



## JUDGMENT OF THE COURT

11 December 2012\*

*(Free movement of goods – Directive 2000/13/EC – Product coverage – Labelling of foodstuffs – Misleading labelling – Lack of notification to ESA of a national measure – Justification – State liability)*

In Case E-2/12,

REQUEST to the Court from Héraðsdómur Reykjavíkur (Reykjavík District Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in the case of

**HOB-vín ehf.**

and

**The State Alcohol and Tobacco Company of Iceland (ÁTVR)**

on the compatibility with the EEA Agreement of national rules under which a State monopoly on the retail sale of alcohol may refuse, under certain conditions, to accept for sale alcoholic beverages that are lawfully produced and marketed in another EEA State,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- HOB-vín ehf. ('the plaintiff'), represented by Stefán Geir Þórisson, Supreme Court Attorney;
- The State Alcohol and Tobacco Company of Iceland (Áfengis- og tóbaksverslun ríkisins) ('ÁTVR' or 'the defendant'), represented by Erla

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\* Language of the request: Icelandic.

Skúladóttir, District Court Attorney, and Skúli Bjarnason, Supreme Court Attorney;

- the Norwegian Government, represented by Tonje Skjeie and Pål Wennerås, Advocates, Office of the Attorney General for Civil Affairs, acting as Agents;
- the Government of the United Kingdom, represented by Alistair Robinson, and Ian Rogers, Barrister, acting as Agents;
- the EFTA Surveillance Authority ('ESA'), represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ('the Commission'), represented by Günter Wilms, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard the oral argument of the plaintiff, represented by Stefán Geir Þórisson; the defendant, represented by Erla Skúladóttir; the Norwegian Government, represented by Tonje Skjeie; the Government of the United Kingdom, represented by Ian Rogers; ESA, represented by Gjermund Mathisen; and the Commission, represented by Günter Wilms, at the hearing on 3 October 2012,

gives the following

## **Judgment**

### **I Legal context**

*EEA law*

1 Article 8(3) EEA reads:

*1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.*

*2. Unless otherwise specified, Articles 10 to 15, 19, 20 and 25 to 27 shall apply only to products originating in the Contracting Parties.*

*3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*

*(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*

*(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

2 Article 11 EEA reads:

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

3 Article 23 EEA reads:

*Specific provisions and arrangements are laid down in:*

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

*(b) Protocol 47 in relation to the abolition of technical barriers to trade in wine;*

*(c) Annex III in relation to product liability.*

*They shall apply to all products unless otherwise specified.*

Directive 2000/13

4 Directive 2000/13/EC of 20 March 2000 of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs ('the Directive' or 'Directive 2000/13') (OJ 2000 L 109, p. 29) was incorporated into the EEA Agreement by Decision No 107/2001 of the EEA Joint Committee of 28 September 2001, amending Chapter XII of Annex II to the Agreement.

5 Recitals 2, 3, 6 and 8 of the preamble of the Directive read:

*(2) Differences between the laws, regulations and administrative provisions of the Member States on the labelling of foodstuffs may impede the free circulation of these products and can lead to unequal conditions of competition.*

*(3) Therefore, approximation of these laws would contribute to the smooth functioning of the internal market.*

*[...]*

*(6) The prime consideration for any rules on the labelling of foodstuffs should be the need to inform and protect the consumer.*

*[...]*

*(8) Detailed labelling, in particular giving the exact nature and characteristics of the product which enables the consumer to make his*

*choice in full knowledge of the facts, is the most appropriate since it creates fewest obstacles to free trade.*

6 Article 1 of the Directive reads:

*1. This Directive concerns the labelling of foodstuffs to be delivered as such to the ultimate consumer and certain aspects relating to the presentation and advertising thereof.*

*2. This Directive shall apply also to foodstuffs intended for supply to restaurants, hospitals, canteens and other similar mass caterers (hereinafter referred to as 'mass caterers').*

*3. For the purpose of this Directive,*

*(a) 'labelling' shall mean any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff; [...]*

7 Article 2 of the Directive reads:

*1. The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;*

*(ii) by attributing to the foodstuff effects or properties which it does not possess;*

*(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;*

...

*3. The prohibitions or restrictions referred to in paragraphs 1 and 2 shall also apply to:*

*(a) the presentation of foodstuffs, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed;*

*(b) advertising.*

8 Article 3 of the Directive reads:

*1. In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:*

...

*(10) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume.*

9 Article 4 of the Directive, in the version applicable at the relevant time, reads:

*1. Community provisions applicable to specified foodstuffs and not to foodstuffs in general may provide for derogations, in exceptional cases, from the requirements laid down in Article 3(1), points 2 and 5, provided that this does not result in the purchaser being inadequately informed.*

*2. Community provisions applicable to specified foodstuffs and not to foodstuffs in general may provide that other particulars in addition to those listed in Article 3 must appear on the labelling.*

*Where there are no Community provisions, Member States may make provision for such particulars in accordance with the procedure laid down in Article 19.*

*3. The Community provisions referred to in paragraphs 1 and 2 shall be adopted in accordance with the procedure laid down in Article 20(2).*

10 Article 12 of the Directive reads (with the text of adaptation [b] of Point 18 in Chapter XII of Annex II to the EEA Agreement):

*The rules concerning indication of the alcoholic strength by volume shall, in the case of products covered by tariff heading [No 22.04], be those laid down in the specific Community provisions applicable to such products.*

*In the case of other beverages containing more than 1,2 % by volume of alcohol, these rules shall be laid down in accordance with the procedure provided for in Article 20(2).*

11 Article 18 of the Directive reads:

*1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.*

*2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:*

- *protection of public health,*
- *prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,*
- *protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.*

