REPORT FOR THE HEARING
in Case E-4/01

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) for an Advisory Opinion in the case pending before it between

Karl K. Karlsson hf.

and

The Icelandic State

on the interpretation of the EEA Agreement, in particular Articles 11 and 16 EEA.

I. Introduction

1. By an order dated 6 April 2001, registered at the Court on 12 April 2001, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in the case pending before it between Karl K. Karlsson hf. (hereinafter the "Plaintiff") and the Icelandic State (hereinafter the "Defendant").

2. The dispute before the Héraðsdómur Reykjavíkur concerns the questions of whether the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995 was incompatible with the EEA Agreement, and, if so, whether a legal person prevented from importing alcoholic beverages is entitled to compensation from the State for financial loss incurred as a result of that monopoly.

II. Legal background

EEA law

3. The questions submitted by the national court concern, *inter alia*, the interpretation of Articles 11 and 16 EEA.

4. Article 11 EEA reads as follows:

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

5. Article 16 EEA reads as follows:

> *"1. 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.*
>
> *2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others."*

National law

6. The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Áfengislög nr. 82/1969* (Act No. 82/1969 on Alcoholic Beverages, hereinafter the "Alcoholic Beverages Act") and *Lög nr. 63/1969 um verslun með áfengi og tóbak* (Act No. 63/1969 on Trading with Alcoholic Beverages and Tobacco, hereinafter the "Alcoholic Beverages and Tobacco Trading Act").

7. At the time of the entry into force of the EEA Agreement, 1 January 1994, the Alcoholic Beverages Act provided that only the Icelandic State was permitted to import alcoholic beverages, and that the Áfengis- og tóbaksverslun ríkisins (State Alcohol and Tobacco Monopoly) was to handle imports and wholesale distribution of such products. The State monopoly on the import and wholesale distribution of alcoholic beverages was abolished and the right to such imports and wholesale distribution was liberalised as of 1 December 1995, by way of the adoption of *Lög nr. 94/1995 um breyting á áfengislögum* and *Lög nr. 95/1995 um breyting á lög um verslun með áfengi og tóbak*, amending the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act,

respectively. The Alcoholic Beverages Act has later been replaced by *Áfengislög nr. 75/1998* (Act No. 75/1998 on Alcoholic Beverages).

III. Facts and procedure

8. It is stated in the Request for an Advisory Opinion that, prior to the entry into force of the EEA Agreement, the Plaintiff, Karl K. Karlsson hf., had taken measures to commence import and wholesale distribution of alcoholic beverages, and was appointed agent for many types of alcoholic beverages, including the French liqueur Cointreau, in Iceland.

9. Moreover, it follows from the Request for an Advisory Opinion that, from 1 January 1994, when the EEA Agreement entered into force, until 1 December 1995, when the State monopoly on the import and wholesale distribution of alcoholic beverages was abolished, the Plaintiff was prohibited from importing into Iceland the alcoholic beverages for which it was the agent, and distributing such products to retailers. The Plaintiff claims that it incurred a considerable financial loss as a result of that prohibition.

10. The Plaintiff brought proceedings against the Defendant, the Icelandic State, before the Héraðsdómur Reykjavíkur in order obtain a declaratory judgment to the effect that the Defendant is liable for compensation for the financial loss sustained by the Plaintiff because it was not permitted to import and distribute on a wholesale basis the French liqueur Cointreau. In the proceedings, the Plaintiff has raised questions concerning the compatibility with the EEA Agreement of the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995. The Plaintiff has, moreover, raised questions concerning possible entitlement under EEA law to compensation for financial loss incurred as a result of that monopoly. On 6 April 2001, Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Questions

11. The following questions were referred to the EFTA Court:

> **1. Should the provisions of the EEA Agreement, in particular Articles 11 and 16, be interpreted as meaning that Iceland was obliged to abolish the State monopoly for the import and wholesale distribution of alcoholic beverages as of the commencement of the Agreement on 1 January 1994?**

2. If the aforementioned question is answered in the affirmative, is Iceland liable for compensation to a legal person which, at the time of entry into force of the Agreement, was the exclusive agent for a specific type of alcoholic beverage, for the financial loss it incurred due to the fact that the import and wholesale distribution of the alcoholic beverage was not permitted until nearly two years after the entry into force of the EEA Agreement, provided that the conditions for liability for compensation according to the case-law of the EFTA Court and Court of Justice of the European Communities are fulfilled?

3. If Questions 1 and 2 are answered in the affirmative, are the conditions for liability for compensation according to the case-law of the aforementioned courts fulfilled?

V. Written Observations

12. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the Plaintiff, Karl K. Karlsson hf., represented by Stefán Geir Þórisson, hæstaréttarlögmaður (Supreme Court Advocate);

– the Defendant, the Icelandic State, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Norway, represented by Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Frode Elgesem, Advocate, Office of the Attorney General (Civil Affairs), acting as Co-agent;

– the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Lena Ström, Legal Adviser, Legal Service, acting as Agent.

Karl K. Karlsson hf.

Question 1

13. The Plaintiff, Karl K. Karlsson hf., contends that the Icelandic State monopoly on the import and wholesale distribution of alcoholic beverages is contrary to Articles 11 and 16 EEA.

14. With regard to Article 11 EEA, the Plaintiff, referring to *Procureur du Roi* v *Dassonville*[1] and *France* v *Commission*,[2] submits that the existence of a monopoly on the import and wholesale distribution of a product deprives a trader of the opportunity to carry on unrestricted distribution of such products. It is likely that such an exclusive right hinders trade between the EEA States.

15. The Plaintiff observes that Article 13 EEA, as a derogation from the basic principle of the free movement of goods, is to be interpreted narrowly. On this point, the Plaintiff refers to *Commission* v *Ireland*[3] and *Commission* v *Italy*.[4] The Plaintiff states that, in order to justify the contested monopoly under Article 13 EEA, it would be necessary for the Defendant to demonstrate that such an exclusive right is essential in order to protect the health and lives of humans, and that this aim could not be achieved by less restrictive means. The Plaintiff considers that the absence of any evidence to that effect was the reason for the Defendant's abolishing of the State monopoly on the import and wholesale distribution of alcoholic beverages.

