REPORT FOR THE HEARING

in Case E-2/12

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

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.

I Introduction

1. By a letter of 6 February 2012, registered at the EFTA Court on 13 February 2012, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between HOB-vín ehf., a company registered in Iceland ("HOB-vín" or "the plaintiff"), and the State Alcohol and Tobacco Company of Iceland ("ÁTVR" or "the defendant").

2. The case before the national court concerns two decisions by the defendant. In the first decision, an application to have four alcoholic beverages placed on sale in ÁTVR's retail outlets was rejected by the defendant with reference to the text and visual imagery on their packaging. In the second decision, the defendant, upon application from the plaintiff, made it a condition for accepting for sale six other alcoholic beverages that the packaging of those beverages be specially marked with adhesive labels, clearly stating the words "alcoholic beverage".

II Legal background

EEA law

3. Article 8(3) EEA reads:

> *Unless otherwise specified, the provisions of this Agreement shall apply only to:*
>
> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

4. Heading 22.05 of the Harmonized Commodity Description and Coding System ("HS") reads:

> *Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances.*

5. Heading 22.06 of the HS reads:

> *Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included.*

6. Article 11 EEA reads:

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

7. Article 13 EEA reads:

> *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.*

8. 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.*

9. 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;*
> *...*
>
> *They shall apply to all products unless otherwise specified.*

10. Directive 2000/13/EC of 20 March 2000 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"),[1] as amended, is incorporated into the EEA Agreement at point 18 of Chapter XII of Annex II to the Agreement.

11. 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:*

[1] OJ 2000 L 109, p. 29.

(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.

12. 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.

13. Article 4 of the Directive 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)

14. 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.

15. Article 2(3) of Council Regulation (EEC) No 1601/91 laying down general rules on the definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails, [2] incorporated into the EEA Agreement at point 3 of Chapter XXVII of Annex II to the Agreement, reads:

Definitions of the various categories of aromatized wine-based drinks the description of which may:

- replace the description "aromatized wine-based drink" in the Member State of production,

- be used to supplement "aromatized wine-based drink" in the other Member States:

(a) Sangria:

a drink obtained from wine, aromatized with the addition of natural citrus-fruit extracts or essences, with or without the juice of such fruit and with the possible addition of spices, sweetened and with CO_2 added, having an acquired alcoholic strength by volume of less than 12 % vol.

The drink may contain solid particles of citrus-fruit pulp or peel and its colour must come exclusively from the raw materials used.

The description "Sangria" must be accompanied by the words "produced in ..." followed by the name of the Member State of production or of a more restricted region except where the product is produced in Spain or Portugal.

The description "Sangria" may replace the description "aromatized wine-based drink" only where the drink is manufactured in Spain or Portugal;

...

16. 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

[2] OJ 1991 L 149, p. 1, as amended.

the ultimate consumer ("Directive 87/250")[3] is incorporated into the EEA Agreement at point 41 of Chapter XII of Annex II to the Agreement.

17. 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.".*

National law[4]

18. 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. Under Article 2 of the Act, any liquid fit for consumption, which contains more than 2.25% of pure alcohol, by volume, is defined as an alcoholic beverage. Article 10 of the Act confers a retail alcohol monopoly on ÁTVR.

19. The fifth paragraph of Article 5 of the Act authorises the Minister to issue regulations containing more detailed provisions on the granting of licences for the commercial importing, retailing or production of alcohol. On the basis of this authorisation, the Minister issued Regulation No 828/2005 on the commercial production, import and wholesale of alcohol. The regulation contains general provisions on the granting of licences for the import, wholesale and production of alcohol. Article 8 of Regulation No 828/2005 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.*

20. However, at the time of the adoption of the challenged decisions, 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:

> *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*

---

[3] OJ 1987 L 113, p. 57.

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

instances conforming to this Act, the Alcoholic Beverages Act and other provisions made in legislation and regulations at any given time.

21. 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.

22. 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 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.

…

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

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

24. 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.

25. Articles 5.4 to 5.12 of the product selection rules included requirements regarding products, packaging and alterations to products. Article 5.4 stated as follows:

Suppliers are responsible for ensuring that product contents, labelling, visual imagery and packaging conform to the rules of the country of origin and Icelandic legislation, such as the Foodstuffs Act No 93/1995, and regulations issued thereunder.

26. Article 5.10 of the product selection rules provided 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;*
>
> *...*

27. 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. 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.*

III Facts and procedure

28. The plaintiff is an importer of alcoholic beverages to Iceland. The plaintiff requested that the defendant place three cider beverages on trial sale in its retail outlets in the first half of 2010. These beverages were: "Tempt 2 Apple", "Tempt 7 Elderflower Blueberry" and "Tempt 9 Strawberry Lime". All these beverages

are produced in Denmark and lawfully marketed there. By an e-mail of 31 May 2010, the defendant refused the application.

29. 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 packaging and labelling may only contain certain information relating to the product, its production method or its properties, and 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.

30. After the plaintiff sought further reasoning for the refusal, the defendant stated that "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 is 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, and that 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". The opinion went on to stress 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".

31. In 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 their packaging be specially marked with adhesive labels, clearly stating the words "alcoholic beverage". Such labelling is not on the beverages' original packaging. Also in this instance, the defendant relied on Article 5.10 of its product selection rules.

32. The products in question were two beverages produced in the United Kingdom, and lawfully marketed there in glass bottles: "Caribbean Kick" and "Diabolo Ice", which both have an alcohol content of 4%, and four beverages produced in Spain and lawfully marketed there without labelling of this type. These are "Sangría Siesta", sold in cartons, and "Don Simón Sangría", which is marketed in plastic bottles, both of which have an alcohol content of 4%, and the red wine, "Tinto de Verano Don Simón", and the white wine, "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.

33. In the case before Reykjavík District Court, the plaintiff seeks to have the two decisions set aside. Furthermore, the plaintiff is seeking compensation and damages from the defendant.

34. 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 substantial significance for the resolution of the case. The defendant brought an appeal against that decision before the Supreme Court of Iceland, which in a judgment of 24 January 2012 upheld the District Court's decision.

35. The Supreme Court states in its judgment that there is no dispute as to the fact that the cider beverages in question, and the beverages "Caribbean Kick", "Diabolo Ice", "Sangría Siesta" and "Don Simon Sangría" fall within the notion of goods for the purposes of Part II of the EEA Agreement and that the table wine varieties "Tinto de Verano Don Simón" and "Blanco de Verano Don Simón", on the other hand, do not fall within that notion.

36. 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.**

IV Written observations

37. 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 Stefán Geir Þórisson, Supreme Court Attorney;
- the defendant, represented by Skúli Bjarnason, Supreme Court Attorney, and Erla Skúladóttir, District Court Attorney, of the law firm Málþing ehf.;
- the Norwegian Government, represented by Tonje Skjeie, Deputy Advocate, Office of the Attorney General of Civil Affairs, and Kristin Nordland Hansen, Higher Executive Officer, Ministry of Foreign Affairs, acting as Agents;
- the United Kingdom Government, represented by Alistair Robinson, Cabinet Office European Law Division, Treasury Solicitor's Department, acting as Agent, and Ian Rogers, Barrister;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, 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

Introductory remarks regarding product coverage

38. The plaintiff notes that it is undisputed that all the products originate in the EEA. It notes, furthermore, that in its judgment the Supreme Court of Iceland states that, apart from the table wine varieties "Tinto de Verano Don Simón" and "Blanco de Verano Don Simón", all the products in question fall within the notion of goods for the purposes of Part II of the EEA Agreement. The plaintiff disputes that the two latter wine products fall outside the notion of goods, and indicates that it will further elaborate on that point at the oral hearing.