- 12 Article 19 of the Directive (with adaptations under point 4(d) of Protocol 1 EEA on Horizontal Adaptations, Article 5(2)(d) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [‘SCA’], and Article 1 of Protocol 1 SCA) reads:

*Where reference is made to this Article, the following procedure shall apply should an EFTA State deem it necessary to adopt new legislation.*

*It shall notify [ESA] and the other Contracting Parties of the measures envisaged and give the reasons justifying them. ESA shall consult the Contracting Parties within the Standing Committee on Foodstuffs set up by Council Decision 69/414/EEC if it considers such consultation to be useful or if a Contracting Party so requests.*

*Contracting Parties may take such envisaged measures only three months after such notification and provided that [ESA’s] opinion is not negative.*

*In the latter event, and before the expiry of the abovementioned period, [ESA] shall initiate the procedure provided for in Article 20(2) in order to determine whether the envisaged measures may be implemented subject, if necessary, to the appropriate modifications.*

#### Directive 87/250

- 13 Commission Directive 87/250/EEC of 15 April 1987 on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer (‘Directive 87/250’) (OJ 1987 L 113, p. 57) is referred to in point 41 of Chapter XII of Annex II to the EEA Agreement.
- 14 Article 1 of Directive 87/250 reads:

*This Directive concerns the indication of the actual alcoholic strength by volume in the labelling of beverages containing more than 1,2 % by volume of alcohol other than those classified under headings No 22.04 and 22.05 of the Common Customs Tariff.*

- 15 Article 2(2) of Directive 87/250 reads:

*The figure for alcoholic strength shall be given to not more than one decimal place. It shall be followed by the symbol ‘% vol.’ and may be preceded by the word ‘alcohol’ or the abbreviation ‘alc.’.*

Regulation 1926/2006

- 16 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (‘Regulation 1924/2006’) (OJ 2006 L 404, p. 9) was incorporated into the EEA Agreement by Decision No 46/2008 of the EEA Joint Committee of 25 April 2008, amending Chapter XII of Annex II to the Agreement. The Decision entered into force on 1 May 2010.

- 17 Article 2(5) of Regulation 1924/2006 reads:

*‘health claim’ means any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health;*

...

- 18 Article 4(3) of Regulation 1924/2006 reads:

*Beverages containing more than 1,2 % by volume of alcohol shall not bear:*

*(a) health claims*

...

*National law*

- 19 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 states that the aim of the Act is to militate against the abuse of alcohol. Under Article 2, any liquid fit for consumption that contains more than 2.25 % of pure alcohol by volume, is defined as an alcoholic beverage. Article 10 confers a retail alcohol monopoly on ÁTVR.
- 20 Regulation No 828/2005 on the commercial production, import and wholesale of alcohol (‘Regulation 828/2005’) contains general provisions on the granting of licences for the import, wholesale and production of alcohol in Iceland. Article 8 reads:

*The licensee shall ensure that packaging (both inner and outer packaging) of alcoholic beverages produced in Iceland, or imported, indicate that the contents are alcoholic beverages. The alcohol content of the product shall*

*be stated clearly on the packaging. Furthermore, the packaging (both inner and outer) of alcoholic beverages shall be labelled with the name and address of the producer or distributor.*

21 ÁTVR's product selection rules No 631/2009 ('the product selection rules') cover its dealings with suppliers.

22 Article 5.10 of the product selection rules provides as follows:

*Text and visual imagery: Packaging and labelling may only contain information relating to the product, its production and its properties. ÁTVR does not accept products if the text or visual imagery on the packaging:*

*- indicates a lower legal drinking age than prescribed by law or which may appeal to children and teenagers, e.g. through illustrations and slogans;*

*- encourages alcohol consumption or relates to circumstances in which the consumption of alcohol is unusual or may be dangerous;*

*- contains loaded or unrelated information or implies that alcohol enhances physical, mental [or] social ability;*

*- offends people's general sense of propriety, e.g. by referring to violence, religion, pornography, illegal drugs, political views, discrimination, criminal conduct, etc.;*

*- involves a lottery or an offer, or can be considered likely to encourage sales by other means;*

...

23 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 entered into force. Article 11 of that act incorporates parts of the product selection rules. Paragraphs 4 and 5 of Article 11 read as follows:

*(4) ÁTVR may reject products that contain loaded or unrelated information or suggest that alcohol enhances physical, mental, social or sexual function, are of an offensive nature or otherwise violate public morality, e.g. with reference to violence, religion, illegal drugs, political views, discrimination or criminal conduct.*

*(5) ÁTVR may reject a product that is very similar to another product on the market.*



