



## JUDGMENT OF THE COURT

25 February 2005\*

*(Free movement of goods and services - prohibition against alcohol advertisement - trade in wine – Articles 8(3) and 18 EEA - “other technical barriers to trade” - advertisement of wine – restriction – protection of public health – principle of proportionality – applicability of the precautionary principle)*

In Case E-4/04,

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 Markedsrådet (the Market Council), Norway, in a case pending before it between

**Pedicel AS**

and

**Sosial- og helsedirektoratet (Directorate for Health and Social Affairs)**

on the interpretation of the rules of free movement of goods and services within the EEA,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

---

\* Language of the Request: Norwegian.

Registrar: Henning Harborg,

having considered the written observations submitted on behalf of:

- Pedicel AS (hereinafter the “Appellant”), by Jan Magne Langseth, Advokat;
- the Norwegian Directorate for Health and Social Affairs (hereinafter the “Respondent”) and the Kingdom of Norway, by Fredrik Sejersted, Advokat, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Republic of Iceland, by Finnur Thór Birgisson, Legal Officer at the Ministry for Foreign Affairs, acting as Agent;
- the Republic of Poland, by Tomasz Nowakowski, Committee for European Integration, acting as Agent;
- the EFTA Surveillance Authority, by Niels Fenger, Director, and Arne Torsten Andersen, Legal Officer, acting as Agents; and,
- the Commission of the European Communities, by Gregorio Valero Jordana and Xavier Lewis, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Appellant, represented by Jan Magne Langseth and Hanne Camilla Zimmer, the Defendant and the Kingdom of Norway, represented by Fredrik Sejersted, the Republic of Iceland, represented by Finnur Thór Birgisson, the Republic of Poland, represented by Tomasz L. Krawczyk, the EFTA Surveillance Authority, represented by Arne Torsten Andersen and the Commission of the European Communities, represented by Xavier Lewis at the hearing on 23 November 2004,

gives the following

## **Judgment**

### **I Facts and procedure**

- 1 By a decision of 7 July 2004, registered at the Court on 9 July 2004, Markedsrådet referred 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 (the “ESA/Court Agreement”) three questions on the interpretation of the rules of free movement of goods and services within the EEA.

- 2 Those questions arose in the context of a dispute over a decision imposing a sanction against the Appellant for breaches of the prohibition against alcohol advertising under Norwegian law.
- 3 The Appellant is a company engaged in publishing “Vinforum”, a “magazine for gourmets and wine lovers”. It is published in five issues per year and is distributed mainly through subscription. On average, 4500 copies are distributed per issue. Over ninety percent of its readers are over the age of thirty.
- 4 The December 2003 issue of “Vinforum” contained commercial wine advertisements, including for wine produced in France and Spain. On 19 December 2003, the Respondent, on account of the Appellant’s breaches of the prohibition against alcohol advertising in section 9-2 of the Norwegian Act on the sale of alcoholic beverages of 2 June 1989 (*Lov av 2. juni 1989 nr. 27 om omsetning av alkoholholdig drikk m.v.*; hereinafter the “Alcohol Act”), imposed a predetermined coercive fine of NOK 200,000 on the Appellant in the event of any further breaches within the ensuing twelve months. On 14 January 2004, the Appellant filed an administrative appeal to Markedsrådet, requesting that the decision concerning the coercive fine be set aside.
- 5 Markedsrådet referred the following questions to the Court:

*1. Since wine is not included in the product coverage of Article 8(3) of the EEA Agreement: Should the Agreement – including Article 18 and Article 23 cf. Protocol 47 – be so understood that Article 11 and/or Article 36 are applicable to wine?*

*2. Should Article 11 and/or Article 36 of the EEA Agreement be so understood that they are applicable to national legislation that contains a general prohibition against the advertising of alcoholic beverages, such as in the Act on the sale of alcoholic beverages, section 9-2 et al.?*

*3. If question 2 is answered in the affirmative: Can such a prohibition nevertheless be maintained out of concerns for public health, and if so, is it in conformity with the proportionality principle of EEA law? When answering this question, it should be indicated to what extent the application of a general precautionary principle in this field would be in conformity with the case law of the EFTA Court/Court of Justice of the European Communities.*