The first three questions

39. According to the plaintiff, it is appropriate to consider the first three questions jointly, as they all concern Article 11 EEA.

40. The plaintiff observes that the national rules in question involve technical regulations containing requirements as to the presentation and labelling of the product. In its submission, both requirements constitute measures equivalent to quantitative restrictions within the meaning of Article 11 EEA.

41. According to the plaintiff, the measures taken by ÁTVR have the effect of hindering the import of the beverages into the Icelandic market. The packaging of the "Tempt Cider" beverages will need to be altered completely at a cost that makes import impossible.

42. Moreover, the plaintiff continues, the additional labelling "alcoholic beverage" also entails extra costs and work, making it too burdensome and costly to keep the product on the Icelandic market.

43. The plaintiff submits that the requirement to put additional labels on each bottle of the beverages establishes, in fact, a dual burden on the plaintiff, which, according to the case-law of the Court of Justice of the European Union ("ECJ") is *prima facie* unlawful. The beverages have been lawfully marketed and produced in Denmark, Spain and other EEA countries. On the basis of the principle of mutual recognition, they should, the plaintiff submits, enjoy the right of free movement within the European Economic Area and be considered lawfully marketed in other Member States.[5]

44. In the view of the plaintiff, both the decisions in question, whether considered to hinder the import directly or indirectly, actually or potentially, are measures having equivalent effect for the purposes of Article 11 EEA.[6] In this regard, the plaintiff stresses that the fact that the national measures are indistinctly applicable is not decisive and, hence, the measures may still be caught by Article 11 EEA.[7]

The fourth question

45. At the outset, the plaintiff observes that the nature of retail monopolies entails that, unlike other undertakings, monopolies cannot choose freely the products to be sold in their outlets. Since importers wishing to sell their products

---

[5] Reference is made to Cases 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, and C-110/05 *Commission* v *Italy* [2009] ECR I-519.

[6] Reference is made to Case 8/74 *Dassonville* [1974] ECR 837.

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

on the Icelandic market have a single possible contracting partner, a ban on imported products has a negative effect on market access.

46. The plaintiff submits that, as State monopolies of a commercial character are a well known obstacle to the free movement of goods, there is a particular need for caution to ensure that an EEA State does not take advantage of its position and that derogations are not used as tools to bypass fundamental principles of EEA law.

47. The plaintiff asserts that the refusal to sell the "Tempt cider" beverages due to their presentation cannot be justified under Article 13 EEA. The image on the package is not offensive or harmful to public morality, and does not include references to obscene or indecent material.

48. According to the plaintiff, moral criteria are subject to various interpretations at different times, by different individuals. An image can appear to suggest a sexual function to one person while it may seem to reveal an artistic message to another. In other words, the assessment is a subjective one. Therefore, in the view of the plaintiff, the margin of discretion given to Member States for the evaluation of such a criterion must be narrow in scope. Otherwise, it would result in arbitrary and unforeseeable measures taken by the Member State.

49. The plaintiff argues that, although the ECJ has held that "it is for each Member State to decide upon the nature of public morality for its own territory", its case-law demonstrates that justification on grounds of public morality is permitted only in relation to obscene and indecent matters such as pornography, violence and sex toys.[8]

50. According to the plaintiff, the refusal to sell "Tempt Cider" due to the illustrations on the cans is a disproportionate means of pursuing legitimate aims. The disputed pictures are approximately 15 mm in size and display two sets of female legs clad in stockings and high heels. One picture does not show any bare skin. The second picture shows female thighs from the knee up. That part is 5 mm in size. The plaintiff submits that, judged objectively, the packaging cannot be seen as having a sexual reference, and, even if it were to be regarded as having such, it is clearly not of the scale to be offensive to any person. If female thighs are indeed so offensive that they justify derogation on grounds of public morality, many advertisements on television and in newspapers must be regarded as offensive to the majority of the Icelandic nation. The plaintiff asserts that, by refusing to sell the product in question, ÁTVR is imposing a much more rigorous standard of morality than necessary to uphold any legitimate aim of protecting public morals.

---

[8] Reference is made to Cases 34/79 *Henn and Darby* [1979] ECR 3795 and E-8/97 *TV 1000 Sverige* [1998] EFTA Ct. Rep. 68.

51. Moreover, in the view of the plaintiff, the requirement to re-label the beverages is a discriminatory and disproportionate measure.

52. It observes, first, that a Member State cannot restrict at will the import of one product, if similar foreign or domestic products are not restricted.[9] In this regard, the plaintiff refers to the packaging of the contested beverage "Sangría Don Simón", which contains an image with fruits and a pitcher and where the percentage of alcohol volume (7%) is marked on the back. In large letters on the front is the word "...Sangría". Sangria is an alcoholic mixture known worldwide. However, there are other similar imported alcoholic beverages on the Icelandic market, which are colourful, include fruity images and some of them have the alcohol brand marked in small letters on the packages. They all show the alcohol content in volume. The only difference is the material of the packaging. The contested beverage is offered for sale in a bottle made of plastic and not glass, as is the case with the other imported beverages. According to the plaintiff, the difference in packaging material cannot suffice to justify a derogation under Article 13 EEA.

53. Second, it observes that, for a restrictive measure to be justified, it must be necessary to achieve its legitimate aim and proportionate to that end.[10]

54. In this regard, the plaintiff notes that the State monopoly entails that alcohol is only available in special outlets and only to persons over the age of twenty. According to the plaintiff, the public policy of the Icelandic authorities already restricts trade on imports to the level necessary for the protection of public health. Furthermore, the products marketed by the plaintiff are sold ÁTVR's special outlets which offer only alcoholic beverages and further already contain a clear label of their alcohol content. Therefore, there is no need for any additional labels. In its view, such re-labelling cannot be justified under Article 13 EEA.[11]

The fifth question

55. The plaintiff submits that, as far as the principle of State liability is concerned, case-law of the Court and the ECJ has so far only concerned the liability of the Member States and not State institutions such as ÁTVR. However, according to the plaintiff, there is no reason to treat a State institution such as ÁTVR differently from a Member State when it comes to a breach of EEA law. The plaintiff indicates that it will elaborate further on the fifth question in its submissions at the oral hearing.

---

[9] Reference is made to *Cassis de Dijon*, cited above, paragraphs 11 and 14.

[10] Reference is made, *inter alia*, to Cases 104/75 *De Peijper* [1976] ECR 613, paragraphs 16 to 17, and 188/84 *Commission* v *France* [1986] ECR 419.

[11] Reference is made to Case 27/80 *Fietje* [1980] ECR 3839, paragraphs 12 and 15.