16. With regard to Article 16 EEA, the Plaintiff points out that this rule applies to State institutions which, *de jure* or *de facto*, monitor, directly or indirectly, or determine or substantially influence, import or export between the EEA States. The Plaintiff asserts that the contested monopoly on the import and wholesale distribution of alcoholic beverages implies that the State is able to determine, or have a decisive influence on, what is actually imported, instead of such matters being in the hands of independent commercial operators. Referring to the judgments in *Pubblico Ministereo* v *Manghera*[5] and *Restamark*,[6] the Plaintiff contends that Article 16 EEA must be interpreted as prohibiting the Defendant from maintaining the contested State monopoly. The Plaintiff adds that this view is in accordance with the conclusion reached by the EFTA Surveillance Authority in its letter of formal notice of 20 July 1994, and its

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1 Case 84/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

2 Case 90/82 *France* v *Commission* [1983] ECR 2011.

3 Case 113/80 *Commission* v *Ireland* [1981] ECR 1625.

4 Case 95/1981 *Commission* v *Italy* [1982] ECR 2187.

5 Case 59/75 *Pubblico Ministereo* v *Manghera* [1976] ECR 91.

6 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15 (hereinafter "*Restamark*").

reasoned opinion of 22 February 1995 regarding the compatibility of that monopoly with Articles 11 and 16 EEA.

17. The Plaintiff claims that the Defendant was under an obligation to abolish the State monopoly at issue on the date of the entry into force of the EEA Agreement. In support of that view, the Plaintiff refers to the aforementioned reasoned opinion of the EFTA Surveillance Authority, in which it is stated that "since the EEA Agreement does not provide for any transitional period as regards the adjustment of the Icelandic alcohol monopoly, Iceland should have adapted its alcohol monopoly as from the entry into force of the agreement, i.e. as from 1 January 1994".

Question 2

18. In answering the second question, the Plaintiff begins by referring to *Sveinbjörnsdóttir*,[7] in which the EFTA Court held that an EFTA State may incur liability under EEA law for incorrect implementation of secondary legislation forming part of the EEA Agreement. The plaintiff points out that the situation in the present case differs materially from the situation in *Sveinbjörnsdóttir* in two main respects. First, the present case involves an infringement of provisions of the main part of the EEA Agreement, and not provisions of secondary legislation. Second, the Plaintiff in the present case is a company, and not a private individual.

19. As regards the first issue, the Plaintiff refers to *Brasserie du Pêcheur and Factortame*[8] and other case-law[9] of the Court of Justice of the European Communities establishing State liability for infringements of the main part of the EC Treaty. The main part of the EEA Agreement contains the basic principles, and the Plaintiff asserts that an infringement of provisions of the main part is more serious than an infringement of secondary legislation.

20. As regards the second issue, the Plaintiff claims, in essence, that legal persons and physical persons have equal rights to compensation under the principle of State liability for breach of EEA law. That was confirmed, *inter alia*, in *Brasserie du Pêcheur and Factortame*.

21. The Plaintiff adds that the principle of State liability under Community law applies to breaches of both directly effective provisions and provisions that

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7 Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 95 (hereinafter "*Sveinbjörnsdóttir*").

8 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (hereinafter "*Brasserie du Pêcheur and Factortame*").

9 Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165; Case C-242/95 *GT-Link* v *DSB* [1997] ECR I-4449; Case C-90/96 *Petrie and Others* v *Università di Verona and Bettoni* [1997] ECR I-6527; Case C-302/97 *Konle* [1999] ECR I-3099; and Case C-424/97 *Haim* [2000] ECR I-5123.

do not have such direct effect. On this point, the Plaintiff again refers to the judgment in *Brasserie du Pêcheur and Factortame*.

22. The Plaintiff concludes, in essence, that, under EEA law, a State may incur liability for compensation to a legal person for breaches of the main part of the EEA Agreement.

Question 3

23. In considering whether the conditions for State liability are met in the present case, the Plaintiff begins by stating that the conditions for liability for compensation established by the EFTA Court in *Sveinbjörnsdóttir* is in complete conformity with the conditions laid down by the Court of Justice of the European Communities in *Brasserie du Pêcheur and Factortame*.

24. As regards the condition that the EEA rule breached must be intended to confer rights on individuals, the Plaintiff refers to *Brasserie du Pêcheur and Factortame*, in which the provision of the EC Treaty corresponding to Article 11 EEA was held to be intended to confer rights on individuals.

25. As regards the condition that the infringement must be sufficiently serious to entail liability for compensation, the Plaintiff states that, in the present case, it is only necessary to consider one specific issue, namely, whether the Defendant has continuously perpetrated the infringement, despite the existence of clear case-law of the Court of Justice of the European Communities or the EFTA Court to the effect that the conduct of the Defendant indeed constitutes an infringement. If so, it follows from *Brasserie du Pêcheur and Factortame* and *Haim*[10] that the conduct is sufficiently serious to fulfil the condition of State liability.

26. Referring to the judgments in *The Queen* v *MAFF, ex parte Hedley Lomas*[11] and *Norbrook Laboratories* v *MAFF*,[12] the Plaintiff observes that when the EEA State committing the infringement has only very little or even no discretion as to how it designs its legislation, the mere existence of an infringement of EEA law can be enough to establish that the condition of a sufficiently serious breach is fulfilled.

27. The Plaintiff does not share the Defendant's view that uncertainty prevailed regarding the compatibility with the EEA Agreement of the State monopoly on the import and wholesale distribution of alcoholic beverages. The Plaintiff acknowledges that there may have been uncertainty with regard to the legality of the retail monopoly, but it rejects the possibility that the sources

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10 Case C-424/97 *Haim* [2000] ECR I-5213.

11 Case C-5/94 *The Queen* v *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553.

12 Case C-127/95 *Norbrook Laboratories* v *MAFF* [1998] ECR I-1531.

referred to by the Defendant indicate any legitimate uncertainty with regard to the import and wholesale distribution monopoly. On that point, the Plaintiff adds that the judgment in *Franzén*[13] concerns the right to retail sales of alcoholic beverages.

28. The Plaintiff contends that, at the time of the negotiations of the EEA Agreement, clear and consistent case-law of the Court of Justice of the European Communities, *inter alia* the judgment in *Pubblico Ministereo* v *Manghera*,[14] confirmed the view that an exclusive import right violated the provisions of the EC Treaty corresponding to Articles 11 and 16 EEA. The Plaintiff claims that the Defendant was fully aware of that case-law and its relevance for the interpretation of the EEA Agreement under Article 6 EEA, both during the negotiations on the EEA Agreement, and at the time of signing that Agreement on 2 May 1992. In the view of the Plaintiff, the Defendant cannot maintain that the time between the signing of the EEA Agreement and its entry into force on 1 January 1994 was too short to rectify its legislation.