## II Legal background

### *National Law*

6 Section 9-2 of the Alcohol Act reads:

*The advertising of alcoholic beverages shall be prohibited. The prohibition also applies to the advertising of other products carrying the same label or distinctive mark as beverages containing more than 2.50 per cent of alcohol by volume. Moreover, such products must not be included in advertisements for other goods or services.*

*The Ministry may lay down regulations to delimit, supplement and implement the provisions of the first paragraph. The Ministry may make exemptions from the prohibitions when there are special reasons for doing so.*

7 Section 9-2 of the Regulation of 11 December 1997 No 1292 on the sale of alcoholic beverages (*forskrift om omsetning av alkoholholdig drikk mv.*; hereinafter the “Regulation”) reads:

*Advertisement is understood to mean any form of mass communication for the purpose of marketing, including advertisements in printed publications, film, radio, television, telephone network, computer network, illuminated advertising, billboards, signs and similar devices, depictions, exhibitions and the like, distribution of printed matter, samples etc.*

8 Section 9-3 of the Regulation reads:

*The following are exempted from the prohibition:*

*1. Advertisements in foreign printed publications that are imported to Norway, unless the main purpose of the publication or import is to advertise alcoholic beverages in Norway.*

*2. Informative advertisements in trade publications and other information to licensees in the line of the ordinary process of selling alcoholic beverages.*

*3. Advertisements for sales premises or serving premises with information about the premises’ name, address and opening times as well as licensed rights.*

*4. Information signs of small size in close proximity to sales or serving premises.*

5. *Marking of ordinary serving equipment on sales premises with the trade name and/or company name of an alcohol producer or wholesaler.*

6. *Marking of a licensee's vehicles, packaging, service uniforms and the like with the licensee's own trade name and/or company name.*

7. *Advertising on foreign television channels, where the advertisement complies with the advertising rules in the country from which the channel is broadcast.*

8. *Product and price information on the internet when the information given by A/S Vinmonopolet as a basis for placing orders via the internet (internet sales) or by the holder of a municipal licence to sell beer via the internet.*

*The exemption of the first paragraph does not apply to advertisements in television broadcasts especially targeted at Norway.*

- 9 Mention of alcoholic beverages subject to editorial freedom of the press falls outside the scope of the prohibition of Section 9-2 of the Alcohol Act, e.g. editorial mention in daily newspapers, periodicals, weeklies, and on the internet.

*EEA Law*

- 10 Article 8 paragraph 3 of the EEA Agreement 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.*

- 11 Article 11 EEA reads:

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

- 12 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 Contracting Parties.*

13 Article 18 EEA reads:

*Without prejudice to the specific arrangements governing trade in agricultural products, the Contracting Parties shall ensure that the arrangements provided for in Articles 17 and 23 (a) and (b), as they apply to products other than those covered by Article 8(3), are not compromised by other technical barriers to trade. Article 13 shall apply.*

14 Article 23 EEA reads:

*Specific provisions and arrangements are laid down in:*

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

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

*[...]*

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

15 Protocol 47 to the EEA Agreement on the abolition of technical barriers to trade in wine states that:

*[t]he Contracting Parties shall authorize imports and marketing of wine products, originating in their territories, which are in conformity with the EC legislation, as adapted for the purposes of the Agreement, as set out in Appendix 1 to this Protocol related to product definition, oenological practices, composition of products and modalities for circulation and marketing.*

*[...]*

*For all purposes other than trade between the EFTA States and the Community, the EFTA States may continue to apply their national legislation.*

16 Article 36(1) EEA reads:

*Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

17 Article 39 EEA reads:

*The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.*

18 Article 33 EEA reads:

*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

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

### **III Findings of the Court**

#### *Admissibility*

20 Under Article 34 of the ESA/Court Agreement, any court or tribunal may, if it considers it necessary to enable it to give judgment, refer questions on the interpretation of the EEA Agreement to the Court.