56. The plaintiff proposes that the Court should answer the questions as follows:

> *1. It is not compatible 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. It is not compatible 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. It is not of any significance whether the legislation or administrative regulations concerning the above questions apply equally to domestic and foreign products.*
>
> *4. It is considered that an arrangement such as the one described in the first and second questions above is contrary to Article 11 EEA and such restrictions cannot be considered justifiable with reference to Article 13 EEA.*
>
> *5. A State institution such as the defendant in the main proceedings that has monopoly on retail sale of alcoholic beverages in Iceland is liable towards a party that suffers loss due to its breaches of EEA law, subject to the general conditions for State liability put out by the EFTA Court are fulfilled.*

The defendant

Introductory remarks on alcohol policy

57. At the outset, the defendant stresses the negative effects alcohol has on public health. It notes that the World Health Organisation ("WHO") recently has stated, based on large, diverse and persuasive evidence, that alcohol is one of the world's top three priority public health areas, and that there is a need for strengthened action in Europe. In this regard, it refers to a new action plan to reduce the harmful use of alcohol for the European Region of WHO, including the EEA territory, which was adopted in September 2011.

58. It observes, in addition, that, in 2006, the European Commission launched its Communication on an EU strategy to support Member States in reducing alcohol related harm.[12] That document states that, in order to protect young people from alcohol related harm, worrying drinking trends among young people can be effectively addressed through public policy. Examples of effective measures implemented by Member States are recommended, including enforcement of restrictions on sales, on availability and on marketing likely to influence young people.

59. The defendant also notes that the State monopoly on the retailing of alcoholic beverages has been of crucial importance in the Icelandic Government's alcohol policy. In maintaining this monopoly, the Government has been able to control the retail sale of alcohol and ensure that its restrictive alcohol policy has been observed in practice.

The applicability of Article 11 EEA

60. The defendant submits that Articles 11 and 16 EEA are to be understood as applying exclusively rather than cumulatively.[13] Measures relating to the existence and operation of State monopolies, such as the defendant, should be scrutinised under Article 16(1) EEA, while provisions which, although having a bearing upon the monopoly, are separable from its operations, should be examined under Articles 11 and 13 EEA.[14] Thus, each provision covers different aspects of State monopolies of a commercial character.

61. Consequently, according to the defendant, it must be ascertained whether the provisions of Icelandic legislation and administrative regulations addressed in the case at hand relate to the existence and operation of ÁTVR and to the exercise of its exclusive rights, or whether they are separable from the operation of the monopoly although having a bearing upon it.

62. The defendant submits that it is established case-law that the selection of products to be sold in a State monopoly on the retailing of alcoholic beverages is among the central issues of the monopoly, inseparable from its existence and operation.[15] Accordingly, provisions granting ÁTVR the right to refuse to accept for sale alcoholic beverages, e.g. on the grounds that the packaging and labelling of the products do not merely relate to the product, its production method or its characteristics and contain loaded or unrelated information or suggest that

---

[12] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, An EU strategy to support Member States in reducing alcohol related harm, COM(2006) 625 final of 24 October 2006.

[13] Reference is made to Case E-4/05 *HOB-vín* [2005] EFTA Ct. Rep. 4, paragraph 24.

[14] Reference is made to Cases C-189/95 *Franzén* [1997] ECR I-5909, E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 108, and *HOB-vín*, cited above.

[15] Reference is made to Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paragraph 20, *Franzén*, cited above, paragraphs 43 to 52, and Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep. 72, paragraph 35.

alcohol enhances physical, mental, social or sexual function, and provisions empowering the defendant to refuse to accept alcoholic beverages for sale, unless it is clearly stated on their packaging that their contents are alcoholic, have to be assessed in the light of Article 16(1) EEA and not Article 11 EEA.

The first question

- Assessment under Article 16(1) EEA

63. The defendant submits that, in order to assess the compatibility with Article 16(1) EEA in the case at hand, it is necessary to determine whether by the provisions at stake ÁTVR pursues a public interest aim and, if so, that those provisions are not discriminatory.[16]

64. In its view, the provisions of Icelandic legislation and administrative regulations referred to in the first question evidently pursue public interest aims, that is, the protection of public health and the protection of young people from the harmful effects of alcohol in particular. Therefore, the decisive test is that of discrimination.

65. In the defendant's view, nothing in the request for an Advisory Opinion indicates the existence of any discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed. Nor has the plaintiff referred to any possible or alleged discrimination in its action against the defendant before Reykjavík District Court.

66. Instead, the defendant continues, the rules authorising it to refuse to accept alcoholic beverages for sale 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 apply in the same way irrespective of the origin of the products. Accordingly, those rules are compatible with Article 16(1) EEA.

- In the alternative: assessment under Article 11 EEA

67. If, contrary to the defendant's submission, the Court finds that Article 11 EEA is applicable in this case, the defendant makes the following argument in the alternative.

68. On the basis of established case-law, the defendant asserts that the provisions concern selling arrangements and, as such, do not constitute a restriction within the meaning of Article 11 EEA provided that they apply to all relevant traders operating within the national territory and affect the marketing of

---

[16] Reference is made to Case 59/75 *Manghera* [1976] ECR 91, paragraph 5, and *Franzén*, cited above, paragraphs 39 to 41.

domestic products and of those from other EEA States in the same manner, both in law and in fact.[17]

69. In this regard, the defendant reiterates that there is nothing to imply that in the case at hand there has been any discrimination, whether in law or in fact. Accordingly, in its view, the rules in question are compatible with Article 11 EEA.

The second question

- Assessment under Article 16(1) EEA

70. The defendant notes that the basis for the decision in question was the fact that the visual imagery on the packaging appealed to children and teenagers. Additionally, there was a risk of confusion between the alcoholic beverages and non-alcoholic products.

71. It observes, however, that, in the plaintiff's favour, it agreed to accept these products for retail sale if their packaging was clearly marked as alcoholic beverages thus meeting the conditions of Article 5.10 of the product selection rules and avoiding the risk of confusion with non-alcoholic beverages. The defendant indicates that it provided the plaintiff with the required labelling free of charge.

72. The defendant stresses that it follows from legislation and administrative regulations, e.g. on the labelling of foodstuffs, that it is compulsory to state on the packaging of alcoholic beverages that they contain alcohol. These food-labelling provisions are in conformity with Article 3(1), point 10, of Directive 2000/13, which requires that with respect to beverages containing more than 1.2% by volume of alcohol, it is compulsory to indicate on their packaging the actual alcoholic strength by volume.

73. The defendant asserts that it is compatible with Article 16 EEA not only for an EFTA State to include in its legislation or administrative regulations rules which require it to be clearly stated on the packaging of beverages if their contents are alcoholic. In addition, a state-owned monopoly may refuse to accept such products for sale if the packaging does not meet this requirement. Moreover, according to the defendant, such provisions are absolutely necessary to protect the consumer, children and young people in particular, from the risk of confusion between harmless non-alcoholic products and harmful alcoholic beverages and to prevent circumvention of the ban on the advertising of alcohol.

---

[17] Reference is made to Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 44, and the case-law cited.

- In the alternative: assessment under Article 11 EEA

74. According to the defendant, the provisions addressed in the second question may be justified on the same basis as the provisions mentioned in the first question. Thus, as regards their compatibility with Article 11 EEA, it refers to its observations made in relation to the first question.

