# REPORT FOR THE HEARING
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)**

Concerning the free movement of goods and services within the EEA.

## I. Introduction

1. By a reference dated 7 July 2004, registered at the Court on 9 July 2004, Markedsrådet made a request for an Advisory Opinion in a case pending before it between Pedicel AS (hereinafter the "Appellant") and the Directorate for Health and Social Affairs (hereinafter the "Respondent").

## II. Facts and legal background

2. The case concerns an administrative appeal of a decision of 19 December 2003 by which the Respondent, due to the Appellant's existing 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 1989-06-02 nr 27: lov om omsetning av alkoholholdig drikk m.v.; hereinafter the "Alcohol Act"), imposed a predetermined coercive fine against the Appellant pursuant to section 9-4(3) of that Act in the event of any further breaches within the pursuing twelve months of the prohibition against alcohol advertising in section 9-2 thereof.

3. The Appellant is a company engaged in publishing a publication entitled "Vinforum". The publication declares itself a "magazine for gourmets and wine lovers". "Vinforum" publishes five issues per year and is distributed mainly through subscription. On average, 4500 copies are distributed per issue.

According to a survey of the readership, over ninety percent of its readers are over the age of thirty.

4. The Respondent supervises compliance with the prohibition against alcohol advertising that is laid down in or pursuant to the Alcohol Act, cf. Section 9-3 of that Act.

5. 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.*

6. 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.

7. Section 9-4 of the Alcohol Act reads:

> *Should the Ministry of Health and Social Affairs find that the prohibition against advertising has been violated, it may order the circumstance to be rectified. A deadline for rectification shall be set at the same time.*
>
> *A coercive fine may be imposed at the same time as the rectification order is given. The fine shall run as from the deadline for rectification, and may be set in the form of a one-off fine or a daily fine. The fine accrues to the State.*
>
> *Should the Directorate for Health and Social Affairs, upon uncovering a violation, find particular cause to believe that new violations of the prohibition against advertising will be committed that cannot be halted under the first and second paragraph, it may determine in advance that the fine will run as from the date when a new violation commences. Such coercive fine may be imposed for a period of up to one year.*
>
> *When called for by special reasons, the Directorate for Health and Social Affairs may partially or entirely waive an imposed coercive fine.*
>
> *The Ministry may issue regulations concerning the imposition, calculation and collection of coercive fines.*

8. Section 9-5 of the Alcohol Act establishes that a decision pursuant to section 9-4 can be appealed to Markedsrådet.

9. 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.*

10. 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.*

11. The December issue of "Vinforum" contained commercial wine advertisements, including for wine produced in France and Spain. None of the advertisements were for beer or spirits. On 19 December 2003, the Respondent made a decision setting a coercive fine. The decision reads, inter alia, as follows:

> *Under the legal authority of the third paragraph of section 9-4 of the Alcohol Act, the Directorate sets a coercive fine of NOK 200,000 as a single payment with a duration of one year from the receipt of this decision. The sum falls due in*

*the event that "Vinforum" prints another alcohol advertisement contrary to the first paragraph of section 9-2 of the Alcohol Act and/or offers alcohol as a prize in connection with subscription campaigns for soliciting new readers.*

12. On 14 January 2004, the Appellant filed an administrative appeal to Markedsrådet, requesting that the decision concerning the coercive fine be set aside. The Appellant acknowledges that the marketing of wine products on which the decision is based, falls within the wording of the first paragraph of Section 9-2 of the Alcohol Act. It is not disputed that, viewed in isolation, the conditions for a coercive fine pursuant the third paragraph of section 9-4 of the same Act, are present. The basis for the appeal – and for the claim that the decision must be set aside as invalid – is that a general prohibition against alcohol advertising is contrary to Articles 11 and 36 of the EEA Agreement.

13. Markedsrådet is of the opinion that there is a need for a clarification, inter alia, of the question concerning to what degree wine is covered by the EEA Agreement, and 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 Markedsrådet qualifies as a "court or tribunal" pursuant to Article 34(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice[1] is not disputed.

## III. EEA Law

14. Article 8 in Part II of the EEA Agreement ("Free Movement of Goods") reads in paragraph 3:

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

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

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

15. Article 11 EEA reads:

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

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[1] See Joined Cases E-8/94 and E-9/94 *Mattel and Lego* [1994/1995] EFTA Ct. Rep. 113, para 12 et seq.

16. 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.*

17. 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.*

18. 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.*

19. Protocol 47 to the EEA Agreement on the abolition of technical barriers to trade in wine reads in its introductory part:

> *[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.*

20. Article 36 EEA in Part III ("Free Movement of Persons, Services and Capital"), Chapter 3 ("Services") reads:

> *1. 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.*
>
> *2. Annexes IX to XI contain specific provisions on the freedom to provide services.*

21. Article 39 EEA reads:

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

22. 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.*

## IV. Questions

23. The following questions were referred to the EFTA 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.**

## V. Written Observations

24. 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 Appellant, represented by Jan Magne Langseth, Advokat, Schjødt, Oslo;

- the Respondent and the Kingdom of Norway, represented by Fredrik Sejersted, Advokat, Office of the Attorney General (Civil Affairs), acting as Agent;

- the Republic of Iceland, represented by Finnur Thór Birgisson, Legal Officer at the Ministry for Foreign Affairs, acting as Agent;

- the Republic of Poland, represented by T. Nowakowski, Committee for European Integration, acting as Agent.