21 The Court held on an earlier occasion that Markedsrådet fulfils the requirements of being a court or tribunal in the sense of Article 34 of the ESA/Court Agreement (see Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S* [1994/1995] EFTA Ct. Rep. 113, at paragraph 15). The request from Markedsrådet is therefore admissible.

#### *First question*

22 By its first question, Markedsrådet is asking whether Article 11 and/or 36 EEA are applicable to wine. This question addresses in fact two issues that need to be dealt with separately. The first issue relates to Article 11 and the second to Article 36 EEA.

#### *Article 11 EEA*

23 The question of whether Article 11 EEA applies to wine calls for an interpretation of the rules on product coverage contained in the EEA Agreement. Pursuant to Article 8(3) EEA, the provisions of the Agreement shall only apply to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (hereinafter the “Harmonized System”). The products listed in Protocol 2 are excluded from the product coverage, and the

products specified in Protocol 3 are subject to the specific arrangements set out in that Protocol. Wine falls under Chapter 22, heading 22.04, of the Harmonized System and is not mentioned in Protocol 3 (see the Court’s findings in Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, at paragraph 40; E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 110, at paragraph 8, and E-9/00 *EFTA Surveillance Authority v Norway* [2002] EFTA Ct. Rep. 72, at paragraph 30).

- 24 The Court notes that the scope of the EEA Agreement differs from the EC Treaty with regard to its coverage of agricultural and fishery products. The EEA Agreement takes the approach of excluding the bulk of agricultural products from its product coverage. With respect to differences in scope between the EEA Agreement and the EC Treaty, reference is made to the Court’s earlier findings in Case E-2/97, *Mag Instrument Inc. v California Trading Company Norway, Ulsteen*, [1997] EFTA Ct. Rep. 127, at paragraph 25.
- 25 A main category of products listed in Chapters 1 to 24 of the Harmonized System are agricultural products (including wine). The underlying reason for excluding these products from the general scope of the EEA Agreement must be that the Contracting Parties wished to maintain the freedom to decide on their respective regulations unaffected by the rules contained in the EEA Agreement unless otherwise specified.
- 26 The Appellant maintains that wine as an agricultural product is protected, pursuant to Article 18 EEA, against measures having equivalent effect to quantitative restrictions. Article 18 obliges the Contracting Parties, without prejudice to the specific arrangements governing trade in agricultural products, to ensure *inter alia* that the arrangements provided in Article 23(b) (which refers to Protocol 47) regarding the abolition of technical barriers to trade in wine, are not compromised by “other technical barriers to trade” (see Case E-1/94 *Restamark*, at paragraph 42).
- 27 The Court cannot accept the Appellant’s suggestion to construe the term “technical barriers to trade” in Article 18 EEA as being synonymous with “measures having equivalent effect” to quantitative restrictions in Article 11 EEA. Already the explicit difference in wording speaks against such a conclusion. Moreover, the purpose of Protocol 47, to which Article 18 EEA refers via Article 23(b) EEA, is to facilitate trade in wine products insofar as they are in conformity with the EC legislation as set out in Appendix 1 to the Protocol. Hence, the prohibition of “other technical barriers to trade” in Article 18 EEA can only be understood to the effect that no further requirements of the same kind as foreseen under the implemented EC legislation shall be imposed. The object is not, directly or indirectly, to make Article 11 EEA applicable to wine and thereby bypass the product coverage rules as established under the EEA Agreement. In that context, the Court notes that the last sentence of Article 18 EEA provides that Article 13 EEA shall apply, while there is no corresponding reference to Article 11 EEA.



- 28 The Contracting Parties are pursuing the objective of creating a dynamic and homogeneous European Economic Area. This fundamental goal, which is laid down, *inter alia*, in the fourth and fifteenth recitals of the Preamble to the EEA Agreement, may make a dynamic interpretation of EEA law necessary. That is, however, not so with regard to Article 8(3) EEA. The Court cannot hold that Article 11 EEA applies to trade in wine since this would amount to extending the scope of the Agreement.
- 29 Based on the above, the Court holds that Article 11 EEA is to be understood as not applying to trade in wine (see the Court's finding in E-1/97 *Gundersen*, at paragraph 8).