The third question

75. The defendant submits that in determining whether the provisions of Icelandic legislation and administrative regulations addressed in the first and second questions constitute a restriction within the meaning of Article 11 EEA it is of significance whether they apply equally to domestic and foreign products.[18]

The fourth question

76. The defendant reiterates that the provisions at stake pursue a public interest aim, namely to reduce alcohol consumption and to protect children and young people from the harmful use of alcohol.

77. The defendant submits that the life and health of humans rank foremost among the interests protected by Article 13 EEA and that a Member State has a particular discretion in determining the degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved.[19] It stresses that the ECJ has recognised that the protection of young people against alcoholism is "of quite special importance".[20]

78. According to the defendant, it is evident that the existence of a risk of confusion between alcoholic and non-alcoholic beverages as well as the direct and indirect marketing of alcohol, particularly marketing aimed at young people, poses a great health risk.

79. As regards proportionality, the defendant submits, first, that a Member State must be allowed to introduce public health measures even though there may at present be some scientific uncertainty as regards the suitability and necessity of the measures.[21]

80. Further, the defendant submits that the national provisions at stake are necessary in that the same level of protection cannot be achieved through less restrictive means. In this regard, it recalls that an arrangement to reduce alcohol

---

[18] Reference is made to *Philip Morris*, cited above, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, and Case C-110/05 *Commission* v *Italy* [2009] ECR I-519.

[19] Reference is made to *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.

[20] 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.

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

consumption may be justified on grounds of the protection of public health, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the EEA Contracting Party concerned, the protection of public health against the harmful effects of alcohol can be secured by measures having less effect on intra-EEA trade.[22]

81. Thus, if the Court considers 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, the defendant submits that such an arrangement is justifiable by reference to Article 13 EEA.

The fifth question

82. The defendant observes that it follows from established case-law that EEA States may have an obligation to provide compensation for loss and damage if three conditions are met. First, the rule of EEA law infringed must be intended to confer rights on individuals. Second, the breach must have been sufficiently serious. Third, there must be a direct and causal link between the breach of the obligation of the State and the damage sustained by the injured parties.[23]

83. It observes further that it is for the national court to assess the facts of the case and to determine whether the conditions for State liability are met. Thus, in the view of the defendant, the Court should confine itself to indicating certain circumstances and considerations which are for the national court to take into account in its evaluation.[24]

84. Were the Court to consider the provisions at issue in the case at hand in breach of EEA law, the breach would not, the defendant submits, be sufficiently serious to entail State liability.[25]

85. The defendant proposes that the Court should answer the questions as follows:

> *1. Provided that the criteria are neither discriminatory nor likely to put imported products at a disadvantage, it is compatible with Article 16 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*

---

[22] Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 61.

[23] Reference is made to Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 66, and Case E-4/01 *Karlsson* [2001] EFTA Ct. Rep. 287, paragraph 32.

[24] Reference is made to *Karlsson*, cited above, paragraph 36.

[25] Ibid., paragraph 38.

grounds that the packaging and labelling of the products contain loaded or unrelated information or suggest that alcohol enhances physical, social or sexual function and do not merely relate to the product, its production method or its characteristics.

2. Provided that the criteria are neither discriminatory nor likely to put imported products at a disadvantage, it is compatible with Article 16 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 alcoholic 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.

86. In the alternative, if the Court finds that Article 11 EEA is applicable in this case, the defendant proposes the following answers:

1. It is compatible 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, social or sexual function and do not merely relate to the product, its production method or its characteristics.

2. It is compatible 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 alcoholic beverages that their contents are alcoholic, and that state-owned monopoly may refuse to accept such products for sale if the packaging does not meet this requirement

3. It is of significance, in answering the first and second questions, whether the legislation or administrative regulations apply equally to domestic and foreign products.

4. If the honourable Court finds 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, such an arrangement would be justifiable with reference to Article 13 EEA.

5. If the EFTA Court finds 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 the conditions for State liability are not met.

The Norwegian Government

The first three questions

87. The Norwegian Government submits that the rules governing the product selection of ÁTVR are to be assessed under Article 16 EEA. The reference does not indicate that the Icelandic regulation implies a general prohibition on the import or the sale of the products in other outlets. As such, it does not constitute regulations "separable from the operation of the monopoly". On the contrary, in the Government's view, product selection is at the very core of the "existence and operation" of a State monopoly, as established in consistent case-law.[26]

88. According to the Norwegian Government, the decisive test under Article 16 EEA is that of discrimination. Hence, the operation of a monopoly is consistent with Article 16 EEA as long as trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods.[27]

89. In the view of the Norwegian Government, there is nothing to indicate that there is any kind of discrimination in law or in fact. Should the Court find that the selection rules put imported products at a disadvantage in comparison to national products, public health grounds relied on by ÁTVR constitute relevant grounds for differentiating the relevant products from other products within this context, in that the products are not "in a comparable situation", [28] or, alternatively, that differentiation is objectively justified.

90. Should the Court find that the right to refuse the relevant alcoholic beverages must be assessed under Article 11 EEA and not Article 16 EEA, the Norwegian Government submits, in light of the information provided by the national court, that the regulations represent a certain type of selling arrangements that, in accordance with settled case-law, do not constitute an import restriction for the purposes of Article 11 EEA if they 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.[29] It observes that there is no indication of discrimination in the Icelandic provisions, whether in law or in fact.

---

[26] Reference is made to *Franzén*, paragraphs 35 to 36, and 43 to 52; *Rosengren and Others*, paragraphs 17 to 18; *Gundersen*, paragraphs 17 and 19; *ESA* v *Norway*, paragraph 35; and *Karlsson*, paragraph 15, all cited above, and Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 53, paragraph 103.

[27] Reference is made, *inter alia*, to *Franzén*, paragraph 40, *Gundersen*, paragraph 21, and *ESA* v *Norway*, paragraph 36, all cited above.

[28] Reference is made to Cases 106/83 *Serinide* [1984] ECR 4209, paragraph 28, C-127/07 *Société Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 2, and *Franzén*, cited above, paragraph 65.

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

91. Accordingly, the Norwegian Government submits that the rules in question are compatible both with Article 16 EEA and Article 11 EEA.

The fourth question

92. Should the Court conclude that the relevant provisions constitute restrictions for the purposes of Article 16 or 11 EEA, the Norwegian Government submits that they are justified on grounds of public health, in particular the need to deter consumption of alcohol among young people.

93. The Norwegian Government stresses that the health and life of humans rank foremost among legitimate objectives, 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 by other EEA States.[30] Moreover, 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. Hence, according to the Government, it suffices that the existing documentation indicates that it is "reasonable to assume that the measure would be able to contribute to the protection of human health".[31]

94. The Norwegian Government submits that relevant research supports the proposition that the appearance, imagery and labelling of products can induce higher alcohol consumption amongst young people, in turn leading to adverse health effects.[32] In its view, it is reasonable to assume, therefore, that refusal of the relevant products will contribute to the protection of public health.

95. According to the Norwegian Government, the national measure is also necessary, as the same level of protection cannot be achieved equally effectively with less restrictive means. It fails to see alternative measures that would counter the risks and worries set out above to the same effect. Should the facts of the case give rise to any doubts in that regard, the Government submits that it is appropriate to leave to the national court the decision on the necessity of the measure.