## II Facts and procedure

- 24 The plaintiff is an importer of alcoholic beverages to Iceland. It requested that the defendant place the three cider beverages ‘Tempt 2 Apple’, ‘Tempt 7 Elderflower Blueberry’ and ‘Tempt 9 Strawberry Lime’ on trial sale in its retail outlets in the first half of 2010. These beverages are produced in Denmark and lawfully marketed there. In an e-mail of 31 May 2010, the defendant refused the request (‘the refusal decision’).
- 25 The basis for the refusal was that the text and visual imagery on the packaging of the beverages was contrary to Article 5.10 of ÁTVR’s product selection rules. Those rules provide that labelling may only contain information relating to the product, its production method or its properties. They also provide that ÁTVR will not accept products if the text or visual imagery on the packaging contains, *inter alia*, loaded or unrelated information, or suggests that alcohol enhances physical, mental, social or sexual function, or if it offends people’s general sense of propriety, e.g. by referring to violence, religion, pornography, illegal drugs, political views, discrimination, criminal conduct, etc.
- 26 After the plaintiff sought further reasoning for the refusal, the defendant stated that the three ‘Tempt Cider’ products were marketed in stylish and attractively decorated 33cl aluminium cans, featuring artful drawings, including colourful illustrations of women’s legs with some apparently naked skin. It concluded that the illustrations on the cans ‘are evidently intended to make the products sensually appealing and challenging’ and that their sexual reference was obvious. Moreover, it stated that the ‘frivolous pictures with a sensuous, even lewd undertone’ were at the outer limit of the public’s sense of propriety. The defendant argued that such a combination of image and alcoholic beverages was not compatible with its product selection policy. It was irrelevant that ‘the attempted reference had been to energy, stamina or enjoyment, or some other image-related aspect which had absolutely nothing to do with the product’. It was further stated that, in Iceland, the principles applying to alcohol were ‘different from those applying to other consumer products’, and that consideration had to be given to the Icelandic Government’s alcohol policy and how it had been interpreted, ‘guided by values such as moderation, caution and conservatism’.
- 27 During the same period, ÁTVR made it a condition for the acceptance for sale of six other alcoholic beverages which the plaintiff imports into Iceland that they be specially marked with adhesive labels, clearly containing the words ‘alcoholic beverage’ (‘the labelling decision’). Also in this instance, the defendant relied on Article 5.10 of its product selection rules.
- 28 The labelling decision concerned two beverages produced in the United Kingdom and lawfully marketed there in glass bottles: ‘Caribbean Kick’ and ‘Diabolo Ice’. Both have an alcohol content of 4 %. The labelling decision also concerned four beverages produced in Spain and lawfully marketed there: ‘Sangría Siesta’, sold in cartons; ‘Don Simón Sangría’, which is marketed in plastic bottles, both of which have an alcohol content of 7 %; the mixed red wine drink ‘Tinto de

Verano Don Simón', and the mixed white wine drink 'Blanco de Verano Don Simón', both of which are marketed in plastic bottles. Their alcohol content is said to be 3.9 % and 4.5 %, respectively.

- 29 In the case before Reykjavík District Court, the plaintiff seeks to have the two decisions set aside. Furthermore, the plaintiff is claiming compensation and damages from the defendant.
- 30 On 21 December 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 and 13 EEA could be of significance to the resolution of the case. The defendant appealed against that decision to the Supreme Court of Iceland, which, in a judgment of 24 January 2012, upheld the District Court's decision.
- 31 Reykjavík District Court has referred the following questions to the Court:
1. *Is it incompatible with Article 11 EEA for a state enterprise, which has a monopoly on the retail sale of alcohol in the territory of an EEA State, to be permitted under legislation or administrative regulations to refuse to accept for sale alcoholic beverages that are lawfully produced and marketed in another EEA State, on the grounds that the packaging and labelling of the products contain loaded or unrelated information or suggest that alcohol enhances physical, mental, social or sexual function and do not merely relate to the product, its production method or its characteristics?*
  2. *Is it incompatible with Article 11 EEA for an EEA State to include in its legislation or administrative regulations, rules which require that it be clearly stated on the packaging of alcohol beverages that their contents are alcoholic, and that a state-owned monopoly may refuse to accept such products for sale if the packaging does not meet this requirement?*
  3. *In answering the first and second questions above, is it of significance whether the legislation or administrative regulations apply equally to domestic and foreign products?*
  4. *If it is considered that an arrangement such as the one described in the first and/or second question above constitutes a quantitative restriction, or a measure having equivalent effects, within the meaning of Article 11 EEA, then it is requested that the EFTA Court state whether such an arrangement may nevertheless be considered justifiable with reference to Article 13 EEA.*
  5. *If it is considered that an arrangement such as the one described in the first and/or second question above, which is based on law or administrative regulations, is incompatible with Article 11 EEA, then it is requested that the EFTA Court state whether it considers that the*

*conditions for State liability are met, to the extent that the EFTA Court assesses this point.*

- 32 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

### **III The questions referred to the Court**

#### *Preliminary remarks*

- 33 The national court essentially wishes to know whether national legislation and administrative regulations, which allow the State-owned monopoly, ÁTVR, to refuse certain products for sale because they do not comply with these rules, are compatible with EEA law.
- 34 The national proceedings concern two decisions by ÁTVR, the refusal decision and the labelling decision.
- 35 Even though there have been no explicit pleas that the request for an Advisory Opinion should be declared inadmissible, the parties to the national proceedings and the other participants that have submitted written observations disagree, firstly, about the extent to which EEA law applies to the products concerned by the two decisions by ÁTVR at issue in the main proceedings, and, secondly, about which rules of EEA law are applicable to these products if EEA law is applicable in the first place.
- 36 With reference to Article 8 EEA and Protocol 3 to the EEA Agreement, there is disagreement about the extent to which the products in question should fall under heading 22.05 or 22.06 of the Harmonized System and about what conclusions to draw concerning the applicability of EEA law to these products.
- 37 The plaintiff and the Commission argue that the products in question fall under Directive 2000/13. ESA claims that the EEA Agreement is not applicable to the products concerned and the rules envisaged in the first question, but that the second question should be answered in light of Directive 2000/13. The defendant and the Norwegian Government, on the other hand, maintain that the questions should be answered in light of Article 16 EEA.
- 38 The Court observes that, in proceedings under Article 34 SCA, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary.