*Article 36 EEA*

- 30 The question from Markedsrådet regarding Article 36 EEA addresses the service of making available commercial advertisement space to wine producers and traders established in EEA Contracting Parties.
- 31 The Appellant argues that Article 36 EEA is applicable in a situation as in the case at hand. The EFTA Surveillance Authority supports this position and refers to the scheme of the EEA Agreement according to which Article 8 EEA is included in Part II on the free movement of goods. The Commission of the European Communities shares the view that Article 36 EEA applies.
- 32 The Respondent, supported by the Republic of Iceland and the Republic of Poland, holds the view that it would be incoherent to exclude a product from the coverage of the EEA Agreement, and at the same time provide protection for the provision of advertising services that have as their sole purpose the promotion of sales of that product. The Respondent further points to the technique adopted in the drafting of the EEA Agreement, where specific mention is made where, exceptionally, provisions of the Agreement shall apply to products which are excluded from its general product coverage, e.g. in Article 8(2) EEA and in Protocol 8 on Article 16 EEA.
- 33 The inclusion of Article 8 EEA in Part II of the Agreement, which concerns the free movement of goods, and the fact that services are not covered by the Harmonized System as referred to in Article 8(3) EEA cannot, in the Court's view, be decisive. The issue in question calls for a broader interpretative approach that takes into account all the relevant elements, in particular the purpose of the provision.
- 34 That purpose, as stated above, consists, in the context of the present case, in leaving the decision of how to regulate trade in wine to the Contracting Parties who are in principle not bound by the rules on free movement of goods. The Court concludes from this that a service such as the one at issue, which is inseparably linked to the sale of wine, must be deemed to be excluded from the scope of Article 36 of the EEA Agreement.

- 35 The Appellant in the case at hand is the publisher of a wine magazine, whose interest is not to sell wine, but to sell advertisement services as such. Such advertisement services fulfil however, the purpose of promoting the sale of wine and thereby form an integral part of, and are inseparable from, trade in wine. They are therefore, in light of what was stated in paragraph 34 excluded from the scope of the EEA Agreement.
- 36 The Court does not overlook the multifunctional role of advertising services in modern economies. Advertising has the primary function of increasing demand for and promoting the sale of the advertised product. Press and broadcasting undertakings as well as advertisement service providers on the Internet offer their media as means for communicating advertising material to producers, wholesalers and retailers. Creative agencies produce advertising content, and sell their services in a market which is increasingly global. The relevance of these services is therefore not limited to their impact on the end sale of the advertised product, wine. The Court cannot, however, on those grounds deviate from its finding that Article 36 EEA is not applicable to the advertisement of wine.
- 37 The EFTA Surveillance Authority and the Commission of the European Communities are of the view that the advertisement of wine should be covered by Article 36 EEA. Otherwise, it might, in their view, follow that all services related to wine and other agricultural products, such as transport and veterinary services, as well as any goods in use in the wine industry and in the agricultural sector generally, such as bottles and tractors, would escape the application of Articles 11 and 36 EEA.
- 38 The Court does not share this concern. Firstly, industrial products, such as tractors and bottles, fall within the product coverage of the EEA Agreement. Secondly, the reasoning on which the Court has based its conclusion that Article 36 EEA does not apply to the advertisement of wine would not extend to services which are not inseparably linked to the trade in goods not covered by the Agreement.
- 39 Finally, the Court does not share the view of the Commission of the European Communities that the question of whether or not Article 36 EEA is applicable to the advertisement of wine should be decided in light of whether the Court of Justice of the European Communities would assess that service under Article 28 EC (the equivalent of Article 11 EEA) or under Article 49 EC (the equivalent of Article 36 EEA). Article 8(3) has no counterpart in Community law. In light of this difference in scope, the case law of the Court of Justice of the European Communities referred to by the Commission is not relevant as regards the question of interpretation of Articles 8(3) and 36 EEA in the case at issue.
- 40 The answer to the second element of the first question by Markedsrådet must therefore be that Article 36 EEA is to be understood as not applying to the provision of advertisement services for wine in a case such as the one at hand.

