free movement of goods, must be necessary in order to attain the objective pursued. Fourth, it must be verified whether the undertaking's specific task could be performed with less restrictive measures.[70] As regards the two latter conditions, ESA refers to its submissions in relation to Article 13 EEA. Finally, the fifth condition requires that the measure contrary to Article 16 EEA does not affect the development of trade to such an extent as would be contrary to the interests of the Contracting Parties. In this regard, ESA observes that the ban does not apply to the catering system that represents around 20% of the market in alcoholic beverages.

The third question

124. ESA contends that the conditions for State liability under EEA law are that the rule of law infringed must be intended to confer rights on individuals; that the breach must have been sufficiently serious; and that there must be a direct and causal link between the breach of the obligation on the State and the damage sustained by the injured parties.[71]

125. In ESA's view, it is, in principle, for the national court to assess the facts of the case, and to determine whether the conditions for State liability for breach of EEA law are met. The Court may nevertheless indicate certain considerations which are for the national court to take into account in its evaluation.

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[69] Reference is made to Cases C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 32; C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 43; C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 49; and *HOB-vín*, cited above.

[70] Reference is made to Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 80.

[71] Reference is made to *Sveinbjörnsdóttir*, paragraph 65, and *Karlsson*, paragraph 34, both cited above.

126. As regards the condition that the breach of EEA law must be sufficiently serious, this depends on whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers. In order to determine whether this condition is met, the national court must take into account, *inter alia*, the clarity and the precision of the rule infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable.[72]

127. Assuming that the national court establishes the existence of a breach of EEA law, in the view of ESA, this breach is not sufficiently serious to entail State liability. The applicability of the exemption permitted under Article 13 EEA to the measures at hand is not obvious. Indeed, the facts of the case might lead the national court to conclude, notwithstanding any breach of Article 11 or 16 EEA, that the measure is none the less justified. In any event, even if the national court rules otherwise, the breach cannot be regarded as obvious. In ESA's view, if the breach of EEA law is questionable, it cannot be considered sufficiently serious to entail State liability.

128. ESA proposes that the Court should answer the questions as follows:

> *1. Article 11 of the Agreement on the European Economic Area shall be interpreted as precluding the decision of an undertaking holding a retail monopoly to refuse to sell alcoholic beverages containing caffeine through its network of retail outlets.*
>
> *In the alternative, Article 16 of the Agreement on the European Economic Area shall be interpreted as precluding a provision granting a retail monopoly the right to refuse to sell alcoholic beverages containing caffeine through its network of retail outlets as well as the decision of an undertaking holding a retail monopoly to refuse to sell those products.*
>
> *2. Article 13 of the Agreement on the European Economic Area shall be interpreted as justifying the adoption of a decision of an undertaking holding a retail monopoly to refuse to sell alcoholic beverages containing caffeine through its network of retail outlets provided that the measure is appropriate to reach the aim of fighting against excessive alcohol consumption, in particular among young people and that no other less restrictive measure could attain the same objective.*
>
> *In the alternative, Article 59(2) of the Agreement on the European Economic Area shall be interpreted as justifying the adoption or the maintenance of such a measure provided that the measure is appropriate to reach the aim of fighting against excessive alcohol consumption, in particular among young people, that no other less restrictive measure*

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[72] Reference is made to *Karlsson*, paragraph 38, and *Nguyen*, paragraph 33, both cited above.

could attain the same objective and that the measure does not affect the development of trade to such an extent as would be contrary to the interests of the Contracting Parties.

Even if the national court was to decide that the measure cannot be justified according to Article 13 EEA or, in the alternative, Article 59(2) EEA, the refusal to sell beverages combining alcohol and caffeine in the monopoly's network of outlets would not constitute a breach of the Agreement on the European Economic Area sufficiently serious to entail the liability of the Icelandic State.