- the EFTA Surveillance Authority, represented by Niels Fenger, Director, and Arne Torsten Andersen, Legal Officer, acting as Agents; and

- the Commission of the European Communities, represented by Gregorio Valero Jordana and Xavier Lewis, Members of its Legal Service, acting as Agents.

*The Appellant*

25. At the outset, the Appellant stresses the importance of advertising for the penetration of markets in other countries and contends that the total advertising ban, as established by the Alcohol Act, benefits domestic, well-established beer producers in Norway. It is furthermore emphasised that the sanctions for violations of the Act may include fines or imprisonment of up to two years so that the consequences of infringing the ban may be severe.

26. As to the question of whether Article 11 and/or Article 36 EEA apply to wine, the Appellant suggests an answer in the affirmative. As regards Article 36 EEA, the Appellant submits that Article 8(3) can not exclude its applicability as Article 8(3) only refers to goods, not services, and no services are covered by the Harmonized Commodity Description and Coding System. Furthermore, Annexes IX to XI, as referred to in Article 36(2) EEA, do not contain any exemptions with

respect to wine. The fact that the so-called "Television without Frontiers"-Directive was specially adapted by the EFTA States with regard to advertisements for alcoholic beverages, is considered a confirmation of the rule that such advertisement is covered by the Agreement. Finally, if the scope of Article 36 EEA were to depend on whether the services relate to products outside or within Article 8(3) EEA, its operation would be extremely difficult and the principles of homogeneity and equal treatment underlying the EEA Agreement would be jeopardized.

27. If Article 36 EEA covers services related to alcohol advertising, including for wine, it would constitute an incongruity in the EEA Agreement and stand in contrast to the situation in the European Union if alcohol advertising were not covered by Article 11 EEA. According to the Court's case law, a number of alcoholic beverages such as beer do come within the range of that provision.[2] As to wine, the Appellant submits that nothing in the Agreement or its annexes suggests that wine shall be given less preferential treatment than other goods covered by Article 8 EEA. Wine is mentioned in Article 23 EEA and in Protocols 8 and 47 to the Agreement. It is also covered by the bilateral agreement on trade in agricultural products between Norway and the European Community, as referred to in Protocol 42 to the EEA Agreement. Once wine is imported under this agreement, the EEA Agreement ensures that it is not subjected to discriminatory treatment.

28. In examining Article 18 EEA, the Appellant focuses on the question of whether an arrangement provided for in Articles 17 or 23 EEA is compromised by another technical barrier to trade. The purpose of these arrangements is to ensure free movement of the products concerned, subject only to the provision of Article 13 EEA and the specific regimes governing agricultural products. Ensuring free trade with the European Community also underlies Protocol 47. As to the interpretation of the term "technical barrier to trade", the Appellant rejects a literal interpretation and suggests that it is to be understood as synonymous with "measures having equivalent effect to quantitative restrictions", according to its understanding at the time the EEA Agreement was negotiated. At that time, the European Community was bringing about the internal market and the Court of Justice of the European Communities had not yet excluded non-discriminatory selling arrangements from the scope of Article 28 EC. The Appellant's understanding is also based on systematic and teleological considerations, as well as on considerations of legal certainty. In particular, an interpretation whereby only product-related requirements could constitute "technical barriers" would be at odds with the fact that arrangements provided for in Articles 17 and 23 may also cover non-product related requirements. Furthermore, such an interpretation would disqualify all selling arrangements, including discriminatory ones, from the scope of the Agreement, and would thereby frustrate the objective of equal treatment. If the Court were to rule that only product-related requirements were

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[2] Reference is made to Cases E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 53, and E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 108.

covered by the Agreement, there would be no means of redressing the pernicious effects of other measures, excluding also the possibility of State liability. An additional point is made with regard to the possibility of implementing secondary legislation: if products not mentioned in Article 8(3) EEA but subject to an arrangement provided for in Articles 17 and 23 were to be considered outside the Agreement with respect to advertising, acts having an impact on advertising without making an exception for such products[3] could hardly be assumed by the EFTA/EEA States, due to the Joint Committee's lack of competence.[4] Finally, an interpretation that does not equate "technical barriers to trade" with "measures having equivalent effect as quantitative restrictions" would make for uncertainty as to which trading rules apply. Both traders and the Contracting Parties would be well served by following the case law of the Court of Justice of the European Communities, once it has been established that the product in question is covered by an arrangement provided for in Article 17 or 23. The Appellant finds support in the ruling of that Court in *Franzén*.[5]