*Second question*

- 41 By its second question, Markedsrådet essentially asks whether a general prohibition of advertisement for alcoholic beverages such as the one laid down in Section 9-2 of the Norwegian Alcohol Act is covered by Article 11 and/or Article 36 EEA.
- 42 The Respondent has argued that the Court should not reply to this question because the inapplicability of Articles 11 and 36 EEA to wine would render the two last questions hypothetical, and an answer would thus be unnecessary. The Court does not share that view. In that respect, the Court notes that Markedsrådet has explicitly stated in its request that there is a need for a clarification of whether the principle of free movement of goods and services is material to the interpretation of a national general prohibition against alcohol advertising, and if so, in what manner. That request must be answered, insofar as it relates to alcoholic beverages falling within the scope of the EEA Agreement.
- 43 It is clear that Articles 11 and 36 EEA apply to beer and certain spirits (see with regard to beer, Case E-6/96 *Tore Wilhelmsen AS v Oslo kommune*, 1997 EFTA Ct. Rep. 53, at paragraph 33; with regard to whisky, Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, at paragraph 39; with regard to so-called “alcopops”, Case E-9/00 *EFTA Surveillance Authority v Norway*, at paragraph 31).
- 44 The Court notes that all those who have submitted observations in the proceedings before it have understood that question to the effect that Markedsrådet wishes to know whether a prohibition against the advertising of alcoholic beverages such as the one laid down in the Norwegian legislation at issue is compatible with Article 11 and/or 36 EEA. The Appellant is of the view that the Norwegian ban might affect the marketing of products from other EEA Contracting Parties more heavily than the marketing of domestic alcoholic products and therefore constitutes a restriction under Article 11 EEA. It also maintains that this constitutes a restriction within the meaning of Article 36 EEA. The Respondent states that the general prohibition against alcohol advertising might be argued to potentially affect the marketing of products from other EEA Contracting Parties somewhat more heavily than the marketing of domestic alcohol products, but that this is probably not the case.
- 45 Article 11 EEA prohibits any measures having an effect equivalent to quantitative restrictions on imports. This prohibition applies to rules which are capable of hindering, directly or indirectly, actually or potentially trade between the Contracting Parties (see Case E-5/96 *Ullensaker kommune and others v Nille AS* [1997] EFTA Ct. Rep. 30, at paragraph 22; cf. Court of Justice of the European Communities Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837). Thereby, Article 11 EEA grants market access to products from other EEA Contracting Parties (see Case E-6/96 *Tore Wilhelmsen AS v Oslo kommune*, at paragraph 51). The basis for the application of Article 11 EEA is the effect of national measures on individuals and economic operators within the EEA. The

application of Article 11 EEA is not conditional upon proof that the measure in question actually restricts imports; it is sufficient that it potentially has an effect on trade (see Case E-1/94 *Restamark*, at paragraph 47).

- 46 It cannot be excluded that an outright prohibition, applying in one Contracting Party, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Contracting Parties (see Joined Cases C-34/95 to C-36/95 *Konsumentombudsmannen v De Agostini and TV Shop i Sverige* [1997] ECR I-3843, at paragraph 42). The prohibition at issue prevents producers from advertising all alcoholic beverages in all media, with only few exceptions. It is for the national court to carry out a precise analysis of the facts of the case. However, the Court notes that in the *Gourmet* case, which to a certain extent resembles the case at hand, the Court of Justice of the European Communities was able to conclude, without regarding it necessary to carry out a precise analysis of the facts, that in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers is liable to impede market access for products from other Member States more than for products from domestic producers (Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR I-1795, at paragraph 21; see also Case E-6/96 *Wilhelmsen*, at paragraph 73). The information presented to the Court does not indicate that this presumption does not apply in relation to the circumstances in Norway.
- 47 A general prohibition on advertising of alcohol such as that at issue must on this basis be regarded as potentially affecting market access for products from other EEA Contracting Parties more heavily than for domestic products, and thereby constituting an obstacle to trade between Contracting Parties covered by Article 11 EEA.
- 48 The free movement of services as provided for in Article 36 EEA encompasses, *inter alia*, the provision of advertising space and time to potential advertisers and the communication of commercial messages to the audience. The right to provide such services may be relied on by an undertaking against the EEA Contracting Party in which it is established if the services are provided to persons established in another EEA Contracting Party (compare Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, at paragraph 30). Moreover, the freedom to provide services is enjoyed by both providers and recipients of the services (compare Case C-262/02 *Commission v France*, judgment of 13 July 2004, not yet reported, at paragraph 22).
- 49 The general prohibition of advertisement for alcoholic beverages under the Norwegian Alcohol Act restricts the right of press undertakings established in the territory of that EEA Contracting Party to offer advertising space in their publications to potential advertisers established in other EEA Contracting Parties. Such a prohibition has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby impedes