---

30 Reference is made to *Pedicel*, paragraph 55, *Philip Morris*, paragraphs 77 and 80, and *Ker-Optika*, paragraph 58, all cited above.

31 Reference is made to *Philip Morris*, cited above, paragraphs 82 to 83.

32 Reference is made, *inter alia*, to Jackson et al., "Marketing alcohol to young people: implications for industry regulation and research policy", *Addiction* (2000) 95 (Supplement 4) pp. 597 to 608 (http://staff.psycholoy.bangor.ac.uk/Members/pss216/Jackson%2Oetal%202000.pdf), Sally Caswell, "Alcohol brands in young people's everyday lives: new developments in marketing", *Alcohol and alcoholism*, Vol. 39, No. 6 pp. 471 to 476 (http://alcalc.oxfordjournals.org/content/39/6/471.full); and Gates et al., "The influence of product packaging on young people's palatability rating for RTDs and other alcoholic beverages", *Alcohol and Alcoholism* Vol. 42, No. 2, pp. 138 to 142 (http://alcalc.oxfordiournals.org!contentl42/2/138.full).

The fifth question

96. The Norwegian Government notes that it is a condition for State liability that the breach by the State is sufficiently serious. The decisive test is whether the EEA State has "manifestly and gravely" disregarded the limits of its powers under the EEA Agreement. In this regard, the national court must take into account all the factors that characterise the situation before it. Those factors include, *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".[33]

97. According to the Norwegian Government, the Court should indicate to the referring court that a possible misinterpretation of Article 16 EEA, or Articles 11 and 13 EEA, cannot lead to any State liability. First, there does not appear to be any relevant case-law making it clear that in relation to the national rules on the operation of the monopoly EEA law has been applied incorrectly in the present case. Second, the relevant articles of the EEA Agreement are very general in nature and leave considerable discretion to the States in forming their policies, in particular within the public health sphere. Third, it is difficult to establish the boundaries of this discretion, i.e. to determine at what point the legitimate discretion turns into illegitimate regulation.[34]

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

> *1. It is not incompatible with Article 16 EEA for a state monopoly to be permitted under legislation or administrative regulations to refuse to accept for sale alcoholic beverages on the grounds outlined in question number one, provided that it is not demonstrated before the national court that the criteria are discriminatory.*
>
> *2. It is not incompatible with Article 16 EEA for a state monopoly to be permitted under legislation or administrative regulations to refuse to accept for sale alcoholic beverages on the grounds outlined in question number two, provided that it is not demonstrated before the national court that the criteria are discriminatory.*
>
> *3. Alternatively, Article 11 EEA does not preclude measures such as those described in questions number one and two.*

---

[33] Reference is made to *Sveinbjörnsdóttir*, paragraph 68, and *Karlsson*, paragraphs 38 to 39, both cited above, and Case E-8/07 *Nguyen* [2008] EFTA Ct. Rep. 224, paragraph 33, and Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraph 82.

[34] 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.

4. The measures described in questions one and two may in any case be justified on grounds of public health.

5. It is for the national court to decide, where appropriate, whether the conditions for State liability are met.

The United Kingdom Government

99. The United Kingdom Government limits its observations to the fourth question, in so far as it relates to the arrangement described in the first question.

100. In the view of the United Kingdom Government, if the arrangement whereby the State monopoly on the retail sale of alcohol may 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 is considered a restriction within the meaning of Article 11 EEA, then such an arrangement may be justified pursuant to Article 13 EEA on grounds of the protection of public health.

101. The United Kingdom Government submits that it is for the national court to identify the aim which a national measure is intended to pursue.[35] However, in the present case, it does not appear to be controversial that excessive alcohol consumption is harmful to public health and that the aim of the Icelandic measures is to reduce alcohol consumption, particularly relating to young persons.

102. When assessing whether alcohol packaging measures may be justified on public health grounds under Article 13 EEA, the United Kingdom Government emphasises that it should be recalled, first, that it is for the State to decide on the degree of protection which it wishes to afford to public health and on the way in which that protection is to be achieved.[36] Thus, if one EEA State imposes less strict rules than another, that does not mean that the latter's rules are disproportionate.[37] Another consequence is that in this area, neither the Court nor the ECJ enquires whether the benefits to human health deriving from the measure outweigh any detriments.[38]

---

[35] Reference is made to *Philip Morris*, cited above, paragraph 78.

[36] Reference is made to Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 24, and *Pedicel*, cited above, paragraph 55.

[37] Reference is made to *Philip Morris*, cited above, paragraph 80.

[38] Reference is made to Case C-262/02 *Commission* v *France*, cited above, paragraph 24, and the Opinion of Advocate General Geelhoed in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, point 230, and his Joint Opinion in Cases C-434/02 *Arnold André* [2004] ECR I-11825 and C-210/03 *Swedish Match* [2004] ECR I-11893, points 111 and 112.

103. Second, it continues, in reviewing the proportionality of the national measure in issue, the State's margin of appreciation is particularly broad in the field of public health. The Court and the ECJ will not interfere with a national measure unless the measure is manifestly unreasonable or manifestly inappropriate having regard to the public health objective which the State is seeking to pursue.[39]

104. The United Kingdom Government contends that measures restricting the visual appeal of the packaging of products such as alcoholic beverages, such as the measures in issue in the first question, are, by their nature likely to limit, at least in the long run, the consumption of alcohol in the State concerned. Accordingly, in the absence of convincing proof to the contrary, measures of the kind considered in the first question may be considered suitable for the protection of public health.[40]

105. Furthermore, the United Kingdom Government notes that, in considering whether a measure goes beyond what is necessary to achieve the legitimate aim, the ECJ does not always refer to the question of whether another measure less extensive or restrictive of intra-EU trade (intra-EEA trade in the present case) could achieve the same objective. In such cases, as in an area of public health involving, for example, difficult evaluations of political, social and economic considerations, the question is simply whether the measure is manifestly inappropriate or manifestly unreasonable. It stresses, in addition, that to the extent that a court considers whether a measure is less restrictive, it may only consider measures which are shown by the plaintiff to be equally effective and efficient to achieve the same level of health protection.

106. The United Kingdom Government asserts that it cannot be shown that the Icelandic measures on packaging of alcoholic beverages were manifestly inappropriate. The legislation was based on reasonable grounds, especially in the context of public health.

107. The United Kingdom Government proposes that the Court should answer the fourth question (insofar as it relates to the first question) as follows:

> *If it is considered that an arrangement such as the one described in the first question above constitutes a quantitative restriction or a measure having equivalent effects, within the meaning of Article 11 EEA Agreement, then such an arrangement may be justified on grounds of the protection of public health against harmful consumption of alcohol, within the meaning of Article 13 EEA Agreement.*

---

[39] Reference is made to *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123, *Swedish Match*, paragraphs 47 to 48, and *Aragonesa de Publicidad Exterior and Publivía*, paragraphs 14 and 17, all cited above.

[40] Reference is made to *Philip Morris*, cited above, paragraph 84.

The EFTA Surveillance Authority

Introductory remark concerning the applicability of Article 11 EEA

108. ESA submits that, on closer examination of the ingredients of the products in question, most of the products in issue in these proceedings fall outside the scope of Article 11 EEA.