- 39 It is clear from the request that the decisions at issue in the main proceedings concern the refusal of ÁTVR to carry the products in question on account of their labelling.
- 40 It also follows from the request that these decisions concern nine different brands of alcoholic beverages that the plaintiff wished to import to Iceland and to have them placed in the selection of products sold through ÁTVR's outlets in Iceland.
- 41 The rules on the approximation of the laws of the EEA States relating to the labelling, presentation and advertising of foodstuffs are contained in Directive 2000/13, which is referred to in Annex II of the EEA Agreement.
- 42 Pursuant to its Article 1, Directive 2000/13 concerns the labelling of foodstuffs to be delivered as such to the ultimate consumer, as well as certain aspects relating to the presentation and advertising thereof.
- 43 There is no doubt that the beverages in question are foodstuffs in the meaning of the Directive.
- 44 Since the national proceedings concern decisions to refuse the sale of the nine beverages to the ultimate consumer through the outlets of ÁTVR because of issues related to their labelling, the national court's questions have to be answered in light of Directive 2000/13 insofar as they concern the labelling of the foodstuffs in question.
- 45 According to Article 23, second paragraph, EEA, the rules in Annex II relating to technical regulations, standards, testing and certification shall apply to all products unless otherwise specified.
- 46 Directive 2000/13 has been incorporated into Annex II to the EEA Agreement. Since it has been made part of the Agreement without specifying any limitations on the scope of its application except the general exception concerning Liechtenstein, the Directive must be considered to apply to all foodstuffs. For the purposes of the applicability of Directive 2000/13 in the present proceedings, it is therefore of no relevance under which Chapter of the Harmonized Description and Coding System the nine beverages at issue in the national proceedings might fall.
- 47 This is supported by the fact that the text of adaptation (b) of Point 18 (Directive 2000/13) in Chapter XII of Annex II to the EEA Agreement provides that, in Article 9(5) of Directive 2000/13, the heading in the Harmonized System corresponding to CN codes 2206 00 91, 2206 00 93 and 2206 00 99 is 22.06. Products manufactured from grapes or grape musts under heading 22.06 fall under the scope of Directive 2000/13. This means that it was never intended to limit the applicability of the rules on labelling in Directive 2000/13 to those listed in Protocol 3 to the EEA Agreement.

- 48 The first, second, third and fourth questions must therefore be answered in light of Directive 2000/13.
- 49 Since the answers to the third and fourth questions are linked to the answers to the first and second questions, the Court will answer those questions in the context of the first and second questions, respectively.

*The first, third and fourth questions*

- Preliminary remarks

- 50 By its first question, the national court essentially asks whether a rule such as the one which allows ÁTVR to reject the sale of alcoholic beverages that are lawfully produced and marketed in another EEA State, on the grounds that the labelling of the products contains loaded or unrelated information or suggests that alcohol enhances physical, mental, social or sexual function, is compatible with EEA law and whether it is of significance that the legislation or administrative regulations apply equally to domestic and foreign products.
- 51 The question concerns the product selection rules in Iceland that allow ÁTVR to reject the sale of alcoholic beverages, *inter alia*, on the grounds that the labelling of the products (i) contains loaded or unrelated information, or (ii) suggests that alcohol enhances physical, mental, social ability and does not merely relate to the product, its production method or its characteristics.
- 52 While formulated only in abstract terms, the question must be construed as referring to the part of the national proceedings that concerns the refusal decision.
- 53 Firstly, the refusal decision seems to have been based exclusively on Article 5.10, fourth indent, of the product selection rules, relating to text or visual imagery that offends people's general sense of propriety, and not on the third indent of those rules, which covers loaded or unrelated information or implications that alcohol enhances physical, mental or social ability.
- 54 Secondly, according to the request, the requirement that the labelling must not suggest that alcohol enhances sexual function was introduced by Article 11 of Act 86/2011, which entered into force on 30 June 2011, after the present action was brought.
- 55 It is for the national court to provide the Court with the factual and legal information necessary to provide useful answers to the questions it submits to it. However, it is for the national court to interpret the national provisions at issue. The Court cannot therefore substitute its own judgment for that of the national court as regards the question of whether those provisions apply in the case before it.
- 56 Nevertheless, in order to give the national court a useful answer, it is necessary to reformulate the question slightly. In the Court's view, what the national court is

asking is whether Article 5.10 of the product selection rules, which allows ÁTVR to reject the sale of alcoholic beverages that are lawfully produced and marketed in another EEA State, on the grounds that the labelling of the products contains loaded or unrelated information, is compatible with EEA law and whether it is of significance that the legislation or administrative regulations apply equally to domestic and foreign products.

- Answer of the Court

- 57 The plaintiff, ESA and the Commission suggest that the relevant provisions under Icelandic law and the refusal decision should be assessed in light of Article 18 of Directive 2000/13.
- 58 The defendant claims that the Icelandic regulations fulfil the requirements laid down in Directive 2000/13. The regulations are intended to protect consumers from being misled. The Norwegian Government underlines that the rules and the refusal decision concern the presentation rather than the labelling of the products in question, which is subject to a lesser degree of harmonisation under Directive 2000/13, which provides for the harmonisation of certain national provisions on labelling and establishes rules governing non-harmonised national provisions.
- 59 The United Kingdom Government states that the refusal to sell the products can be justified with regard to the protection of public health.
- 60 It follows from recitals 2 and 3 of its preamble that the Directive is intended to bring about the approximation of laws, regulations and administrative provisions of EEA States on the labelling of foodstuffs to promote the free circulation of those products and the smooth functioning of the internal market.
- 61 The Directive thus governs all rules on labelling, as defined in Article 1(3)(a) thereof, by, firstly, providing for the harmonisation of certain national provisions and, secondly, establishing the rules governing the non-harmonised national provisions. As regards the non-harmonised provisions, Article 18 of the Directive provides that the EEA States may not prohibit trade in foodstuffs that comply with the rules laid down in the Directive by the application of non-harmonised national provisions unless they are justified on one of the grounds referred to in paragraph 2 of that Article (see, for comparison, Cases C-229/01 *Müller* [2003] ECR I-2587, paragraph 28).
- 62 Article 1(3)(a) of the Directive provides that, for its purposes, labelling means any word, particulars, trade marks, brand name including pictorial matters, relating to a foodstuff and placed on, *inter alia*, any packaging or label. Article 3 of the Directive provides for particulars which shall be compulsory on the labelling of foodstuffs in accordance with Articles 4 to 17 of the Directive and the exceptions contained therein.
- 63 It is clear from the request that the refusal decision concerns labelling within the meaning of the Directive.