29. With regard to the second question, the Appellant proposes an answer in the affirmative and bases itself on the cases of the Court of Justice of the European Communities in *De Agostini*[6] and *Gourmet.*[7] In comparison, the Swedish legislation governing alcohol advertising at issue in *Gourmet* was less restrictive than the Norwegian. The former allowed advertising in restaurants and bars as well as at the outlets of the Swedish Alcohol Monopoly, the number of which is considerably higher – more than 1200 – than the number in Norway – less than 200. Moreover, in Sweden beer (containing more than 3.5% alcohol by volume) is only sold through the monopoly, while in Norway, beer (containing up to 4.75% alcohol by volume), most of which is domestically produced, is in free sale in over 4500 retail outlets. Alleging that the Court of Justice of the European Communities came close to finding the Swedish legislation discriminatory in *Gourmet*, the Appellant considers the situation in Norway even more discriminatory against imported products.

30. Dealing with the third question, the Appellant first calls upon the Court to provide, in the spirit of cooperation underpinning Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the national court with guidance on the issue of proportionality, since the latter has expressly asked for it. The Court is furthermore invited to take into consideration the judgments given by the Stockholms tingsrätt (Stockholm

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3 In this respect, reference is made to Council Directive 84/450 EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as an example.

4 Reference is made to Case E-6/01 *CIBA* [2002] EFTA Ct. Rep. 281.

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

6 Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO)* v *De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843.

7 Case C-405/98 *Konsumentombudsmannen (KO)* v *Gourmet International Products AB (GIP)* [2001] ECR I-1795.

District Court) and the Swedish Marknadsdomstolen (Swedish Market Court)[8] in the *Gourmet* case, wherein the Swedish legislation at issue was considered disproportionate. Even though these judgments are not binding on the Court, they are cited for their persuasive authority. Also, the fact that it is largely left to a Contracting Party's discretion to determine limitations on the advertising of alcoholic beverages does not prevent the Court from finding the total ban on advertising unacceptable under the EEA Agreement.

31. As to circumstances particular to Norway, the Appellant is of the opinion that they reveal a more aggravated violation than in the Swedish case. The Norwegian consumer is exposed to beer - mostly domestically produced - in supermarkets, while not being permitted to see advertisement of wine. Moreover, beer producers are generally large undertakings while wine producers are not. As concerns Norway's stated goal of reducing alcohol abuse and the total consumption of alcohol, the Appellant fails to see any distinctions from the situation in Sweden. However, the inconsistent and draconian measures implemented to pursue that policy to the detriment of foreign traders endeavouring to penetrate the market distinguish the Norwegian situation from the Swedish one. The policy was originally designed to protect domestic brewers; the fact that it has become embedded in the national culture does not change this fact. Furthermore, the Appellant doubts that the Norwegian policy to reduce total alcohol consumption can successfully be pursued, since that would entail closing of the domestic breweries, laying off the workers, bankruptcy of bars, reduced turnover of firms in the transport sector, etc. Finally, the Appellant is not convinced that banning advertising in a magazine such as the one at issue in the main proceedings would contribute to the achievement of the stated objectives of Norwegian alcohol policy. The exposure of a readership numbering 4500, of which 90% is over 30 years of age, to an advertisement for wine will not jeopardise Norwegian alcohol policy.

32. The Appellant denies that the precautionary principle, as established in Case E-3/00 *EFTA Surveillance Authority* v *Norway* in connection with scientific uncertainty as to the effect of food additives, should play a role in the case at hand. The effects of alcohol are well-documented. The effects on health are positive or at least neutral if consumption is moderate, and they are negative if consumption is excessive. However, as to the effect of advertising on human behaviour, they do not lie within the realm of exact science, precluding the applicability of the precautionary principle. Courts should not leave to science the role of final arbiters of societal conflicts. The Appellant recognises the assumption that advertising must in some way be effective, as undertakings would otherwise not invest in it, but argues that that does not lead to an assumption that advertising also will lead to an overall sales increase in the relevant sector. However, even when assuming this as a possibility, the Swedish Marknadsdomstol found that the Swedish legislation did not fulfil the

[8] Judgment of 5 February 2003, http://www.marknadsdomstolen.se.

requirement of proportionality. Finally, the Appellant proposes, as a matter of common sense, that insofar as a product is allowed to be sold, it should also be allowed to be advertised. If wine may be sold, advertising it should also be acceptable. Furthermore, one may not ban advertisements due to uncertain effects, just because the product is known to have harmful effects if consumed in excess. Public health concerns can be fully safeguarded through rules on how the advertising is to be effected.