29. The Plaintiff submits that lack of understanding with regard to the significance of EEA rules, or lack of knowledge in the relevant field of law, does not constitute grounds for arguing that the condition of a sufficiently serious breach has not been met. The Defendant's misapprehension of Articles 11 and 16 EEA has nothing in common with the understandable confusion regarding the interpretation of Community law that occurred in the cases *The Queen* v *H. M. Treasury, ex parte British Telecommunications*[15] and *Denkavit Internationaal and Others* v *Bundesamt für Finanzen*.[16]

30. The Plaintiff acknowledges that it follows from *Brasserie du Pêcheur and Factortame* that it is for the party who invokes the general principle of State liability to demonstrate that the State has manifestly and gravely disregarded the limits on its discretion. It also follows from the case-law[17] of the Court of Justice of the European Communities that if it has all the information necessary, that Court will make its own assessment of the seriousness of an infringement. The Plaintiff believes that the EFTA Court has all the information necessary in order to make such an assessment in the present case.

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13 Case C-189/95 *Franzén* [1997] ECR I-5909.

14 See footnote 5.

15 Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631.

16 Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063.

17 Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Case C-319/96 *Brinkmann Tabakfabriken* v *Skatteministeriet* [1998] ECR I-5255; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063; and Case C-140/97 *Rechberger and Others* [1999] ECR I-3499.

31. In *Brasserie du Pêcheur and Factortame*, the Court of Justice of the European Communities mentioned certain factors that may be taken into account in the consideration of whether an infringement is sufficiently serious to entail State liability. In applying those factors in the present case, the Plaintiff submits that: the rule which was violated was perfectly clear; it permitted the national authorities no discretion; any error of law is inexcusable; and no EFTA or Community institution contributed to the infringement.

32. The Plaintiff points out that the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, as referred to by the Defendant, is a unilateral declaration and, therefore, has very limited significance as a source of law. It was made without prejudice to the obligations arising under the EEA Agreement and refers to grounds similar to those in the derogation provided for in Article 13 EEA. Whether a State entity or a private party imports alcoholic beverages and distributes such products on a wholesale level is of no relevance for the health and social policy considerations invoked by the Defendant. The Plaintiff is of the view that the said Declaration is of no significance for the assessment of the seriousness of the infringement.

33. The Plaintiff concludes that the condition that the breach must be sufficiently serious is fulfilled in the present case.

34. As regards the condition that there must be a causal link between the breach and the loss suffered, the Plaintiff refers to the judgment in *Brinkmann Tabakfabriken* v *Skatteministeriet* [18] and *Rechberger and Others*,[19] from which it follows that the EFTA Court may assess whether a causal link exists if it considers that it has all the information necessary to make that assessment.

35. The Plaintiff considers that there is a causal link between the Defendant's breach of Articles 11 and 16 EEA and the loss sustained by the Plaintiff. If the Defendant had abolished the contested State monopoly as of 1 January 1994, the Plaintiff would not have sustained the loss of profits on the import and wholesale distribution of the alcoholic beverage Cointreau during the period from 1 January 1994 to 1 December 1995.

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18 Case C-319/96 *Brinkmann Tabakfabriken* v *Skatteministeriet* [1998] ECR I-5255.

19 Case C-140/97 *Rechberger and Others* [1999] ECR I-3499.

The Icelandic State

Question 1

36. The Defendant, the Icelandic State, points out that prior to, and for a period of time after, the entry into force of the EEA Agreement, the Defendant was firmly of the view that the State monopoly on the import and wholesale distribution of alcoholic beverages was in conformity with the EEA Agreement. That view was based on, *inter alia*, the assertion that the arrangement was flexible enough not to restrict imports within the meaning of Article 11 EEA, and that it ensured equal treatment of EEA nationals as regards the conditions under which the products are procured and marketed as required by Article 16 EEA. In addition, the Defendant considered that Article 13 EEA enabled it to impose certain restrictions on the importation of alcoholic beverages on grounds related to, *inter alia*, the protection of health and life of humans. In support of the view taken at that time, the Defendant refers to the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, which reads as follows:

> *"Without prejudice to the obligations arising under this Agreement, Finland, Iceland, Norway and Sweden recall that their alcohol monopolies are based on important health and social policy considerations."*

37. The Defendant recalls that the position taken in that Declaration did not elicit any reaction by the other Contracting Parties when the EEA Agreement was concluded.

38. The Defendant submits that there are other examples which demonstrate that it had, at that time, reasons to believe that the contested State monopoly did not conflict with the EEA Agreement. The Defendant mentions the explanatory report of the bill that later became *Lög nr. 2/1993 um Evrópska efnahagssvæðið* (Act No. 2/1993 on the European Economic Area, hereinafter the "EEA Act"), which contains the following statement on Article 37 of the EC Treaty (now, after amendment, Article 31 EC) and the corresponding Article 16 EEA:

> *"Interpretation of this provision within the EC must be taken into account. There, it has been emphasised that so-called collateral importation must always be possible, in order to bring competition to bear on the holder of a monopoly. During the EEA negotiations, the Nordic countries within the EFTA, who all maintain State monopolies for the sale of alcoholic beverages, have not considered that the undertakings contained in the agreement provide an occasion to alter the sales arrangement, provided the monopolies undertake not to discriminate between brands according to place of origin. It has been noted that, in fact, the arrangement in effect is a retail sale arrangement and, consequently, is an internal matter rather than a matter directly concerned with international trade. During the negotiations, the EC Commission has not challenged this interpretation."*

39. According to the Defendant, the State monopoly on the import and wholesale distribution of alcoholic beverages was abolished in 1995 as a result of both the administrative procedure initiated by the EFTA Surveillance Authority under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "ESA/Court Agreement") regarding that monopoly, and the judgment of the EFTA Court in *Restamark*. The conclusion arrived at by the EFTA Surveillance Authority and the EFTA Court convinced the Defendant that the EEA Agreement was to be interpreted so as not to allow for restrictions on the importation of alcoholic beverages.

40. The Defendant makes the point that it does not follow expressly from the wording of any of the provisions of EEA Agreement that the State monopoly on the import and wholesale distribution of alcoholic beverages had to be abolished. The conclusion arrived at by the EFTA Surveillance Authority and the EFTA Court was based on a detailed legal examination and interpretation of the provisions of the EEA Agreement, and was not evident in advance.

41. The Defendant considers, in essence, that the now-accepted understanding of the EEA Agreement, as preventing the maintenance of a State monopoly on the import and wholesale distribution of alcoholic beverages, was unknown at the time of its entry into force. That understanding became clear at a later date, and the Defendant then amended its legislation accordingly, in order to fulfil the requirements of uniform interpretation provided for in the EEA Agreement. On this point, the Defendant adds that the EEA Agreement sets out no time-limit for the achievement of uniform interpretation.

42. Based on these considerations, the Defendant contends that it was under no obligation to abolish the State monopoly on import and wholesale distribution of alcoholic beverages upon the entry into force of the EEA Agreement, 1 January 1994. That duty arose at a later date, after the legal situation had become clear from the decisions of the EFTA Surveillance Authority and the EFTA Court. At that time, the obligation was fulfilled as soon as possible, by the adoption of appropriate legislation.