- 64 It is therefore necessary, firstly, to determine whether indent four of Article 5.10 of the Icelandic product selection rules constitutes a non-harmonised provision governing the labelling and presentation of certain foodstuffs.
- 65 Information on labelling that may offend the public's sense of propriety and loaded or unrelated information do not fall under the harmonised compulsory requirements in Article 3 of Directive 2000/13.
- 66 Labelling that merely contains information that may offend the public's sense of propriety does not fall within the meaning of misleading labelling pursuant to Article 2(1)(a) of the Directive. Such information cannot in itself be likely to deceive and to affect the economic behaviour of consumers.
- 67 Accordingly, provisions such as indent four of Article 5.10 of the Icelandic production selection rules, which states that ÁTVR does not accept products if the text or visual imagery on the packaging contains loaded or unrelated information, or offends people's general sense of propriety, must be regarded as a non-harmonised measure pursuant to Article 18(1) of the Directive.
- 68 Secondly, it must be determined whether the application of these rules amounts to a ban on trade in foodstuffs that comply with the rules laid down in the Directive, and which is prohibited under Article 18(1) of the Directive.
- 69 It appears from the request that the products in question comply with the compulsory requirements laid down in Article 3 of Directive 2000/13.
- 70 The refusal decision was based on the first alternative of the fourth indent of Article 5.10 of the Icelandic product selection rules. It stated that the pictorial matter on the labels of the 'Tempt Ciders' products is 'evidently intended to make the products sensually appealing and challenging and that their sexual reference is obvious', and that such 'frivolous pictures with a sensuous, even lewd undertone' were at the outer limit of the public's sense of propriety. The effect of the decision was that the applicant was denied the right to sell the beverages in question through ÁTVR outlets in Iceland.
- 71 Accordingly, it must be concluded that the application by ÁTVR of Article 5.10 of the product selection rules constituted a prohibition on trade in foodstuffs, which is prohibited pursuant to Article 18(1) of the Directive.
- 72 ÁTVR claims that such a ban on the trade in foodstuffs can be justified with reference to consumer protection and public health under Article 18(2), first indent, of Directive 2000/13.
- 73 The Icelandic rule in question, as applied in the refusal decision, allows ÁTVR to reject the sale of alcoholic beverages on the basis that the labelling contains information that may offend against the public's sense of propriety. The decision itself seems to have been based exclusively on this requirement and not on any public health considerations.

- 74 It follows from Article 18(2) of the Directive that non-harmonised national provisions governing the labelling and presentation of foodstuffs which prohibit the trade in foodstuffs that comply with the rules laid down in the Directive, may be justified on the grounds of, *inter alia*, the protection of public health, which includes the protection of consumers.
- 75 According to recitals 6 and 8 of its preamble, the Directive's prime consideration is the need to inform and protect the consumer and to enable the consumer to make his choice in full knowledge of the facts.
- 76 Subject to the exceptions contained in Articles 4 to 17, the compulsory information listed in Article 3 of the Directive should be sufficient to ensure a certain level of consumer protection, while ensuring that few obstacles are created to free trade. As a result, consumer protection is an inherent objective of Directive 2000/13.
- 77 For justification to be possible, national measures must be appropriate in relation to securing the attainment of the objective that the Directive pursues, and they must not go beyond what is necessary in order to attain it.
- 78 As applied in the refusal decision, Article 5.10 of the product selection rules allows ÁTVR to refuse the sale of beverages that comply with the rules laid down in the Directive on the grounds that the labels offend people's general sense of propriety.
- 79 The purpose of the Directive, to contribute to the smooth functioning of the internal market, would be rendered ineffective if national authorities were entitled to consider labelling that complied with the Directive as being capable of offending or misleading the consumer.
- 80 Consequently, the application of non-harmonised national provisions governing the labelling and presentation of foodstuffs, which provide that ÁTVR may refuse the sale of beverages that comply with the rules laid down in the Directive on the grounds that the labels offend people's general sense of propriety, cannot be justified with regard to the protection of consumers. That protection is ensured by the information provided on the products in compliance with the Directive and cannot justify the prohibition in question.
- 81 As regards the protection of public health, the Court recalls that combating alcohol abuse is a public health concern of high priority (Cases E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 53, paragraph 85; E-9/00 *ESA v Norway* [2002] EFTA Ct. Rep. 72, paragraph 44, and E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 54). EEA States enjoy wide freedom in formulating and implementing their alcohol policies (Case E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 108, paragraph 20, and *Pedicel*, cited above, paragraph 55).
- 82 However, the reasons that may be invoked by an EEA State in justification must be accompanied by an analysis of the appropriateness and proportionality of the



measure adopted and by specific evidence supporting the arguments (see Case E-9/11 *ESA v Norway*, judgment of 16 July 2012, not yet reported, paragraph 89). Those requirements are not fulfilled in the case of the rule in question, which allows ÁTVR to reject the sale of alcoholic beverages on the basis that the labelling contains information that may offend against the public's sense of propriety. Under those circumstances, that measure cannot be justified by reasons of public health.

83 For the sake of order, the Court adds that other possible criteria referred to in the first question concern labelling that suggests that alcohol enhances physical, mental, social or sexual function. The issue will be addressed even if this may not be relevant in the case before the national court, since the national court has made specific reference to it.