The European Commission

The first question

- Whether the measure should be examined under Article 16 or Article 11 EEA

129. The Commission submits that, as a matter of EU law, measures relating to the existence and operation of State monopolies should be examined under Article 37(1) TFEU, while provisions which, although having a bearing upon the monopoly, are separable from its operations should be examined under Articles 34 and 36 TFEU. Thus, according to case-law, national rules concerning the alcohol beverage monopoly's product selection system are to be examined under Article 37(1) TFEU.[73] On the other hand, the Commission notes that the ECJ analysed the ban on the private importation of alcohol in Sweden under Articles 34 and 36 TFEU, as the ban "is not intended to govern ... the system for selection of goods by the monopoly".

130. The Commission asserts that the provision in question, granting the State monopoly an exclusive right to refuse the retail sale in Iceland of alcoholic beverages containing caffeine or other stimulants, relates to the system of selection of goods by ÁTVR, and as a consequence concerns the very existence and operation of that monopoly. Accordingly, the provision has to be assessed in the light of Article 16(1) EEA and not Article 11 EEA.

- Assessment under Article 16 EEA

131. The Commission contends that Article 37(1) TFEU (Article 16 EEA) does not oblige national monopolies having a commercial character to be abolished, but simply requires those monopolies 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 Member States.[74]

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[73] Reference is made to *Franzén*, paragraph 35, and *Gundersen*, paragraph 17, both cited above.

[74] Reference is made to Case 59/75 *Manghera and Others* [1976] ECR 91, paragraph 5, and *Franzén*, cited above, paragraph 38.

132. The Commission submits that, in *Franzén*, the ECJ went a step further establishing the requirements for considering a State monopoly lawful. First, the monopoly must have a public interest objective.[75] Second, the maintenance of a State monopoly is not necessarily discriminatory since the State is under an obligation to ensure that the organisation and operation of the monopoly is 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.[76]

133. Consequently, the Commission argues, it is necessary to assess whether ÁTVR pursues a public interest aim and operates in a manner which is not discriminatory, that is, it does not place operators or products from other Contracting Parties at a disadvantage.

134. As regards the first requirement, it is clear, according to the Commission, that the protection of public health is indisputably a public interest objective which can justify the maintenance of a State monopoly.[77] It notes that, according to case-law, the protection of young people against alcoholism is "of quite special importance".[78] In the Commission's view, "Mokai Cider" and "Cult Shaker" which contain caffeine are targeted at young people who are generally not drawn to traditional alcoholic beverages such as beer or wine, but are more attracted to alcoholic drinks with a high sugar and/or caffeine content. The Commission submits, therefore, that the decision by ÁTVR not to accept these beverages for sale may be regarded as based on overriding reasons relating to the public interest.

135. As to the second requirement, namely, that there must be no discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States, the Commission contends that nothing in the request for an Advisory Opinion indicates the existence of any such discrimination.

136. For those reasons, the Commission submits that Article 16(1) EEA does not preclude a Contracting Party from empowering a body exercising a State monopoly on the retail sale of alcohol to refuse to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine, provided that such a refusal is not discriminatory and is not likely to put imported products at a disadvantage.

The second and third questions

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75 Reference is made to *Franzén*, paragraph 39, and *Hanner*, paragraph 35, both cited above.

76 Reference is made to *Franzén*, cited above, paragraph 40.

77 Ibid., paragraph 41.

78 Reference is made to Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 18.

137. The Commission observes that the second and third questions asked by the national court are only to be considered if an arrangement such as that described in the first question is considered to constitute either a quantitative restriction on imports, or a measure having equivalent effect, within the meaning of Article 11 EEA or a breach of Article 16(1) EEA. Given the reply proposed by the Commission to the first question posed by the national court, in its view, there is no need to answer the second and third questions.

138. The Commission proposes that the Court should answer the questions as follows:

> *Article 16(1) EEA does not preclude a Contracting Party from empowering a body exercising a State monopoly on the retail sale of alcohol to refuse to accept for sale in its retail outlets alcoholic beverages containing stimulants such as caffeine, provided that such a refusal is not discriminatory and is not likely to put imported products at a disadvantage.*

Per Christiansen
Judge-Rapporteur