Question 2

43. The Defendant begins by observing that, pursuant to section 2 of the Icelandic Constitution, only national courts have jurisdiction to determine whether the Defendant is liable for compensation under Icelandic law. Only Icelandic sources of law are relevant in that assessment.

44. The Defendant states that the position taken by the Plaintiff seems to be based on the view that the provisions of the EEA Agreement may acquire status of national law without any action on the part of the national legislator, and take

precedence over provisions of conflicting national law. The Defendant regards this view as untenable.

45. In the negotiations leading up to the EEA Agreement, clear reservations were made to the effect that it would not affect the legislative autonomy of the EFTA States. Legislative powers have not been transferred to any EEA institutions, as can clearly be inferred from the Preamble, Article 7 EEA and Protocol 35. In Iceland, the main part of the EEA Agreement was made part of national law by the adoption of section 2 of the EEA Act. The Defendant contends, in essence, that the rule of interpretation found in section 3 of the said Act fulfils the requirement of the EFTA States under Protocol 35 to introduce a statutory provision to the effect that EEA rules are to prevail in the event of conflict between implemented EEA rules and other statutory provisions. In *Restamark*, Protocol 35 was interpreted as imposing a duty on the EFTA States to give precedence to implemented EEA rules that are sufficiently clear and unconditional. The Defendant states that the rule of interpretation in section 3 of the EEA Act is not applicable unless these conditions are fulfilled.

46. The Defendant contends, in essence, that only if the relevant provision of the EEA Agreement is clear and unconditional, and consequently, unequivocal, may it create a basis for individual rights. A right to compensation on the same basis requires an even higher degree of clarity. The Defendant is of the view that the basis of the Plaintiff's claim of liability for compensation fails to fulfil this prerequisite of clarity.

47. It appears from the written submissions that the Defendant is of the view that the implementation of the main part of the EEA Agreement may not entail any liability for compensation. The Defendant acknowledges that the introduction of secondary national legislation may give rise to liability for compensation if that legislation is in conflict with a sufficiently clear and unequivocal provision of the EEA Agreement. However, that is not the case here, as the Defendant in fact abolished the State monopoly on the import and wholesale distribution of alcoholic beverages. The interpretation of the EEA Agreement with regard to restrictions on the import of alcoholic beverages was not clear until after the EFTA Surveillance Authority and the EFTA Court had expressed their views. The period of time used by the Defendant to adapt to the position of the EFTA Surveillance Authority and the EFTA Court by abolishing the contested State monopoly cannot be regarded as excessive.

Question 3

48. Referring to the principle of State liability laid down in *Sveinbjörnsdóttir*, the Defendant contends, in essence, that it must be a prerequisite for such liability that secondary acts referred to in the Annexes to the EEA Agreement have not properly been made part of national law as set out in Article 7 EEA. The Defendant points out that amendments were, in fact, made to the Alcoholic

Beverages Act and the Alcoholic Beverages and Tobacco Trading Act in order to adapt to the EEA Agreement, following the position taken by the EFTA Surveillance Authority and the EFTA Court with regard to restrictions on the import of alcoholic beverages. The basic prerequisite for liability is, therefore, lacking.

49. The Defendant adds that none of the three conditions for State liability set out in *Sveinbjörnsdóttir* are fulfilled. First, there was no clear provision prohibiting a State monopoly on the import and wholesale distribution of alcoholic beverages. That prohibition only became evident after the position taken by the EFTA Surveillance Authority and the EFTA Court. Second, the Defendant did not breach its obligations seriously. The Contracting Parties were fully aware of the attitude of the Defendant, and the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, did not elicit any objections. That, together with the lack of any clear provision or precedent indicating the illegality of a State monopoly on the import and wholesale distribution of alcoholic beverages, and the later abolition of that monopoly, shows that no sufficiently serious breach exists. Third, the Plaintiff has not demonstrated any loss caused by the fact that the contested provisions of the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act remained in force for a period of time after the entry into force of the EEA Agreement.

The Government of Norway

Question 1

50. The Government of Norway contends that the first question should be ruled inadmissible. The basis for that submission is Article 96(3) of the Rules of Procedure of the EFTA Court, providing that the Request for an Advisory Opinion is to be accompanied by, *inter alia*, a summary of the case before the national court, including a description of the facts of the case, necessary to enable the Court to assess the question to which a reply is sought. In the view of the Government of Norway, the Request for an Advisory Opinion from Héraðsdómur Reykjavíkur does not contain a sufficient account for the factual circumstances and specifics of the case, rendering it virtually impossible for the EEA States and interested parties to submit relevant observations. In support of that position, the Government of Norway refers to the judgments in *Telemarsicabruzzo*[20] and *Holdijk*.[21]

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[20] Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393.

[21] Joined Cases 141-143/81 *Holdijk* [1982] ECR 1299.

Question 2

51. The Government of Norway contends that the EEA Agreement does not contain a sufficient legal basis to establish a principle of State liability.

52. There is no explicit provision in the EEA Agreement establishing a basis for State liability towards individuals for breaches of the EEA Agreement. Moreover, no such obligation can be derived from the EEA Agreement.

53. The Government of Norway acknowledges that the EFTA Court, in *Sveinbjörnsdóttir*, held that an EEA State could, under certain conditions, be obliged to pay compensation to individuals who have suffered loss or damage due to incorrect implementation of a directive. However, the Government of Norway considers that the EFTA Court in that case did not take sufficient account of the special characteristics of the EEA Agreement.

54. The Government of Norway argues that the principle of State liability under Community law, as developed by the Court of Justice of the European Communities, is inseparable from the fundamental principle of direct effect. The principle of State liability was established as a direct prolongation of the doctrine of direct effect. It follows from *Brasserie du Pêcheur and Factortame* that State liability is "the necessary corollary of the direct effect of the Community provisions". The principles of direct effect and State liability constitute complementary elements of the supranational Community law, which is absent in the EEA. The Government of Norway maintains that it would be contrary to the expressed views of both the Court of Justice of the European Communities and the EFTA Court to establish a principle of State liability under the EEA Agreement which in its effect is similar to the principle of direct effect.

55. The Government of Norway observes that in *Sveinbjörnsdóttir*, the EFTA Court stated that the depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty. Referring to the judgment *Van Gend en Loos*,[22] the Government of Norway points out that a characteristic feature of Community law is the transfer to the Community of sovereign rights and legislative powers from the Member States. Such a transfer of sovereign rights and legislative powers was deliberately and explicitly excluded from the EEA Agreement. The Government of Norway refers to *Opinion 1/91*,[23] in which the Court of Justice of the European Communities stated that the EEA Agreement "merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up".