84 Article 2(1)(b) of the Directive prohibits the use of labelling that attributes medicinal properties to food. With reference to Article 2(2) of the Directive, that provision has been complemented by Regulation 1924/2006, which lays down specific provisions concerning the use of nutrition and health claims relating to foods. Pursuant to Article 2(2)(5) of Regulation 1924/2006, a health claim is any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents, and health.

85 Pursuant to Article 4(3)(a) of Regulation 1924/2006, all health claims relating to beverages containing more than 1.2 % by volume of alcohol are prohibited without exception. Accordingly, a national rule prohibiting labelling which suggests that alcohol enhances physical, mental, social or sexual function is in line with EEA law.

- The origin of the products in question

86 The product selection rules imposing a ban on the sale of alcoholic beverages solely on the basis that the labelling contains information that may offend the public's sense of propriety cannot be justified pursuant to Article 18(2) of the Directive. Such a rule must be deemed to be an obstacle to the free movement of goods, since the purpose of the Directive is to facilitate the free circulation of foodstuffs and to prevent unequal conditions of competition.

87 Article 11 EEA prohibits obstacles to the free movement of goods resulting from rules that lay down requirements to be met by such goods, such as requirements as to designation, form, size, weight, composition, presentation, labelling or packaging, even if those rules apply without distinction to all national and imported products, unless their application can be justified by a public-interest objective that takes precedence over the free movement of goods.

88 As has been shown above, no public-interest objectives can justify the ban at issue.

89 As far as the first question is concerned, it is therefore not of any consequence that the national rules apply equally to domestic and foreign products.

90 The first, third and fourth questions must therefore be answered as follows:

Article 18 of Directive 2000/13 precludes a rule, such as Article 5.10 of the product selection rules, by which ÁTVR is entitled to reject the sale of alcoholic beverages that are lawfully produced and marketed in another EEA State on the grounds that the labelling of the products contains loaded or unrelated information.

It is of no significance whether such a rule applies equally to domestic and foreign products

*The second, third and fourth questions*

91 By its second question, the national court essentially asks whether a rule, which allows ÁTVR to reject the sale of alcoholic beverages on the grounds that it must be clearly stated on the packaging of alcoholic beverages that their content is alcoholic, is compatible with EEA law, and whether it is of significance that the legislation or administrative regulations apply equally to domestic and foreign products.

92 The question, while formulated only in abstract terms, must be construed as referring to the part of the national proceedings concerning the labelling decision.

93 In order to give the national court a useful answer, it is necessary to reformulate the question slightly. In the Court's view, the national court is asking whether Article 8 of the Icelandic Regulation 828/2005, which allows ÁTVR to reject the sale of alcoholic beverages that are lawfully produced and marketed in another EEA State unless the importer puts stickers carrying the text 'alcoholic beverage' on the packages, is compatible with EEA law and whether it is of significance that the legislation or administrative regulations apply equally to domestic and foreign products.

- Rules concerning the indication of alcoholic strength by volume

94 The situation as regards the applicable rules concerning the indication of the alcoholic strength by volume merits some attention.

95 As the Court has found in paragraphs 40 to 41 above, the general rules on labelling in Directive 2000/13 apply to the foodstuffs at issue in the main proceedings.

96 Article 2(1)(a) of the Directive provides that the labelling of foodstuffs must not be such as to mislead the purchaser to a material degree, particularly as to the characteristics of the foodstuff or by attributing to the foodstuff effects or properties that it does not possess, or by suggesting that the foodstuff possesses

special characteristics when in fact all similar foodstuffs possess such characteristics.

- 97 Accordingly, the principle underlying the Directive is that the consumer should be given accurate information about various characteristics of a foodstuff. To this effect, Article 3 of the Directive lists the particulars that are compulsory on the labelling of foodstuffs. Article 3(1)(10) of the Directive establishes that beverages containing more than 1.2 % by volume of alcohol shall indicate the actual alcoholic strength by volume on the labelling.
- 98 The conditions under which those particulars listed in Article 3 of the Directive must appear on the labelling are set out in Articles 4 to 17, which also provide for certain derogations from Article 3.
- 99 Pursuant to Article 12(1) of the Directive, in the wording of adaptation (d) of Point 18 (Directive 2000/13) in Chapter XII of Annex II to the Agreement, the rules concerning the indication of alcoholic strength by volume shall, in the case of products covered by tariff heading No 22.04, be those laid down in the specific EEA law provision applicable to such products. In the case of other beverages containing more than 1.2 % by volume of alcohol, Article 12(2) provides that these rules shall be laid down in accordance with the procedure provided for in Article 20(2) of the Directive, which refers to the comitology procedure in the EU established by Decision 1999/468/EEC.
- 100 The rules concerning the indication of alcoholic strength by volume on the labelling of alcoholic beverages for sale to the ultimate consumer are laid down in Directive 87/250/EEC. Pursuant to Article 2(2) of this Directive, the figure for alcoholic strength shall be given to not more than one decimal place. It shall be followed by the symbol ‘% vol.’ and may be preceded by the word ‘alcohol’ or the abbreviation ‘alc.’. However, pursuant to its Article 1, that Directive is not applicable to products classified under headings 22.04 and 22.05 of the Common Customs Tariff.
- 101 It follows that, in the EEA Agreement, the rules on the labelling of products which fall under heading 22.05 are set by Directive 2000/13, whereas the rules on the labelling of products that fall under heading 22.06 are set by Directive 2000/13 and Directive 87/250.
- 102 In the European Union, this situation has been remedied by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, which has not yet been incorporated into the EEA Agreement. Pursuant to this Regulation, the

labelling requirement in question does not only apply to products that fall under heading 22.04.