market access for both providers and recipients of the services at stake. It therefore constitutes a restriction on the freedom to provide services within the meaning of Article 36 EEA (compare Case C-405/98 *Gourmet*, at paragraphs 38-39).

- 50 The answer to the second question must therefore be that a general prohibition against the advertising of alcoholic beverages such as the one laid down in Section 9-2 of the Alcohol Act constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA and a restriction within the meaning of Article 36 EEA, as regards alcoholic beverages falling within the scope of the EEA Agreement.

*Third question*

- 51 By its third question, Markedsrådet asks in the first place whether, in the event of an affirmative answer to the second question, the prohibition of advertising for alcoholic beverages falling within the general scope of the EEA Agreement may nevertheless be justified on grounds of public health applying the proportionality principle.
- 52 At the outset, the Court notes that the protection of public health is recognized in both Articles 13 and 33 EEA as a possible basis for exemption from the principles of free movement of goods and services. It is appropriate to deal with both provisions together.
- 53 The Court has consistently held that Articles 13 and 33 EEA must be interpreted strictly, as they constitute derogations from the basic rule that all obstacles to the free movement of goods and services between the Member States must be eliminated (see, to this effect, Cases E-1/94 *Restamark*, at paragraph 56, and E-5/96 *Nille*, at paragraph 33).
- 54 The Court has no reason to doubt that there are serious social and health considerations behind the Norwegian alcohol policy in general and the prohibition against alcohol advertisements in particular. Furthermore, the Court has already held that combating alcohol abuse constitutes a public health concern (Case E-6/96 *Wilhelmsen*, at paragraph 85). In the case at issue, there is no evidence before the Court to suggest that the Norwegian prohibition of alcohol advertisement constitutes a means of arbitrary discrimination or a disguised restriction on trade between the EEA Contracting Parties, as precluded by the second sentence of Article 13 EEA.
- 55 The Court held in *Gundersen* (E-1/97, at paragraph 20) that the EEA Contracting Parties enjoy wide freedom in formulating and implementing their alcohol policies. In that context, the Court recalls that according to settled case law the health and life of humans rank foremost among the property or interests protected by Article 13 EEA (compare Case C-320/93 *Ortscheit* [1994] ECR I-5243, at paragraph 16). It is for the Contracting Parties to decide on the degree of protection which they wish to afford to public health and the way in which that

protection is to be achieved. They may do so, however, only within the limits set by the EEA Agreement and must, in particular, comply with the principle of proportionality (compare Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, at paragraph 16; Case C-262/02 *Commission v France*, at paragraph 24).