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22 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

23 *Opinion 1/91* [1991] ECR I-6079.

56. In support of the position that individuals cannot rely on EEA rules unless they have been correctly implemented in national law, the Government of Norway also refers to Article 7 EEA and Protocol 35 to the EEA Agreement. Based on those provisions, the EFTA Court, in *Sveinbjörnsdóttir*, emphasised that "the EEA Agreement does not entail a transfer of legislative powers". The Government of Norway contends that the EFTA Court thereby clearly stated that EEA provisions do not have direct effect, neither horizontally nor vertically, and endorsed the position of the Court of Justice of the European Communities in *Opinion 1/91*.[24]

57. The Government of Norway observes that, when they ratified the EEA Agreement, all the Nordic EFTA States (Norway, Sweden, Finland and Iceland) assumed that the EEA Agreement would not entail any transfer of legislative powers and would not affect the dualistic principle as regards the relationship between treaty obligations and national law.[25] It was presupposed that, in the dualistic EFTA States, the EEA rules would not form the basis for any individual rights without formal implementation. In Norway, that follows from Proposition to the Storting No. 100 1991-92 on ratification of the EEA Agreement, in which it is stated that EEA rules "will not have direct effect here as in the EC".[26] It was also confirmed by Recommendation to the Storting No. 248 1991-92 on ratification of the EEA Agreement, in which it is stated that the EEA Agreement only entails a transfer of powers with regard to the enforcement of the competition rules, and that the "EEA Agreement on all other points is an international agreement".[27] As for the principle of State liability established in *Francovich and Others*,[28] it is stated in the Proposition to the Odelsting No. 62 1991-92[29] that it can be seen as a "reflection of the EC law principle of direct effect, which is not to be applicable under the EEA Agreement".

58. The Government of Norway adds that a principle of State liability within the EEA would be even more far-reaching than the principle of State liability within the EU. The fact that EEA rules, including directives, do not have direct effect means that State liability within the EEA would, to a certain extent, replace the principle of vertical direct effect of directives within the EU. This illustrates that the consequence of the principle established in *Sveinbjörnsdóttir* is, in effect, similar to the principle of direct effect within the EU.

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24 See footnote 23.

25 Norway: Proposition to the Storting No. 100 1991-92, pages 37-38 and pages 317-318; and Recommendation to the Storting No. 248 1991-92, pages 84-85. Sweden: Proposition of the Government No. 170 1991-92. Finland: Proposition of the Government No. 95 1992. Iceland: Explanatory report of the bill that later became Act No. 2/1993 on the European Economic Area.

26 Proposition to the Storting No. 100 1991-92 on ratification of the EEA Agreement, page 318.

27 Recommendation to the Storting No. 248 1991-92 on ratification of the EEA Agreement, pages 84-85.

28 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

29 Proposition to the Odelsting No. 62 1991-92, page 7.

59. The Government of Norway contests the position taken by the EFTA Court in *Sveinbjörnsdóttir* that the homogeneity objective, the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities, and the loyalty obligations of the EEA States under Article 3 EEA, may create a basis for a principle of State liability. The mere reference to Article 1(1) EEA and the Preamble of the EEA Agreement in *Sveinbjörnsdóttir* cannot constitute the leading argument for State liability.

60. As regards the homogeneity objective, the Government of Norway recognises the importance of that objective for the achievement of a functioning European Economic Area. However, the homogeneity objective cannot reach as far as being a basis for establishing a principle of State liability when the legal systems of the EU and EEA are fundamentally different.

61. The Government of Norway contends, in essence, that homogeneity is sufficiently provided for by other means. First, homogeneity is secured by the incorporation of the main part of the EEA Agreement and secondary legislation into the national legal orders of the EFTA States, by decisions of the EEA Joint Committee under Article 102 EEA, and by decisions of the national legislative bodies in the dualistic EFTA States under Article 7 EEA.

62. Second, the EEA Agreement establishes mechanisms with a view to ensuring homogeneous interpretation and application of the incorporated EEA provisions, in particular the principles of interpretation set out in Article 6 EEA and Article 3 ESA/Court Agreement. The Government of Norway adds that the rulings of the Court of Justice of the European Communities on State liability cannot be considered "relevant" to the question of a possible legal basis for State liability under the EEA Agreement, due to the fundamental differences between EEA law and EC law. The Government of Norway finds support for that contention in *Sveinbjörnsdóttir*, in which the EFTA Court found a legal basis for State liability without referring to the said case-law.

63. As regards the rights of individuals and economic operators, the Government of Norway submits that those rights must be ensured by the implementation of the EEA rules in national legislation, and the principle of interpretation embodied in Protocol 35 to the EEA Agreement, as implemented in national law.

64. As regards Article 3 EEA, the Government of Norway contends that the obligations in that provision must be read in the light of the fundamental differences between the EEA Agreement and EC Treaty. The corresponding Article 10 EC has been the cornerstone in the establishment of direct effect and supremacy under Community law. The principle of State liability is a corollary to direct effect, which clearly is not present in the EEA Agreement.

65. Based on the above considerations, the Government of Norway maintains that neither the objectives of homogeneity and protection of individual rights nor the obligations in Article 3 EEA can create a legal basis for State liability.

66. The Government of Norway concludes that the EEA Agreement does not require that an EEA State be held liable towards an individual for a breach of the EEA Agreement.

67. In the alternative, if the EFTA Court were to conclude that State liability is part of the EEA Agreement, the Government of Norway submits that the concept of State liability under the EEA Agreement must be limited to incorrect implementation of directives. That contention is based on two main arguments. First, there are important differences between the present case and the situation in *Sveinbjörnsdóttir*. Second, it follows from the legal character of the EEA Agreement that liability for a breach of the main part of the EEA Agreement cannot be established.

68. With regard to the first argument, the Government of Norway points out that the ruling in *Sveinbjörnsdóttir* is explicitly limited to incorrect implementation of directives.

69. The Government of Norway asserts that State liability is not necessary in order to ensure effective fulfilment of the obligations of the EFTA States as set out in the main part of the EEA Agreement. That has been sufficiently provided for by the implementation of the main part of the EEA Agreement in the national laws of the EFTA States. The main part of the EEA Agreement is an integral part of national law, and can be relied upon by individuals before national courts. It follows from Protocol 35 to the EEA Agreement, as interpreted in *Restamark*, that implemented EEA rules are to prevail in case of conflict, provided they are unconditional and sufficiently precise. The Government of Norway adds that it follows from the judgment in *Restamark* that Article 16 EEA fulfils that requirement of being unconditional and sufficiently precise.