33. The Appellant suggests answering the questions as follows:

> *(1) A ban on advertising of alcohol products as the one at issue in the main proceedings is subject to Article 11 EEA."*
>
> *(2) Article 11 and/or Article 36 of the EEA Agreement should 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) A total ban as the one at issue in the main proceedings does not meet the proportionality test and thus, it is not justified under Articles 13 EEA and 33 EEA, cf. Article 39 EEA. The proportionality assessment is not altered by the precautionary principle.*

*The Respondent*

34. By way of introduction, the Respondent stresses that the general prohibition on advertising of beverages containing more than 2.5% alcohol by volume constitutes an integral part of a comprehensive alcohol policy, which aims to protect public health. The advertising ban falls within one of two pillars of the Norwegian alcohol policy: that of limiting demand. The first pillar is supplemented by a second one, that of limiting the accessibility to alcohol through measures such as establishing a state sales monopoly, a limited number of outlets, restrictions with regard to hours and days for sale, minimum age for the purchase of alcoholic beverages, and high alcohol taxes. The Respondent considers public policy on alcohol in Norway to be not only stricter, but also more comprehensive and effective than in most other European countries. It contributes to the fact that per capita alcohol consumption in Norway is still the second lowest in Europe. Nevertheless, the total consumption of alcohol in Norway has been on the rise in recent years, almost wholly due to a considerable increase in the consumption of wine, a product which is wholly imported. Although Norwegian drinking patterns may have become more "continental", they are still characterized by a great deal of heavy intoxication (drunkenness), both among persons drinking frequently and those drinking only on occasion. Legal challenges based on the EEA Agreement (often as a result of objections by the EFTA Surveillance Authority or sometimes following rulings of the Court) have also substantially weakened national alcohol policy and thus contributed to the increase of alcohol consumption. The Respondent regards it as necessary to

maintain a strict alcohol policy, in order to restrain the increase in consumption and to reduce total consumption to previous levels. The prohibition against alcohol advertising is a core element in this policy.

35. With regard to the first question, the Respondent argues that the decision contested in the main proceedings, although based on the general prohibition in Section 9-2 of the Alcohol Act, in substance only concerns wine advertisements. According to Article 8(3) EEA, wine is not included in the product coverage of the EEA Agreement. According to the Respondent, the term "technical barriers of trade" in Article 18 EEA should be interpreted so as to cover typical product requirements, such as which substances may be contained in different products, etc. Products that fall outside the EEA Agreement's product coverage under Article 8(3) EEA, but which are subject to specific measures pursuant to Article 17 or 23 EEA, should not, by vehicle of Article 18, be brought within the general scope of the EEA Agreement. Article 18 is limited to opening the EEA Agreement for certain specified acts of secondary legislation on the harmonization of technical trade barriers to which the parties have agreed. Protocol 47 to the Agreement, as referred to in Article 23 EEA, only covers secondary EC legislation concerning purely technical obstacles to trade, such as rules on labelling and naming places of origin. That Protocol cannot be used to argue that the general provisions of the main part of the EEA Agreement should apply to the trade in wine. Furthermore, the Respondent concludes *e contrario* from Protocol 8 to the EEA Agreement, which expressly provides for the applicability of Article 16 EEA to wine, that wine in general is not covered by the Agreement. Finally the Respondent points to the case law of the Court to support its position that Article 11 EEA does not apply to the sale of wine.[9] It is concluded that a national prohibition against advertisements for wine cannot be considered a restriction under Article 11 EEA.

36. The Respondent continues on the premise that Article 11 EEA is not applicable to wine, and argues that protecting, under Article 36 EEA, the advertising of wine, whose only purpose is to promote the sale of wine would not be consistent. That protection under Article 36 EEA, in the case at hand, may concern the freedom to provide the service of making commercial advertising space available to advertisers of wine who are established in other EEA States, does not alter the fact that the sole purpose of such marketing would be to promote the sale of a product (wine) which is not covered by the EEA Agreement. The promotion of wine cannot be seen as separated from the sale of the very same product. This is reflected in the parallel assessment of the free movement of goods and services in *Gourmet*. If protection under Article 36 EEA had been intended by the EEA Agreement, there would have to be a provision (similar to Protocol 8 on Article 16 EEA) stating that Article 36 EEA applies to the marketing of wine, which is not the case. Furthermore, the fact that the Court has recognized that the general rule against discrimination in Article 4 EEA does

[9] Case E-1/97 *Gundersen*, paras 8-11.

not apply to the sale of wine also supports the argument that none of the main provisions on the four freedoms apply to national provisions aimed at restricting the sale of wine. It is also argued that, had the Contracting Parties intended that certain articles in the main part of the EEA Agreement should apply to products not covered by Article 8(3) EEA, they would have made a list similar to that in Article 8(2) EEA. Finally, it is stressed that the service of providing alcohol advertising space is for the promotion of wine in the Norwegian market is only restricted with regard to national media.

37. The Respondent argues that restrictions on the advertising of wine fall outside the scope of the EEA Agreement and are a matter for the national legislator. Since the administrative decision at issue only concerns advertisements for wine, it must be judged pursuant to national law alone. Whether the prohibition against advertisements for other alcoholic beverages (i.e. beer or spirits, which are covered by the EEA Agreement) is in accordance with EEA law is of no actual interest to the pending case. Should Norway be forced by EEA law to open up, for example, for beer advertising, it may still wish to retain the prohibition as regards wine advertising. In such a situation, the Court should refrain from opining on what is considered a hypothetical basis.