- Answer of the Court

- 103 The plaintiff, ESA and the Commission submit that Article 3(1) of the Directive contains an exhaustive list of the particulars that it is compulsory to include on the labelling of pre-packaged foodstuffs and that the required extra labelling is a particular in the meaning of Article 4(2), second paragraph, of the Directive. In relation to beverages containing more than 1.2 % by volume of alcohol, point 10 of Article 3(1) of the Directive simply requires an indication of the actual alcoholic strength by volume.
- 104 It is claimed that the Icelandic measure requiring additional labelling cannot be justified under the Directive, because Iceland did not notify ESA of this measure in accordance with Article 19, as required by Article 4(2), second paragraph. The additional requirement that the words ‘alcoholic beverages’ be added on the labelling is thus incompatible with the Directive.
- 105 The defendant, supported by the Norwegian Government, submits that the basis for the labelling decision was that the visual imagery on the packaging appealed to children and teenagers. Moreover, there is a risk of confusion between the alcoholic beverages and non-alcoholic products. This can be reconciled with Article 2(1) of the Directive, which prohibits labelling and presentation that could mislead the consumer to a material degree as to the characteristics of the products.
- 106 The United Kingdom Government emphasises that the extra labelling can be justified having regard to the protection of public health.
- 107 The rule in Article 8 of the Icelandic Regulation 828/2005 requires that it be clearly stated on alcoholic beverages that their contents are alcoholic. The labelling decision was based on this rule.
- 108 A national measure which requires that it be stated, other than by indication of the actual alcoholic strength by volume, on the labelling of alcoholic beverages that their contents are alcoholic must be regarded as concerning the indications needed to inform consumers about particulars in the meaning of Article 3(1) of the Directive.
- 109 It follows from the request that the products in question, which all have an alcohol content of more than 1.2 % by volume, already had the actual alcoholic strength stated on their labelling. Thus, the labelling of the products did meet the requirement set out in Article 3(1)(10) of the Directive.
- 110 According to Article 4(2) of the Directive, EEA States may provide that other particulars in addition to those listed in Article 3 of the Directive must appear on the labelling. Where there are no provisions of European law, EEA States may

only make provision for such particulars in accordance with the procedure laid down in Article 19 of the Directive.

- 111 Pursuant to the second paragraph of Article 19, an EFTA State shall notify ESA and the other EFTA States and the Member States of the EU of the measures envisaged and give the reasons justifying them. It follows from the third paragraph of Article 19 of the Directive that EEA States may take measures only three months after such notification and provided that ESA's opinion is not negative.
- 112 The role of ESA in this regard is regulated under point 4(d) of Protocol 1 EEA on Horizontal Adaptations, Article 5(2)(d) SCA, and Article 1 of Protocol 1 SCA.
- 113 It follows from the case file that ESA was not notified of Article 8 of Regulation 828/2005. As a result of this, as ESA pointed out at the hearing, since the necessary procedure has not been followed, it cannot be considered effective under EEA law and cannot be allowed to impose burdens on individuals and economic operators.
- 114 Consequently, it is not necessary to answer the third question in relation to the second question.
- 115 The answer to the second and fourth questions must therefore be that a national rule such as Article 8 of Icelandic Regulation 828/2005, which requires that it be stated on packages of beverages containing more than 1.2 % by volume of alcohol, other than by indication of the actual alcoholic strength by volume, that their contents are alcoholic, cannot be considered effective and cannot be allowed to impose burdens on individuals and economic operators if it has been adopted without regard to the procedure laid down in Article 19 of the Directive.

*The fifth question*

- 116 By its fifth question, the national court is asking whether the conditions for State liability under the EEA Agreement are met in the case that the arrangements described in the first and second question are found to be incompatible with EEA law.

- Observations submitted to the Court

- 117 The plaintiff, supported by ESA and the Commission, submits that the provisions in the Directive are intended to confer rights on individuals, and that the breach must be regarded as sufficiently serious. ESA and the Commission contend that it is for the national court to decide to what extent the plaintiff has actually sustained damage from the labelling requirements.
- 118 The defendant, supported by the Norwegian Government, submits that the conditions for State liability are not met. In their view, it is for the national court to assess the facts of the case and to determine whether the conditions for State liability are met.

- Answer of the Court

- 119 It is a general principle of EEA law that an EFTA State is obliged to provide for compensation for loss and damage caused to individuals and economic operators as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible. State liability must be seen as an integral part of the EEA Agreement as such (see Cases E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 62 and 63; E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 25; and E-8/07 *Ngyen* [2008] EFTA Ct. Rep. 224, paragraph 31).
- 120 The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development, in the case law of the Court of Justice of the European Union, of the principle of State liability under EU law. Therefore, the application of the principles may not necessarily be coextensive in all respects (see *Karlsson*, cited above, paragraph 30).
- 121 An EFTA State may be held responsible for breaches of its obligations under EEA law when three conditions are met: firstly, the rule of law infringed must be intended to confer rights on individuals and economic operators; secondly, the breach must be sufficiently serious; and, thirdly, 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 (see *Sveinbjörnsdóttir*, cited above, paragraph 66; and *Karlsson*, cited above, paragraph 32).
- 122 It is inherent in the nature of the EEA Agreement that, in cases of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and to claim at the national level any rights that can be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise (see Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 77; and *Karlsson*, cited above, paragraph 37).
- 123 The plaintiff has invoked Article 11 EEA before the national court and claims that this provision confers upon him the rights which he invokes.
- 124 Article 11 EEA prohibits all quantitative restrictions and measures having equivalent effect. As such, it confers on individuals and economic operators rights upon which they are entitled to rely, and a breach of that provision may give rise to reparation (see, by analogy, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 23).
- 125 The plaintiff, ESA and the Commission also refer to the provisions of Directive 2000/13. As is apparent from the wording of recitals 2 and 8 of its preamble, the Directive was adopted in order to facilitate and avoid obstacles to the free circulation of the goods covered by it. Guaranteeing the free movement of goods is thus one of the objectives of the Directive, which, through the approximation of the laws of the EEA States, is designed to encourage intra-EEA trade. The

right conferred by Article 11 EEA is thus defined and given concrete expression by that Directive.