The first question

109. ESA asserts that it must first be decided whether Article 11 EEA is applicable to the products in question.

110. In this regard, ESA submits, first, that Article 8(3) EEA provides that, unless otherwise specified, the provisions of the EEA Agreement apply only to (a) products falling within Chapters 25 to 97 of the HS, excluding the products listed in Protocol 2 EEA, and (b) products specified in Protocol 3 EEA, subject to the specific arrangements set out in that Protocol.

111. In this connection, ESA notes that the request for an Advisory Opinion does not specify in any further detail the ingredients of "Tempt Cider". However, the Authority understands from the declaration of contents that these products are based on apple wine (and no other alcoholic ingredients).[41] Apple wine, and mixed alcoholic beverages based on apple wine, fall within Chapter 22 of the HS, more precisely under HS Heading 22.06, and such products are not specified in Protocol 3 EEA. Accordingly, Article 11 EEA does not apply to the products at issue.

112. ESA therefore suggests that the first question from the national court be answered by stating that Article 11 EEA does not apply to apple wine and mixed alcoholic beverages based on apple wine.

113. Moreover, there is no need to provide any answer to third, fourth and fifth questions from the national court insofar as these questions relate to the first question.

The second question

114. ESA notes that the national court has framed question 2 as one of compatibility with Article 11 EEA. However, according to ESA, labelling of alcoholic beverages as such is exhaustively regulated in secondary legislation, namely by way of Directive 2000/13.

115. In this regard, ESA refers to Article 3(1) of the Directive, which contains "an exhaustive list of the particulars which are compulsory on the labelling of

[41] Reference is made to the website (in Danish) of the producer, Royal Unibrew A/S (http://www.royalunibrew.com/Default.aspx?ID=5256).

pre-packaged foodstuffs". Consequently, according to consistent case-law of the ECJ, the national measures relating to the labelling of the products in issue must be assessed in the light of the provisions of that harmonising measure and not those of the TFEU or the EEA Agreement itself.[42]

116. ESA submits that even though, formally, the national court has limited its questions to the interpretation of Article 11 EEA, that does not prevent the Court from providing the national court with all the elements of interpretation of EEA law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in its questions.[43] ESA submits, therefore, that the Court, in order to provide a useful answer to the national court, must deal with the second question in light of the Directive, and not Article 11 EEA.

117. For the sake of completeness, ESA notes that most of the products at issue fall under HS Heading 22.06 as mixtures of fermented beverages and non-alcoholic beverages: "Blanco de Verano Don Simón" and "Tinto de Verano Don Simón" are both mixed alcoholic beverages based on wine (with no other alcoholic ingredient). "Caribbean Kick" and "Diabolo Ice" are mixed alcoholic beverages based on apple wine (with no other alcoholic ingredient). According to ESA, therefore, as Article 11 EEA does not apply to these products, Article 23 EEA is all the more significant in providing that the Directive applies to all products. The two remaining products at issue, "Sangría Don Simón" and "Sangría Siesta", are both Spanish "sangrias" with a minimum wine content of 50% and an alcohol content of 7% vol. (and not 4% vol. as stated in the request for an Advisory Opinion, page 4). Accordingly, they fall under HS Heading 22.05.[44] HS Heading 22.05 is specified in Protocol 3 EEA. In principle, therefore, the sangrias fall within the scope of Article 11 EEA. In the present case, however, this is of no consequence as the EEA legislation to be applied is Directive 2000/13, and not Article 11 EEA.

118. In relation to beverages containing more than 1.2% by volume of alcohol, ESA notes that the labelling requirement established by Article 3(1), point 10, of the Directive is simply an indication of the actual alcoholic strength by volume. The particulars of how the actual alcoholic strength by volume is to be indicated are laid down in further detail in Directive 87/250/EEC. According to Article 2(2) of Directive 87/250, the figure for alcoholic strength must be given to not more than one decimal place. It must be followed by the symbol "% vol." and may be preceded by the word "alcohol" or the abbreviation "alc." ESA also refers to Article 18(1) of Directive 2000/13, which provides that States may not

---

[42] Reference is made, *inter alia*, to Case C-257/06 *Roby Profumi* [2008] ECR I-189, paragraph 14, and the case-law cited.

[43] Reference is made to Joined Cases C-578/10 to C-580/10 *van Putten and Others*, judgment of 26 April 2012, not yet reported, paragraph 23.

[44] Reference is made to Joined Cases C-59/94 and C-64/94 *Ministre des Finances* v *Pardo & Fils and Carnicas* [1995] ECR I-3159, paragraph 19.

forbid trade in foodstuffs which comply with the rules laid down in the Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

119. ESA submits, therefore, that the abovementioned provisions do not leave room for an additional requirement under national law that also the words "alcoholic beverage" must appear on the packaging. Consequently, in ESA's view, it is incompatible with Article 3(1), point 10, and Article 18(1) of Directive 2000/13 for an EEA State to include in its legislation or administrative regulations, rules which require that it be clearly stated, other than by indication of the actual alcoholic strength by volume, on the packaging of alcohol beverages that their contents are alcoholic, and permit a State-owned monopoly to refuse to accept such products for sale if the packaging does not meet this requirement.

The third question (in relation to the second question)

120. ESA submits that, in answering the second question on the basis of the Directive, it is of no consequence whether or not the legislation or administrative regulations apply equally to domestic and foreign products.

The fourth question (in relation to the second question)

121. ESA asserts that, as the second question must be answered in light of the harmonisation provided for by the Directive, there is no room for the justification of any labelling of alcohol content other than that foreseen in the Directive by reference to Article 13 EEA. In ESA's view, harmonisation serves, *inter alia*, to exclude such justification, and thus Article 13 EEA does not apply within the field harmonised by the Directive.

122. However, ESA continues, the Directive itself does include a set of provisions similar to but with a narrower scope than Article 13 EEA, providing for some possibility to justify "non-harmonised national provisions" on labelling. The relevant provisions are laid down in Article 18(2) of the Directive, which is, ESA submits, the only legal basis on which the requirement of ÁTVR that the beverages at issue be specially marked with adhesive labels, clearly stating the words "alcoholic beverage", could be justified.[45]

123. ESA submits that, in the present case, the criteria established by Article 18(2) of the Directive are not fulfilled. According to ESA, there can be no issue of protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition (Article 18(2) third indent). And there can be no issue of the prevention of fraud (Article 18(2) second indent). Finally, in ESA's view there would not seem to be an issue of protection of public health (Article 18(2) first indent) given that the products at issue must be marked with the actual alcoholic

[45] Reference is made to Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, paragraph 34.

strength by volume (Article 3(1), point 10), and having regard to the fact the State alcohol retail monopoly would sell the products in its special retail outlets for alcoholic beverages. The requirement that the beverages at issue (but apparently not most other beverages sold in the same outlets) be specially marked with adhesive labels, clearly stating the words "alcoholic beverage", therefore does not seem to meet a real need for protection of public health. Moreover, ESA contends that, in any case, such a measure would not seem necessary. The indication of the actual alcoholic strength by volume on every label, the sale of the products in ÁTVR's special retail outlets for alcoholic beverages and, at the discretion of ÁTVR, information in-store that these products (as indeed most other products in the same outlets) are alcoholic, must, according to ESA, suffice.