70. With regard to the second argument, the Government of Norway reiterates that the case-law of the Court of Justice of the European Communities is not "relevant" within the meaning of Article 6 EEA and Article 3 ESA/Court Agreement. Accordingly, the Government of Norway is of the view that the EFTA Court, in the present case, cannot rely on the judgment in *Brasserie du Pêcheur and Factortame*, in which the Court of Justice of the European Communities established a principle of State liability for breach of rules derived from the EC Treaty. The Government adds that, even if that ruling were to be regarded as relevant, it was handed down after the date of signature of the EEA Agreement, which means that the EFTA Court, in accordance with Article 3(2) ESA/Court Agreement, is only required to take "due account" thereof.

71. The Government of Norway adds that the manner in which the Court of Justice of the European Communities established the legal basis for State liability

in *Brasserie du Pêcheur and Factortame* confirms the lack of sufficient legal basis for State liability under the EEA Agreement. In that case, the reasoning of that Court was strongly connected to the direct effect of the EC Treaty. It formulated State liability as "the necessary corollary of the direct effect of the Community provisions". The Government of Norway emphasises again that the principle of direct effect does not exist within the EEA.

72. Moreover, the Government of Norway contends that, in *Brasserie du Pêcheur and Factortame*, the Court of Justice of the European Communities based its finding of State liability on the existence of liability for the Community institutions under Article 288 EC. The Government of Norway points out that neither the EEA Agreement nor the ESA/Court Agreement contain any provision comparable to Article 288 EC.

73. The Government of Norway concludes that the EEA Agreement does not require that an EEA State be held liable towards an individual for breach of the main part of the EEA Agreement.

74. In the alternative, if the EFTA Court concludes that the EEA Agreement provides a sufficient legal basis for State liability for breach of the main part of the EEA Agreement, the Government of Norway proposes a more narrow interpretation under EEA law than under Community law of the condition that there must be a "sufficiently serious" breach in order to establish State liability.

75. Referring to *Brasserie du Pêcheur and Factortame*, the Government of Norway recalls that the decisive test of whether a breach is sufficiently serious under Community law is whether the State has "manifestly and gravely disregarded the limits on its discretion".

76. The Government of Norway considers that the EFTA Court, when applying that condition, must take into account the distinctive characteristics of the EEA Agreement. The fact that no legislative powers have been transferred under the EEA Agreement indicates that a breach can be regarded sufficiently serious only in extraordinary situations.

77. Referring to the judgments in *HNL* v *Council*,[30] *Brasserie du Pêcheur and Factortame*, *The Queen* v *MAFF, ex parte Hedley Lomas*[31] and *Zuckerfabrik Schöppenstedt* v *Council*,[32] the Government of Norway notes that the position of the Court of Justice of the European Communities is that a State can incur liability for legislative measures only in exceptional and special circumstances. It follows from those judgments that the State has wide discretion when adopting legislative measures, in particular measures which are the result of choices of economic policy. The Government of Norway suggests that the same must hold

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30 Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council* [1978] ECR 1209.

31 See footnote 11.

32 Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975.

true when national legislation concerns questions of national importance concerning public health and other policy objectives.

78. The Government of Norway notes that the Court of Justice of the European Communities, in *The Queen* v *H. M. Treasury, ex parte British Telecommunications*,[33] held that a breach is not sufficiently serious if the national interpretation is given "in good faith and on the basis of arguments which are not entirely devoid of substance". The Court of Justice of the European Communities has left considerable room for national interpretations, even if they are subsequently found to be erroneous.

79. In the present case, the Government of Norway considers that, when considering whether the breach is sufficiently serious, a distinction must be drawn between the situation before and after the EFTA Court handed down its judgment in *Restamark*.

80. The Government of Norway asserts that the compatibility with the EEA Agreement of a State monopoly on the import and wholesale distribution of alcoholic beverages was highly uncertain before the judgment in *Restamark*. That assertion is supported by the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act. The Government of Norway also refers to the fact that Article 13 EEA explicitly acknowledges health protection as a ground of derogation from the rules on the free movement of goods. Moreover, the Court of Justice of the European Communities had, at that time, never considered whether an import monopoly was justified due to public health objectives.

81. The Government of Norway claims that the uncertainty surrounding the lawfulness of a State monopoly on the import and wholesale distribution of alcoholic beverages was confirmed by both the EFTA Court in *Restamark* and the Court of Justice of the European Communities in *Franzén*.[34]

82. The Government of Norway considers that the Defendant in the present case did not "manifestly and gravely" disregard the limits on its discretion in interpreting the EEA Agreement as allowing for the contested State monopoly.

83. According to the Government of Norway, the judgment in *Restamark* does not indicate that a State monopoly on the import and wholesale distribution of alcoholic beverages is *per se* unlawful. By opening up for the possibility of exceptions based on public health, the EFTA Court signalled that each monopoly must be considered separately.

84. Where an uncertain legal situation is clarified by a ruling of the EFTA Court, the EEA State in question must be given a reasonable time to adjust its

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33 See footnote 15.

34 See footnote 13.

legislation without incurring liability. Moreover, it follows from *Sveinbjörnsdóttir* and *Brasserie du Pêcheur and Factortame* that the assessment of whether a breach is sufficiently serious must take into account "whether the infringement and the damage caused was intentional or involuntarily" and "whether any error of law was excusable or inexcusable". The State cannot be held liable if responding loyally to a ruling of the EFTA Court. On this point, the Government of Norway refers to the Opinion of the Advocate General in *Brasserie du Pêcheur and Factortame*, from which it follows, *inter alia*, that the State can only incur liability if it does not repair the breach "reasonably quickly". It also refers to Article 21 of Annex 2 to the Agreement Establishing the World Trade Organization, which states that the Members are to have a "reasonable period of time" to comply with decisions of the Dispute Settlement Body, if immediate compliance is impracticable.

85. The Government of Norway contends, in essence, that the Defendant abolished its State monopoly on the import and wholesale distribution of alcoholic beverages within a reasonable time after the judgment in *Restamark*. The Government of Norway adds that the monopoly at issue constituted an important and integral part of Iceland's national health policy, and that the changes in national legislation necessitated by the judgment in *Restamark* must be considered as significant. A State must be given sufficient time to find alternative methods for fulfilling the public health objective if its traditional State monopoly is found to be unlawful. The Defendant's adoption of a new legislative regime within approximately one year must be considered to be within a reasonable period of time. One year is considerably shorter than the usual legislative process.

Question 3

86. Based on the abovementioned conclusions, the Government of Norway states that there is no need to address the third question.

87. The Government of Norway does point out, however, that the EFTA Court is only competent to advise on the interpretation of the EEA Agreement. Referring to the judgment in *Holdijk*,[35] the Government of Norway contends, in effect, that it is for the national court to apply the EEA rules to the facts of the case.