38. Alternatively, if the Court should find that Article 11 and/or Article 36 apply to the present case, or if the Court deems it proper to evaluate the general prohibition regardless of the beverages concerned, the Respondent asserts with regard to the second question, that a prohibition such as laid down in Section 9-2 of the Alcohol Act is in accordance with EEA law. The Respondent acknowledges that a national prohibition against alcohol advertising falls within the scope of Article 36 EEA as a restriction on the freedom to provide services, and notes that the Court of Justice of the European Communities in *Gourmet*, deemed that it is also a restriction on the free movement of goods.[10] In this regard, it is not contested that the general Norwegian prohibition might potentially affect the marketing of products from other EEA States somewhat more heavily than the marketing of domestic alcoholic products.

39. Any possible discriminatory effect of the prohibition is, however, unintended, indirect and (at the most) very limited. The prohibition in section 9-2 of the Alcohol Act is neutral as regards the origin of the alcoholic product and the advertiser. In addition, there is no significant wine production in Norway, and only a limited production of spirits (mainly aquavit). Furthermore, statistics indicate that the greatest increase in alcohol consumption in Norway comes from the sale of wine, despite the (seemingly wrong) assumption that the advertising ban negatively influences wine sales. Finally, it is pointed out that editorial articles on alcoholic beverages published in Norwegian newspapers and periodicals are most often about foreign wines, and to some extent strong beers and spirits, whilst articles about Norwegian beers and spirits are rather rare.

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[10] Case C-405/98 *Gourmet*, paras 18-25.

Thus, the fact that editorial material on alcohol is permitted does not contribute to any actual indirect discrimination against foreign producers.

40. As to the third question, the Respondent contends that a national restriction on alcohol advertising such as the one at issue is justified by the protection of public health under Articles 13 and/or 33 EEA. According to the case law of the Court of Justice of the European Communities, national authorities have the right not only to determine what degree of protection they wish to afford public health in regard to alcohol consumption, but also the manner in which such protection is to be achieved, including by way of prohibiting alcohol advertising.[11] Furthermore, also the EFTA Court has held that a Contracting Party enjoys wide freedom in formulating and implementing its chosen alcohol policies, including broad discretion as to how restrictive the policies should be.[12] The Norwegian general prohibition against alcohol advertisements reflects the fact that the national legislator has decided on a high degree of protection of public health with respect to alcohol consumption. This has been a consistent, decades-long national policy, enjoying broad political support, and there is no evidence to suggest that the prohibition has ever been misused to discriminate against foreign goods or services, nor to protect national products, neither directly nor indirectly.

41. With regard to the remaining question of whether the Norwegian general prohibition on alcohol advertisements is proportionate, the Respondent is of the view that it is proportionate. In this connection, the Respondent contests the way in which the proportionality test was applied by the Swedish courts in *Gourmet*, at least to the extent that this can be said to be of any relevance to the case at hand. Instead, it is suggested that the correct evaluation of the question of proportionality can not be with regard only to a specific kind of periodical like the Vinforum magazine. To be taken into consideration is the application of a general national ban on alcohol advertising, which covers all kinds of media and all kinds of alcoholic beverages. The proportionality test must be conducted with regard to the general effect of the prohibition. It is not possible to single out one (or a few) specific examples on how the general prohibition functions, and conduct a separate test of proportionality for them. Even with the least restrictive rules, it will always be possible to find examples in which it is possible to question the proportionality of the concrete effects of the general ban on a specific kind of advertising, in a specific kind of medium, for certain kinds of beverages, etc. Furthermore, the fact that most (or all) EEA States have less restrictive rules on alcohol advertising than Norway, does not in itself imply that the Norwegian ban is disproportionate.[13] Rather it reflects the fact that the degree

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11 Reference is made to Case 152/78 *Commission* v *France* [1980] ECR 2299, para 17; Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* [1991] ECR 4151, paras 14-16; Case C-405/98 *Gourmet*, para 33 and operative part; Case C-262/02 *Commission* v *France*, paras 24-37 and Case C-426/02 *Bacardi France*, both judgments of 13 July 2004, not yet reported.

12 Case E-1/97 *Gundersen*, para 20.

13 Case C-262/02 *Commission* v *France*, para 37.

of protection of public health with regard to the dangers of alcohol consumption sought by the Norwegian parliament, is higher than in most other EEA States, and that the Norwegian alcohol policy is both more comprehensive and more effective than in most other countries. Moreover, instead of evaluating the effectiveness of a ban on alcohol advertising in isolation from other supplementary policy measures aiming to reduce consumption, account has to be taken of the fact that it is through a combination of different measures that a truly effective alcohol policy is achieved. That other measures are under pressure, or have been weakened is not an argument to abolish remaining measures, but rather to strengthen them. Finally, the Respondent argues that an inherent element of proportionality is in the ban on advertising. The more efficient the prohibition with regard to consumption, the better the protection of public health. Alternatively, the less efficient it is, the less the effect on trade within the EEA. Even if the Norwegian ban were considered ineffective (which it is not), it would therefore not be a strong argument that it is not proportionate. Likewise, it is not possible to ask whether the same public health goals can be achieved through other measures having less effect on EEA trade, since the effects on trade are in themselves a necessary condition for the achievement of the goals. In such a situation, the relevant question is really rather only whether the national prohibition directly or indirectly actually discriminates between domestic and foreign goods or services, to an extent which is disproportionate. This is not the case with the Norwegian prohibition.