- 56 National legislation such as that at issue in the main proceedings must therefore be assessed in relation to the principle of proportionality. The Court has consistently emphasized the importance of this principle of EEA law (see, for instance, Cases E-6/96 *Wilhelmsen*, at paragraph 87, and E-3/00 *EFTA Surveillance Authority v Norway*, at paragraph 27). Under the proportionality principle, the measure chosen by an EEA Contracting Party must be proportionate to the aim pursued. It must be established that measures taken are suited to achieve the objective sought, and that the same objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade.
- 57 As the application of the proportionality test calls for an analysis of the circumstances of law and of fact which characterise the situation in the EEA Contracting Party concerned, the national court is in a better position than the Court to undertake it (see Case C-405/98 *Gourmet*, at paragraph 33). The Court can only give general guidance as to which elements are to be taken into account.
- 58 The national court will have to take into account the availability of means less restrictive on intra-EEA trade as compared to a general prohibition of advertisements for alcoholic beverages, provided that such means are equally effective in attaining the legitimate objective of Norwegian alcohol policy. In that respect, the Court notes that the Court of Justice of the European Communities has found that regional legislation prohibiting advertisements for spirits restricts freedom of trade only to a limited extent, since it concerned only beverages having an alcoholic strength of more than 23 degrees, a criterion which was considered to be not manifestly unreasonable. Furthermore, that Court stated that the regional legislation in question merely prohibited advertising in specified places particularly frequented by motorists and young persons (Joined Cases C-1/90 and C-176/90 *Aragonesa*, at paragraphs 17-18). More recently, the Court of Justice of the European Communities has accepted national measures restricting the advertising of alcoholic beverages (see in particular the cases concerning the French “Loi Evin”, C-262/02 *Commission v France*, and C-429/02 *Bacardi France SAS v Télévision française 1 SA and Others*, judgment of 13 July 2004, not yet reported), where the restriction consisted of an advertisement ban in one medium, namely television.
- 59 Markedsrådet has finally asked for an indication of the role the precautionary principle may play in this field. The ninth recital of the Preamble to the EEA Agreement and Article 174(2) of the EC Treaty refer to the precautionary principle in the context of the protection of the environment. The Court held in Case E-3/00 *EFTA Surveillance Authority v Norway* ([2000-2001] EFTA Ct. Rep. 73), in a case involving a marketing ban imposed on foodstuffs fortified with vitamins and iron that in the absence of harmonisation of rules, when there

is uncertainty as to the current state of scientific research, it is for the Contracting Parties to decide what degree of protection of human health they intend to assure, having regard to the fundamental requirements of EEA law, provided that certain conditions are met (see also Case C-192/01 *Commission v Denmark* [2003] ECR I-9693). Moreover, the Court of Justice of the European Communities and the Court of First Instance of the European Communities have relied on the precautionary principle in cases involving the release of GMOs (Case C-236/01 *Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others* [2003] ECR I-8105), the cross-contamination of fish flour with bone tissue (Case C-286/02 *Bellio F.lli Srl v Prefettura di Treviso*, judgment of 1 April 2004, not yet reported) and the fortification of animal feedingstuffs with antibiotics (Cases T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305 and T-70/99 *Alpharma Inc. v Council of the European Union* [2002] ECR II-3495).

- 60 Under this case law, the precautionary principle may be invoked where the best available scientific information is so insufficient, inconclusive or imprecise as to make it impossible to determine with certainty the risks or hazards that may arise. In the case at issue, the precautionary principle does not apply, since the effects of excessive alcohol consumption on human health are not uncertain. It is not denied that uncertainty may be present with regard to the assessment of the effects of advertising on the consumption of alcoholic beverages. Such uncertainty, however, does not arise in a domain which would allow for the invocation of the precautionary principle as developed in the case law of the three courts mentioned above.
- 61 The answer to the third question must therefore be that a prohibition against the advertising of alcoholic beverages such as the one at issue 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. In a situation such as that at issue, the precautionary principle as recognized by the Court does not apply.

#### **IV Costs**

- 62 The costs incurred by the EFTA Surveillance Authority, the Commission of the European Communities, the Kingdom of Norway, the Republic of Iceland and the Republic of Poland, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before Markedsrådet, any decision on costs is a matter for Markedsrådet.

On those grounds,

THE COURT,

in answer to the questions referred to it by Markedsrådet by a reference of 7 July 2004, hereby gives the following Advisory Opinion:

- 1a. Article 11 EEA is to be understood as not applying to trade in wine.**
- 1b. Article 36 EEA is to be understood as not applying to advertising services related to wine in a case such as the one at hand.**
- 2. A general prohibition against the advertising of alcoholic beverages such as the one laid down in Section 9-2 of the Norwegian Alcohol Act constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA and a restriction within the meaning of Article 36 EEA, as regards alcoholic beverages falling within the scope of the EEA Agreement.**
- 3. Such a prohibition 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. In a situation such as that at issue, the precautionary principle as recognized by the Court does not apply.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 25 February 2005.

Henning Harborg  
Registrar

Carl Baudenbacher  
President