The fifth question (in relation to the second question)

124. ESA recalls the three conditions for State liability, as laid down in the case-law of the Court: 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.[46]

125. First, ESA submits that Article 3(1), point 10, and Article 18(1) of the Directive are intended to confer rights on individuals. Specifically, the harmonisation provided for by the Directive grants, *inter alia*, to importers a right not to be subjected to national requirements that alcoholic beverages be labelled with any indication of their alcohol content other than that provided for in Article 3(1), point 10.[47]

126. Second, in ESA's submission, the unjustified national measures requiring that it be clearly stated, other than by indication of the actual alcoholic strength by volume, on the packaging of alcohol beverages that their contents are alcoholic, and permitting a State-owned monopoly to refuse to accept such products for sale if the packaging does not meet this requirement constitute a sufficiently serious breach. The obligation resting on the State under the Directive is clear and unequivocal, with no relevant margin of appreciation in the implementation required on the part of the State.

127. Third, and accordingly, ESA submits that the State must be liable for damage sustained by the injured party insofar as there is a direct causal link between the breach of the obligation resting on the State and the damage. The extent to which the applicant has sustained such damage must, according to ESA, be for the national court to assess.

---

[46] Reference is made, *inter alia*, to *Kolbeinsson*, cited above, paragraph 78.

[47] Reference is also made to recital 2 of the preamble to the Directive.

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

> *1. Article 11 EEA does not apply to apple wine and mixed alcoholic beverages based on apple wine.*
>
> *2. It is incompatible with Article 3(1), point 10, and Article 18(1) of Directive 2000/13/EC for an EEA State to include in its legislation or administrative regulations rules which require that it be clearly stated, other than by indication of the actual alcoholic strength by volume, 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. The answer to question 2 is the same whether or not the legislation or administrative regulations apply equally to domestic and foreign products.*
>
> *4. Article 13 EEA does not apply within the field harmonised by Directive 2000/13/EC. Instead, Article 18(2) of the Directive would be the basis on which national measures which require that it be clearly stated, other than by indication of the actual alcoholic strength by volume, 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, would have to be justified. However, the criteria for justification under Article 18(2) of the Directive would not seem to be fulfilled for such national measures.*
>
> *5. The State is liable for damage that is directly caused by unjustified national measures which require that it be clearly stated, other than by indication of the actual alcoholic strength by volume, 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. The extent to which the applicant has sustained such damage is for the national court to assess.*

The European Commission

Reformulation of the questions

129. The Commission notes that “Diablo Ice” and “Caribbean Kick” are mixtures of fermented apple wine (cider) and a soft drink. Their alcohol content is 4%. Based on the HS explanatory notes to heading 22.06, they are to be classified under that heading. Since heading 22.06 is not mentioned in Protocol 3 to the EEA Agreement, the Commission submits that those products, together with the “Tempt Ciders”, are not covered by the rules on the free movement of goods in the main part of the EEA Agreement.

130. According to the Commission, the result is different with regard to "Sangría Don Simon" and "Sangría Siesta". The composition is a minimum of 50% red wine, water, sugar, citric acid, natural fruit extract and cinnamon flavours. The Commission notes that, according to the producer's product-description, they have an alcoholic content of 7%. Based on the HS explanatory notes to heading 22.05, the drinks fall, therefore, under that heading.[48] Accordingly, as heading 22.05 is mentioned in Protocol 3 to the EEA Agreement, the sangrias are covered by the rules on the free movement of goods. The Commission notes, however, that the Supreme Court of Iceland states that the alcoholic content of the sangrias is 4%. Were that to be correct, the drinks would fall under heading 22.06, and, consequently, not be covered by the rules on the free movement of goods.

131. The Commission observes that the composition of "Tinto de Verano Don Simón" and the "Blanco de Verano Don Simón" appears to be: wine, water, sugar and extracts of citrus fruit and cinnamon. The Commission asserts that these products are capable, in principle, of falling under heading 22.05, but since their alcohol content is below 7% (in fact, between 3.9% and 4.5%), they fall under heading 22.06. Therefore, the provisions of the main part of the EEA Agreement do not apply to them. Adopting the same reasoning, for the purposes of Protocol 8 on State monopolies, these products cannot fall under Article 16 EEA as "wine" since they do not constitute wine within the meaning of HS heading 22.04.

132. Based on the above analysis, the Commission submits that the main part of the EEA Agreement is applicable only to the two sangria products which are the subject of the labelling decision. The other products ("ciders and veranos") do not fall under Protocol 3 to the EEA Agreement, and, therefore, pursuant to Article 23(a) EEA, will be analysed only in light of Directive 2000/13, which applies to all products.

133. Accordingly, in the Commission's view, the questions posed by the Icelandic court have to be considered first and foremost as referring to Directive 2000/13 and not Articles 11 and 13 EEA. However, if the Court considers that Directive 2000/13 does not provide for a complete harmonisation of labelling rules, Articles 11 and 13 EEA or, conceivably, Article 16 EEA are applicable to the sangrias, but not the ciders and veranos.

The first question

134. The Commission notes that Article 18(1) of Directive 2000/13 provides that Member States may not prohibit trade in foodstuffs which comply with the rules laid down in the Directive.

---

[48] Reference is made to *Ministre des Finances v Pardo & Fils and Camicas*, cited above, paragraphs 19 to 20.

135. In the Commission's view, the defendant's decision forbids trade in the ciders for reasons linked to their labelling.

136. In this regard, the Commission notes that Article 2 of Directive 2000/13 expressly states that labelling must not be misleading as to characteristics of the foodstuffs. According to the Commission, it is for the national court to analyse the exact details of the case. It will depend on this analysis whether the defendant can invoke this provision and whether the Icelandic legislation is considered sufficiently precise to warrant such a prohibition. In the Commission's view, the national court will have to give due consideration to the fact that the refusal decision poses a very serious obstacle to the trade in foodstuffs. Moreover, the defendant will bear the burden of showing that this measure is justified.

The second question

(a) Ciders and veranos

137. The Commission submits that, according to Article 3(1) of the Directive, indication of the particulars set out in points 1 to 10 alone shall be compulsory on the labelling of foodstuffs. According to Article 3(1), point 10, with respect to beverages containing more than 1.2% by volume of alcohol, the actual alcoholic strength by volume must be indicated. Thus, the Commission asserts that the labelling requirement imposed by the defendant goes beyond those requirements. It imposes additional costs on the importer and therefore can have a deterrent effect.[49] Such an effect amounts to a hindrance to the free movement of goods.[50]

138. The Commission submits, therefore, that the labelling decision with regard to the ciders and veranos can only be justified under Article 18(2) of the Directive on grounds of the protection of public health.

(b) Sangrias

139. The Commission submits that for the sangrias the same arguments apply as have been advanced for the ciders and veranos, since, in its opinion, Directive 2000/13 provides for a complete harmonisation.

140. The Commission refers to Article 12 of the Directive which expressly mentions products under tariff heading 22.05 HS. Article 12 provides that the indication of their alcoholic strength must follow the specific provisions applicable to those products. According to the Commission, this is an indirect reference to Directive 87/250, which requires in Article 2 that the figure of alcoholic strength be given to not more one decimal place, be followed by the

---

[49] Reference is made to Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, paragraph 30.