42. Even if the Respondent, in providing the Court with the necessary background, argues that the prohibition is proportionate, it is of the opinion that the Court should not consider the issue of proportionality. The Respondent refers to the Court of Justice of the European Communities'decision in *Gourmet*, where it found that the question of whether such a national prohibition was proportionate calls for an analysis of the circumstances of law and fact that characterize the situation in the State concerned, and that the national court is in the best position to undertake such an analysis. It is therefore suggested that the Court should answer the questions posed in a manner similar to the ruling in *Gourmet*. The subsequent proportionality evaluation will then be for the national courts.

43. The Respondent suggests answering the questions as follows:

> *Since wine does not fall within the product coverage of the EEA Agreement, a national prohibition against the advertising of wine cannot be in breach of Articles 11 and 36.*
>
> *Consequently, it is of no actual interest to the pending case for the Court to answer questions 2 and 3.*

44. Alternatively, the Respondent suggests that the Court answers questions 2 and 3 as follows:

> *Articles 11 and 13 of the EEA Agreement and Articles 33 and 36 of the EEA Agreement do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 9-2 of Lov av 2. juni 1989 nr 27 om omsetning av alkoholholdig drikk (Norwegian Law on the Sale of Alcoholic Beverages), as amended, unless it is apparent that, in the circumstances of law and of fact which characterize the situation in the EFTA State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on trade within the EEA.*

*The EFTA Surveillance Authority*

45. With regard to the first question, a distinction is made between the applicability of Article 11 EEA and Article 36 EEA. As to the former, the EFTA Surveillance Authority starts out by stating that wine is excluded from the product coverage of the Agreement by Article 8(3) EEA. Furthermore, referring to the judgment in *Gundersen*, at paragraph 8, the EFTA Surveillance Authority rejects an indirect application of Article 11 EEA to wine by virtue of Article 18 EEA, since the concept of "technical barriers to trade" mentioned there differs from the concept underlying Article 11 EEA, and comprises fewer measures than the notion of "quantitative restrictions and all other measures having equivalent effect". This is inferred from the difference in wording as well as from the fact that Article 18 EEA only refers to Article 13 EEA and not to Article 11 EEA. Moreover, the notion of "technical barriers to trade" draws upon other regimes concerning free trade, including that developed within GATT and WTO, as well as Directive 83/189/EC. Furthermore, it is suggested that the reference to "other technical barriers" in Article 18 EEA implies that the term "technical barriers" cannot have exactly the same scope as the legislation to which the Article refers, in particular the legislation in Protocol 47. If the term "technical barriers" was interpreted the same as the legislation in Protocol 47, the provision in Article 18 EEA would be both circular and devoid of independent content and purpose. The legislation listed in Protocol 47 is incorporated in the EEA Agreement by virtue of Article 23(b) EEA and by Protocol 47 itself. Such incorporation does not depend upon Article 18 EEA. It can hardly have been the intention of the Contracting Parties to introduce a specific provision in the main part of the Agreement for the sole purpose of prescribing that the EEA States may not infringe (a limited number of) other provisions of the Agreement. For these reasons, the EFTA Surveillance Authority argues that Article 18 EEA may only be applied where the concerned measure compromises the "arrangements" provided for in the listed legislation. This implies that a national measure is only covered by Article 18 EEA if it is in keeping with the aim and subject of the legislation enumerated in Protocol 47 or one of the other protocols or annexes

mentioned in Articles 17 and 23(a) EEA. The EFTA Surveillance Authority concludes that the EEA Agreement can not be understood in such a way that Article 11 EEA applies to wine.

46. As for the applicability of Article 36 EEA to wine, the EFTA Surveillance Authority starts out by stating that the fact that wine is a good rather than a service does not mean that Article 36 EEA cannot apply to services related to the trade in wine, such as advertising services. The Respondent's argument to the effect that since wine falls outside the general rules of the EEA Agreement, services related to the trade in wine should also be excluded from its scope, is neither in keeping with the purpose behind the exclusion of trade in wine, nor is it in keeping with the structure of the Agreement and the manner in which it has hitherto been applied. The EFTA States' concern of shielding the agricultural industry from the Common Agricultural Policy, when negotiating the EEA Agreement, pertained only to the agricultural sector as such and not to all parts of industrial society that deliver goods and services to the agricultural sector. It is suggested that the sale of advertising services is an independent business, whose core purpose is not to sell the product advertised, but rather to sell the advertising service as such. The fundamental distinction between goods and advertising services has been consistently applied in the case law of the Court of Justice of the European Communities.[14] The EFTA Surveillance Authority claims that this distinction must be applied to EEA law, and concludes that national rules on advertising which, in EC law, would have been assessed under Article 28 EC are only subject to scrutiny under EEA law if the product concerned is covered by the Agreement. However, where a restriction on advertising a product in EC law would be evaluated under Article 49 EC, a similar evaluation should be made under Article 36 EEA, regardless of whether the product being advertised is covered by the Agreement or not.