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35 See footnote 21.

The EFTA Surveillance Authority

Question 1

88. The EFTA Surveillance Authority begins by observing that it follows from Article 8(3)(b) EEA that the provisions of the EEA Agreement apply to products specified in Protocol 3. Article 1 of Protocol 3 provides that the provisions in the Agreement are to apply to products listed in Tables I and II. Liqueurs containing more than 5% by weight of added sugar are listed in Table I under Heading 22.08 of the Harmonized Commodity Description and Coding System. The EFTA Surveillance Authority therefore submits that Articles 11 and 16 EEA apply to the product at issue in the main proceedings, Cointreau. The EFTA Surveillance Authority adds that this conclusion cannot be changed by the fact that the Contracting Parties have not yet finalised Protocol 3.

89. In considering whether the contested State monopoly on the import and wholesale distribution of alcoholic beverages is contrary to Articles 11 and 16 EEA, the EFTA Surveillance Authority simply refers to the conclusions arrived at in its letter of formal notice 20 July 1994 and its reasoned opinion of 22 February 1995 to the Defendant regarding the compatibility of that monopoly with the said provisions of the EEA Agreement. The EFTA Surveillance Authority states that those conclusions remain unchanged.

90. As regards Article 11 EEA, the EFTA Surveillance Authority refers to *Commission* v *France*,[36] in which the Court of Justice of the European Communities ruled that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers. Based on that ruling and the ruling by the EFTA Court in *Restamark*, the EFTA Surveillance Authority asserts that the exclusive rights at issue in the main proceedings are incompatible with Article 11 EEA.

91. Referring again to the judgment in *Restamark*, the EFTA Surveillance Authority adds that the State monopoly on the import and wholesale distribution of alcoholic beverages cannot be justified under Article 13 EEA merely because they formed part of an alcohol policy aimed at minimising the harmful effects to health caused by the consumption of alcoholic beverages. That objective could be achieved by means less restrictive of the free movement of goods.

92. As regards Article 16 EEA, the EFTA Surveillance Authority refers to *Pubblico Ministereo* v *Manghera*,[37] from which it follows that the aim of the obligation laid down in Article 16 EEA is to ensure compliance with the fundamental rule of the free movement of goods throughout the common market.

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36 Case C-202/88 *Commission* v *France* [1991] ECR I-1223.

37 See footnote 5.

In that case, the Court of Justice of the European Communities held that exclusive import rights constituted discrimination prohibited by the provision of the EC Treaty corresponding to Article 16 EEA. Every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other EEA States. Moreover, in *Restamark*, the EFTA Court held that a statutory State monopoly that enjoys exclusive rights to all imports of certain products thereby also holds the discretionary right to determine the supply of those products on the domestic market and may consequently also determine their price.

93. Based on the above judgments, the EFTA Surveillance Authority concludes that the national rules providing for the exclusive right of the State to import and distribute alcoholic beverages on a wholesale basis is contrary to Article 16 EEA. The EFTA Surveillance Authority asserts that, in order not to render the prohibition on exclusive import rights ineffective, the prohibition must be considered to cover exclusive rights to wholesale distribution.

94. The EFTA Surveillance Authority adds that it follows from *Franzén*[38] that it is only necessary to examine rules relating to the existence and operation of a monopoly with reference to Article 16 EEA, since that provision is specifically applicable to the exercise of exclusive rights by a domestic commercial monopoly.

95. The EFTA Surveillance Authority concludes that the contested national legislation providing for a State monopoly on the import and wholesale distribution of alcoholic beverages is incompatible with Articles 11 and 16 EEA, and that the Defendant was under an obligation to abolish the said monopoly as of the entry into force of the EEA Agreement on 1 January 1994.

Questions 2 and 3

96. The EFTA Surveillance Authority recalls the finding of the EFTA Court in *Sveinbjörnsdóttir* to the effect that it is a principle of the EEA Agreement that the EEA States are obliged to provide for compensation for loss caused to individuals by a breach of the obligations under the EEA Agreement for which those States can be held responsible. The conditions for such State liability are, first, that the rule of law infringed must have been intended to confer rights on individuals, second, that the breach must be sufficiently serious, and, third, that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. The EFTA Surveillance Authority points out that those conditions are the same as the

[38] See footnote 13.

conditions established in the case law[39] of the Court of Justice of the European Communities with regard to State liability for breach of Community law.

97. As to the first condition, the EFTA Surveillance Authority contends that it follows from *Restamark* that Article 16 EEA fulfils the implicit criteria of Protocol 35 to the EEA Agreement of being sufficiently clear and precise to be relied upon by individuals.

98. As to the second condition, the EFTA Surveillance Authority observes that it is for the national court to apply the criteria establishing the existence of a sufficiently serious breach, in accordance with the guidelines provided by the EFTA Court and the Court of Justice of the European Communities. The EFTA Surveillance Authority acknowledges that a mere infringement of EEA law does not necessarily constitute a sufficiently serious breach. Referring to the judgment in *Brasserie du Pêcheur and Factortame*, the EFTA Surveillance Authority mentions that the factors the national court must take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether the infringement was intentional or involuntary, whether the error of law is excusable and whether the position taken by an EC or EFTA institution may have contributed towards the omission.

99. The EFTA Surveillance Authority recalls the conclusion in *Restamark*, where the EFTA Court held that a monopoly on the import of alcoholic beverages constitutes a clear infringement of Article 16 EEA. Moreover, the EFTA Surveillance Authority argues that, at the time of entry into force of the EEA Agreement, it was clearly established in the case-law of the Court of Justice of the European Communities that the provision of the EC Treaty corresponding to Article 16 EEA must be interpreted as meaning that every national monopoly must be adjusted so as to eliminate the exclusive right to import from other Member States. It follows from *Brasserie du Pêcheur and Factortame* that a breach will clearly be sufficiently serious if it has persisted despite the existence of settled case-law from which it is clear that the conduct in question constitutes an infringement.

100. Referring to the judgment in *The Queen* v *MAFF, ex parte Hedley Lomas*,[40] the EFTA Surveillance Authority submits, in essence, that where the EEA State has little or no discretion to act, a mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach. The existence and scope of discretion must be determined by reference to EEA law.

101. The EFTA Surveillance Authority also points out that it initiated infringement proceedings by sending a letter of formal notice to the Defendant as

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39 *Brasserie du Pêcheur and Factortame*; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Federal Republic of Germany* [1996] ECR I-4845; and Case C-424/97 *Haim* [2000] ECR I-5123.

40 See footnote 11.

early as 20 July 1994. It would, therefore, appear unlikely that an excusable error in law could be established subsequent to that date or that the EFTA Surveillance Authority's position could somehow have contributed towards the infringement.