- 126 Regarding the content of the Directive, it should be noted that, among other things, it governs the labelling of foodstuffs in order to make it possible to market foodstuffs packaged in one EEA State in the market of another EEA State, subject to certain requirements. It follows from Article 18 of the Directive that EEA States may not forbid trade in foodstuffs that comply with the rules laid down in the Directive except under specific circumstances. The ban on the EEA States prohibiting trade in foodstuffs gives individuals and economic operators the right to market foodstuffs that comply with the rules laid down in the Directive in another EEA State.
- 127 Moreover, it is apparent from the Directive that, even though EEA States retain the right to adopt certain additional provisions, this is subject to a procedure at the EEA level.
- 128 In the present context, it is irrelevant whether Directive 2000/13 is being made or has been made part of the legal order in Iceland, since it has been incorporated in the EEA Agreement. With regard to secondary EEA law, individuals and economic operators must be able to invoke the principle of State liability when a decision by the EEA Joint Committee becomes applicable. Consequently, the plaintiff, which claims to have been harmed by the incorrect application of Directive 2000/13, may rely on the free movement of goods in order to be able to render the State liable for the breach of the Directive.
- 129 As regards the condition that the breach must be sufficiently serious, it follows from the Court's case law that this depends on whether, in the exercise of its legislative powers, an EFTA State has manifestly and gravely disregarded the limits on the exercise of its powers, the factors to be taken into consideration in this connection being, *inter alia*, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (see *Karlsson*, cited above, paragraph 38; *Ngyen*, cited above, paragraph 33; and Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraph 82).
- 130 If, however, the EFTA State was not called upon to make any legislative choices and it had only limited or even no discretion, the mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach.
- 131 It follows that the EFTA State's discretion, which is broadly dependent on the degree of clarity and precision of the rule infringed, is an important criterion when determining whether there has been a sufficiently serious breach of EEA law.
- 132 As regards the labelling decision, ÁTVR threatened to reject the sale of the alcoholic beverages in question, which are lawfully produced and marketed in another EEA State, unless the importer put stickers on the packages carrying the text 'alcoholic beverage' in accordance with Article 8 of Regulation 828/2005.

- 133 Article 4(2) of Directive 2000/13 clearly and precisely precludes any possibility for an EEA State to introduce other labelling particulars in addition to those listed in Article 3 without first having undertaken the procedure provided for in Article 19 of the Directive.
- 134 The obligation that rests on EEA States to respect the notification procedure in Article 19 of the Directive is clear and unequivocal.
- 135 Pursuant to Article 104 EEA, the decisions of the EEA Joint Committee in the cases provided for in the Agreement shall, unless provided for therein, upon their entry into force be binding on the Contracting Parties, which shall take the necessary steps to ensure their implementation as well as their application.
- 136 In those circumstances, a breach of Article 19 of that Directive, such as that committed by the Icelandic Minister in adopting Article 8 of Regulation 828/2005 without notifying ESA, is enough to establish a sufficiently serious breach of EEA law.
- 137 Whether there is a direct causal link between the breach of EEA law and any damage sustained is for the national court to determine.
- 138 The answer to the fifth question must therefore be as follows:

Individuals and economic operators who have been harmed by the incorrect application of Directive 2000/13 may rely on the free movement of goods in order to be able to render the State liable for the breach of EEA law.

Damage caused by a national measure such as that described in the first question entails State liability if the national court finds that the application of the national legislation or administrative regulation constitutes a sufficiently serious breach of EEA law and there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

A breach of EEA law is sufficiently serious where damage is caused by a national measure such as that described in the second question, if the national legislation or administrative regulation cannot be considered effective due to a failure to notify it pursuant to Article 19 of Directive 2000/13. Such a breach entails State liability if the national court finds a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

#### **IV Costs**

- 139 The costs incurred by the Norwegian and United Kingdom 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 the costs of the parties to those proceedings is a matter for that court.



On those grounds,

THE COURT

in answer to the questions referred to it by the Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

**1. Article 18 of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs precludes a rule such as Article 5.10 of the product selection rules, by which ÁTVR rejects the sale of alcoholic beverages that are lawfully produced and marketed in another EEA State on the grounds that the labelling of the products contains loaded or unrelated information.**

**It is of no significance whether the product selection rules apply equally to domestic and foreign products.**

**2. A national rule such as Article 8 of the Icelandic Regulation 828/2005 on the commercial production, import and wholesale of alcohol, which requires that it be stated on packages of beverages containing more than 1.2 % by volume of alcohol, other than by indication of the actual alcoholic strength by volume, that their contents are alcoholic, cannot be considered effective and cannot be allowed to impose burdens on individuals and economic operators if it has been adopted without regard to the procedure laid down in Article 19 of Directive 2000/13/EC.**

**3. Individuals and economic operators who have been harmed by the incorrect application of Directive 2000/13/EC may rely on the free movement of goods in order to be able to render the State liable for the breach of EEA law.**

**Damage caused by a national measure such as that described in the first question entails State liability if the national court finds that the application of the national legislation or administrative regulation constitutes a sufficiently serious breach of EEA law and there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.**

**A breach of EEA law is sufficiently serious where damage is caused by a national measure such as that described in the second question if the national legislation or administrative regulation cannot be considered effective due to a failure to notify it pursuant to Article 19 of Directive 2000/13/EC. Such a breach entails State liability if the national court finds a direct causal link between the**

**breach of the obligation resting on the State and the damage sustained by the injured party.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 11 December 2012.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President