47. In answering the second question, the EFTA Surveillance Authority emphasises that the contested decision is formulated in a general way so that it encompasses all future breaches of the advertisement prohibition irrespective of the alcoholic product concerned, and of whether such product falls within or outside the scope of the EEA Agreement. For that reason, the relevance of Article 11 EEA to the present case should not be called into question. As to the question of whether a prohibition on alcohol advertisement is a restriction on trade contrary to Article 11 EEA, the judgment of the Court of Justice of the European Communities in *Gourmet* is considered highly relevant. It is submitted that due account should be taken particularly of the strong similarities between the Norwegian and the Swedish alcohol advertisement prohibition and the way alcoholic products are marketed in the two countries, namely mainly through a retail monopoly. The EFTA Surveillance Authority is, in light of the strong similarities between the facts in *Gourmet* and the present case, of the opinion that

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[14] Reference is made to Joined Cases C-34/95 to C-36/95 *De Agostini;* and Case C-405/98 *Gourmet*.

in the case at hand, the result should be that the prohibition against advertising constitutes a restriction on the freedom to provide services.

48. With regard to the third question, the EFTA Surveillance Authority claims that it follows from the case law of the Court of Justice of the European Communities that rules restricting the advertising of alcoholic beverages intended to combat alcohol abuse reflect public health concerns. This is also in relation both to the rules on the free movement of goods and the rules pertaining to the freedom to provide services.[15] With respect to proportionality, the importance of the test of the suitability and necessity of the contested measures is stressed. With regard to this analysis, the EFTA Surveillance Authority suggests that the Court refrain from applying it, since the national court is in a better position to evaluate the circumstances of law and of fact which characterise the situation in Norway. This is in keeping with the decision of the Court of Justice of the European Communities in *Gourmet*. The EFTA Surveillance Authority claims, however, that the wish to ensure uniform legal application of the rules on free movement would best be served if additional guidance were provided by the Court. This is especially so since the proportionality test in this field should be exercised according to an autonomous EEA law standard and not according to national proportionality principles, including any particular reluctance to scrutinise measures of the national legislator that such principles of national law might contain. On the other hand, considering the somewhat limited description of the background, aims, and effects of the Norwegian alcohol advertising policy, the Court is not considered to be in a position to provide a more concrete and precise answer to this question than that given by the Court of Justice of the European Communities in *Gourmet*.

49. The EFTA Surveillance Authority denies that the precautionary principle is relevant to the proportionality test, since there is no doubt about the potential harm of alcohol to public health. This finding is not altered by the possible scientific uncertainty as to the precise effect of advertising on alcohol consumption as opposed to brand loyalty.

50. The EFTA Surveillance Authority believes that a total advertising ban must be seen as suitable for achieving the desired aim. The effectiveness of the ban is not questioned by the fact that alcohol advertising will be brought into the country through foreign publications and television senders, as well as over the internet, as argued by the Swedish Marknadsdomstol in *Gourmet*. A general ban applying to domestic advertising remains the most effective policy tool available. In assessing the question of whether the public health concerns underlying the advertising prohibition could be addressed by means less restrictive to the fundamental freedoms at issue rather than by a total prohibition, the EFTA Surveillance Authority highlights the discretion of the Contracting Parties to

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[15] Reference is made to Cases 152/78 *Commission* v *France*, para 17; Joined Cases C-1/90 and C-176/90 *Aragonesa*, para 15; Case C-405/98 *Gourmet*, para 27 et al.; Case C-262/02 *Commission* v *France*, para 30, and Case C-426/02 *Bacardi*, para 37.

decide both the degree of desired protection of public health, and the way in which that protection is achieved. That being said, the national court is invited to consider that a general prohibition is a severe restriction on the trade in goods and services within the EEA. It does not permit any advertising whatsoever, of a product legally sold on the Norwegian market, regardless of where the advertisement is placed, what product it concerns or how the advertisement is designed. It applies even in circumstances in which the prominence of such advertising will have only a minor impact, if any, on the consumption of alcohol. In particular, one could consider whether the effect on alcohol consumption of a wine advertisement in a specialist wine magazine (read by adults and totally devoted to articles concerning wine) might be negligible. Moreover, the question is raised of whether it would be possible to achieve the same aim by only regulating the modalities as well as the content and style of the advertisement, inter alia, by prohibiting alcohol advertising along highways and in cinemas or by prohibiting alcohol advertising concerning products with an alcohol content above a certain limit. In summary, the EFTA Surveillance Authority questions whether the alcohol advertising prohibition could have been modelled in such a way as to only affect areas where the prominence of the advertising has a noticeable effect on the consumption of alcohol, instead of imposing a total ban. Finally, the EFTA Surveillance Authority points to a possible inconsistency in the Norwegian alcohol advertising policy. Norwegian law, inter alia, permits alcohol advertisements in magazines intended for traders and wholesalers, while prohibiting them in magazines, such as the one subject to the present dispute, intended for private persons and having a profile and content very similar to that magazines intended for professional traders. [16]