[50] Reference is made to Case C-443/10 *Bonnarde*, judgment of 6 November 2011, not yet reported, paragraph 26.

symbol “% vol.” and may be preceded by the word “alcohol” or the abbreviation “alc.”.

141. Should the Court not take the view that the Directive provides for complete harmonisation of labelling rules, the Commission submits that, since the defendant holds a monopoly over the retail of alcoholic beverages in Iceland, it has to be examined whether the labelling decision falls to be assessed under Article 11 EEA or under Article 16 EEA.

142. The Commission takes the view that the labelling requirement imposed in the cases at stake cannot be considered a measure relating to the existence and operation of State monopolies. Therefore, in the light of the *Franzén* case-law, it should not be examined under Article 16 EEA but under Articles 11 and 13 EEA.[51]

143. In this regard, the Commission reiterates that the labelling requirement imposes additional costs on the importer. As it can have a deterrent effect, it is a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA.

144. Finally, according to the Commission, the analysis of possible justification under Article 13 EEA is identical to the one developed with regard to Article 18(2) of the Directive.

The third question

145. The Commission submits that the absence of discrimination between domestic and foreign products is of no consequence in relation to Article 18(1) and (2) of the Directive.[52]

The fourth question

146. The Commission observes that the defendant in the national case bases its decision on the product selection rules of 2009. The Directive was incorporated into the EEA with effect from 29 September 2001. Therefore, in the view of the Commission, Iceland was obliged to respect the notification procedure of Article 19 of the Directive. However, the file contains no indications whether this procedural requirement has been respected. The Commission contends that, should it come to light that this procedure has not been respected, the defendant cannot validly base its decision on those rules.

147. However, for the sake of completeness, the Commission briefly also sets out what it considers to be the substantive requirements for justification.

---

[51] Reference is made to *Franzén*, cited above, paragraph 35.

[52] Reference is made, with the necessary adjustments, to Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 38.

148. First, it notes that protection of public health constitutes a ground for justification under Article 18(2) of the Directive.[53] Protection of consumers is not expressly mentioned in the English version ("prevention of fraud") but it follows from other language versions (French: "*repression des tromperies*"; German: "*Schutz vor Täuschung*"; Dutch: "*het tegengaan van misleiding*") that "fraud" has to be understood as including the notion of consumer protection.

149. Furthermore, the Commission continues, the measures must be proportionate. In other words they need to be appropriate for securing the attainment of the objective in question and not go beyond what is necessary in order to attain it.[54] According to the case-law of the ECJ, the fact that other Member States do not consider such measures necessary is relevant for the analysis of its proportionality.[55]

150. The Commission recalls that it is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to review the proportionality and the effectiveness of the measures taken. In this regard, the Commission submits that the national court has to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.[56]

151. According to the Commission, the national judge will have to take into consideration the fact that the refusal decision poses a much more serious obstacle to the trade in foodstuffs than the labelling decision. It is much more costly to completely change the packaging of a product than merely add an adhesive label. Therefore, the refusal decision calls for more detailed justification by the defendant and a more profound analysis as to the necessity of the measure.

152. The Commission notes that the refusal decision states that the illustrations on the cans "are evidently intended to make the products sensually appealing and challenging and that their sexual reference is obvious". In the view of the Commission, it is doubtful whether this assertion can be considered a sufficiently specific analysis of the appropriateness and proportionality of the measure. Moreover, it notes that the decision also does not provide specific evidence substantiating the arguments, as is required.[57]

153. According to the Commission, the wording of the product selection rules also raises doubts as to their appropriateness and their necessity. The rules do not

---

[53] Reference is made to *Douwe Egberts*, cited above, paragraph 39.

[54] Reference is made to *Philip Morris*, paragraph 81, and *Douwe Egberts*, paragraph 40, both cited above, and, most recently, Case C-456/10 *ANETT*, judgment of 26 April 2012, not yet reported, paragraph 45.

[55] Reference is made to Case C-421/09 *Humanplasma* [2010] ECR I-12869, paragraph 41.

[56] Reference is made to *Douwe Egberts*, cited above, paragraph 46.

[57] Reference is made to *ANETT*, cited above, paragraph 50.

refer expressly to the protection of health and are applicable regardless of whether the packaging may be apt to mislead the consumer.[58]

154. As regards the labelling decision, the Commission notes that the veranos are marketed in plastic bottles, and that this might play a role in the evaluation of the expectations of an average consumer. Therefore, an effective protection of public health, in particular limiting the – accidental – alcohol consumption of children and adolescents and the protection of the consumer might warrant different approaches in different Member States.

155. With regard to the sangrias, the Commission contends that when assessing justification on the basis of Article 18(2) of the Directive, or directly on the basis of Article 13 EEA, the national court will have to take into consideration that they are packed in cartons or plastic bottles, which might not be customary for alcoholic drinks in Iceland.

The fifth question

156. The Commission notes that the Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.[59]

157. With regard to the first condition, the Commission observes that there is no case-law which establishes whether Article 18(1) of the Directive confers rights on individuals. To a considerable extent, its wording and its objective correspond to those of Article 34 TFEU. By the same token, Article 18(2) of the Directive reproduces some of the grounds of justification set out in Article 36 TFEU and the "mandatory requirement" of consumer protection. It is undisputed that Article 34 TFEU confers rights on individuals,[60] and it is clear that Article 36 TFEU in no way undermines this. Since Article 18(1) of the Directive is also clear and unconditional, the Commission submits that this provision also confers rights on individuals.

158. As regards the second condition, the Commission submits that the ECJ has decided that "a breach of Community law will be sufficiently serious where, in the exercise of its legislative power, a Member State has manifestly and gravely disregarded the limits on its discretion ... . Secondly, where, at the time when it committed the infringement, the Member State in question had only considerably

---

58 Reference is made to *Douwe Egberts*, cited above, paragraphs 40 and 47.

59 Reference is made to Case C-429/09 *Fuß*, judgment of 25 November 2010, not yet reported, paragraph 47, and the case-law cited.

60 Reference is made, *inter alia*, to C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 22.

reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach".[61]

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

> *1. It is incompatible with Article 18(1) of Directive 2000/13 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 characteristic unless the labelling is misleading as to the characteristics of the foodstuffs.*
>
> *2. It is incompatible with Article 18(1) of Directive 2000/13 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 a state-owned monopoly may refuse to accept such products for sale if the packaging does not meet this requirement, where the products in question already contain a mention as to the alcoholic content in line with Art. 3(1), point 10, and Directive 87/250.*
>
> *3. In answering the first and second questions above, it is not of significance whether the legislation or administrative regulations apply equally to domestic and foreign products.*
>
> *4. The possible violations of Art. 18(1) of Directive 2000/13 may nevertheless be considered justifiable with reference to Art. 18(2) of Directive 2000/13 or Art. 13 EEA as long as the national Court comes to the conclusion that they are appropriate and necessary to protect public health or the consumer against misleading information.*

---

[61] Reference is made to Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 212.

5. If it is considered that an arrangement such as the one described in the first and/or second question above is incompatible with Directive 2000/13, then the State is liable in damages if the national judge comes to the conclusion that the rule of EU law infringed was intended to confer rights on individuals and that the breach of that instrument was sufficiently serious; and there was a direct causal link between the breach and the loss or damage sustained by the individuals.

Per Christiansen
Judge-Rapporteur