102. As to the third condition, the EFTA Surveillance Authority observes that it is for the national court to determine whether there is a direct causal link between the Defendant's breach of its obligations and the alleged loss incurred by the Plaintiff. It follows from *Brasserie du Pêcheur and Factortame* that the State must make reparation for the consequences of the loss caused, in accordance with the domestic rules on liability, provided that such rules do not render it impossible or excessively difficult to obtain reparation.

The Commission of the European Communities

Question 1

103. As a preliminary issue, the Commission of the European Communities (hereinafter the "Commission") raise the question of whether the product at issue in the main proceedings, the alcoholic beverage Cointreau, is covered by the material scope of the EEA Agreement.

104. The Commission refers to the annual report 1999/2000 of Rémy Cointreau, from which it follows that Cointreau is a bitter-orange liqueur with an alcohol level of 40%. In answering the question of whether Cointreau is covered by the EEA Agreement, the Commission begins by referring to Article 8 EEA, which is the basic provision dealing with the material scope of the EEA Agreement, and the judgment of the EFTA Court in *Restamark*.

105. With regard to the product coverage of Article 16 EEA, the Commission states that Cointreau does not fall within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System. Furthermore, the EEA Agreement does not appear to contain any specific provision which could apply to Cointreau. The EEA agreement can, therefore, be applicable to Cointreau only if this product is covered by Protocol 3. The Commission submits that, even if there is no subheading expressly covering such liqueur, it is very likely that Protocol 3 covers Cointreau. The Commission refers, *inter alia*, to Table I of Protocol 3, which covers "liqueurs containing more than 5% by weight of added sugar".

106. With regard to the material scope of Article 11 EEA, the Commission points out that it applies only to products originating in the EEA. The Commission assumes that Cointreau is produced within the EEA and therefore fulfils that condition, but states that it is for the national court to make that assessment.

107. Based on the abovementioned consideration, the Commission takes the view that the product at issue in the main proceedings is covered by Articles 11 and 16 EEA.

108. In considering whether the State monopoly on the import of alcoholic beverages at issue is incompatible with Article 16 EEA, the Commission begins by referring to the judgment by the EFTA Court in *Restamark*. The Commission also refers to the judgments by the Court of Justice of the European Communities in *Commission* v *France*[41] and *Pubblico Ministereo* v *Manghera*,[42] from which it follows that there is no obligation to abolish a monopoly of commercial character, but only to adjust it in order to eliminate discrimination.

109. Based on the judgments in *Commission* v *France*[43] and *Commission* v *Netherlands*,[44] the Commission asserts that exclusive import rights, by their nature, give rise to discrimination and is *per se* incompatible with Article 16 EEA.

110. The Commission takes the position that the only way to adjust an import monopoly sufficiently is to abolish the exclusive import rights. By doing so, the import monopoly is abolished. Such an abolition should have been made as of the entry into force of the EEA Agreement on 1 January 1994. The fact that the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act were not amended until late 1995 imply that the necessary adjustment was not performed in time.

111. The Commission submits, with reference to *Commission* v *France*,[45] that no factual information or circumstances have been presented in the present case to allow for a conclusion that the contested State monopoly is justified under Article 59(2) EEA.

112. Referring again to *Commission* v *France*,[46] the Commission considers that there is no reason to examine whether the State monopoly at issue complies with Article 11 EEA, since the monopoly is found to be contrary to Article 16 EEA. However, the Commission states that it sees no reason to depart from the assessment made by the EFTA Court in *Restamark*, and also points to the reasoning in the judgment in *Franzén*.[47]

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41 Case C-159/94 *Commission* v *France* [1997] ECR I-5815.

42 See footnote 5.

43 See footnote 41.

44 Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

45 See footnote 41.

46 See footnote 41.

47 See footnote 13.

113. The Commission adds that the Request for an Advisory Opinion from Héraðsdómur Reykjavíkur does not give sufficient information on how the wholesale distribution monopoly was operated, so as to allow for an assessment to be made of the compatibility with the EEA Agreement.

114. The Commission points out that a wholesale distribution monopoly is, to a certain extent, subject to the same general reasoning as the import monopoly under Articles 16 and 11 EEA. However, a wholesale distribution monopoly cannot be regarded as by nature being discriminatory and *per se* incompatible with Article 16 EEA. A wholesale distribution monopoly may not be incompatible with Article 16 EEA if the trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to trade in domestic goods.

Questions 2 and 3

115. The Commission asserts that, as the first question may only partly be answered in the affirmative since all elements for a final assessment are not known, the answers to questions 2 and 3 will, accordingly, to a large extent be hypothetical.

116. The Commission begins by pointing out that it is important to decide whether there is a breach of Article 16 EEA or Article 11 EEA, because that conclusion may be decisive for the issue of who could be entitled to damages.

117. The Commission refers to the case-law[48] of the Court of Justice of the European Communities in which the main principle on State liability for damages caused by a violation of Community law is laid down and developed. The Commission observes that the Court of Justice of the European Communities has consistently held that the principle that an EC Member State may incur liability for loss and damage caused to individuals as a result of a breach of Community law for which it can be held responsible is inherent in the system of the EC Treaty, and that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. The Court of Justice of the European

[48] *Brasserie du Pêcheur and Factortame*; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Case C-5/94 *The Queen* v *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Federal Republic of Germany* [1996] ECR I-4845; Case C-302/97 *Konle* [1999] ECR I-3099; Case C-424/97 *Haim* [2000] ECR I-5123; and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.

Communities has ruled, *inter alia* in *Stockholm Lindöpark*,[49] that, in principle, it is up to the national courts to decide whether the conditions are fulfilled.

118. It follows from the Commission's submissions that it is of the view that a breach of the provisions of the EC Treaty corresponding to Articles 11 and 16 EEA would, in principle, give rise to a right to damages, provided that the appurtenant conditions are met.

119. The Commission suggests that the abolition of exclusive import rights almost two years after the obligation was imposed by the entry into force of the EEA Agreement must be considered a sufficiently serious breach. The fact that the Defendant, on its own initiative, remedied the situation with effect from 1 December 1995 indicates that the Defendant was aware that the monopoly had to be adjusted in order to be in conformity with Article 16 EEA.

120. Whether the principle established by the EFTA Court in *Sveinbjörnsdóttir* also applies to violations of provisions of the main part of the EEA Agreement requires a further analysis. The Commission finds that such an analysis would be based on hypothetical arguments, as all the circumstances related to the first question are not known. The Commission therefore sees no reason to submit any further observations, neither on that issue in particular nor on the second and third question in general.

Per Tresselt
Judge-Rapporteur

[49] Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.