51. The EFTA Surveillance Authority suggests answering the questions as follows:

> *(1) The EEA Agreement - including Article 18 and Article 23(b) cf. Protocol 47 – should be understood in such a way that Article 11 EEA is not applicable to wine.*
>
> *(2) Article 36 EEA applies to advertising services, irrespective of whether the subject of the actual advert is wine.*
>
> *(3) A general prohibition against the advertising of alcoholic beverages, such as the one found in Section 9-2 et al. of the Norwegian Alcohol Act constitutes both a restriction to the free movement of goods according to Article 11 of the EEA Agreement and a restriction on the freedom to provide services according to Article 36 of the EEA Agreement.*
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> *(4) A prohibition on alcohol advertising, such as the one in place in Section 9-2 of the Norwegian Alcohol Act, could be justified according to*

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[16] However, reference is made to Case C-262/02 *Commission* v *France*, para 33, and Joined Cases C-1/90 and C-176/90 *Aragonesa*, para 16.

*Articles 13 and 39 EEA out of concerns for public health, unless it is apparent that, in the circumstances of law and of fact which characterize the situation in Norway, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-EEA trade.*

*The Commission of the European Communities*

52. In examining the first question, the Commission of the European Communities first submits that Article 11 EEA does not apply to wine, nor does it apply to advertisements concerning wine when the magazine is published and distributed in Norway. Wine is excluded from the general scope of the EEA Agreement by virtue of Article 8(3) EEA, and Article 18 EEA does not have the effect of rendering Article 11 EEA indirectly applicable to wine. Reference is made to the judgment in *Gundersen*, at paragraph 8, where the allusion to "any other specific provisions" encompasses Article 18 EEA. It would be incongruous to interpret Article 18 EEA in such a way as to re-introduce agricultural products within the scope of Article 11 EEA contrary to Article 8(3) EEA. Furthermore, the arrangements provided in Protocol 47 (as referred to by Article 23(b) EEA) shall not be compromised by "other technical barriers to trade". Thus, the restrictions on the free movement of wine, which can be imposed as a consequence of the exclusion from the scope of Article 11 EEA, cannot comprise technical product standards that are different from or contrary to the EC legislation listed in Protocol 47. None of the legislation listed in Protocol 47 actually regulates the commercial advertising of wine. The purpose of Protocol 47 is to ensure that wine produced in accordance with the standards set forth in the EC legislation listed in Protocol 47 does not encounter additional product requirements when it enters Norway, Iceland or Liechtenstein.

53. However, the Commission of the European Communities submits that notwithstanding the inapplicability of Article 11 to wine and advertisements for wine, Article 36 EEA can be applied in the circumstances of the present case. It is inferred *e contrario* from the conclusion of the Court of Justice of the European Communities in *Karner*, that where the dissemination of the advertisement rather than sale of the goods – the wine – is the main objective of the activity, the restriction placed on the activity in question shall be examined under the provisions relating to the freedom to provide services.[17] The fact that wine as a product is excluded from the general rules of the EEA Agreement cannot mean that all services relating to wine fall outside the scope of Article 36 EEA. Agricultural products (including wine) are afforded protection from competition by their exclusion from the general rules of the EEA agreement, but to extend that protection to all sectors of the economy engaged in trade in wine and other agricultural products would be to extend it far beyond its natural reach.

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[17] Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH* v *Troostwijk GmbH*, judgment of 25 March 2004, not yet reported, para 46.

54. As to the second question, the Commission of the European Communities recalls that the coercive fine was imposed on the Appellant should it publish an advertisement for any alcoholic beverage, and not just an advertisement for wine. Thus, the issue arises whether the prohibition against publishing advertisements for alcoholic drinks other than wine (and covered by the EEA Agreement) constitutes a restriction of trade within the meaning of Article 11 EEA. In this respect, guidance can be sought from the judgment of the Court of Justice of the European Communities in *Gourmet*, and a similar conclusion, namely the existence of a restriction, can be reached in the present case given that the prohibition of advertising in both cases is similar, and that in both Norway and Sweden alcoholic drinks are sold through a retail monopoly. The same conclusion should be drawn with regard to a restriction of Article 36 EEA.

55. The *Gourmet* case is also cited by the Commission of the European Communities when examining the third question. Like the present case, *Gourmet* raised the issue of justification of the advertising ban on the ground of protection of human health. Also as in that case, there is no evidence that the public health grounds have been diverted from their purpose. In particular, there is no evidence that the advertising ban is used to reinforce the state monopoly on the sale of alcohol by hindering direct sales. As to carrying out the proportionality analysis, the Commission of the European Communities, again referring to *Gourmet*, suggests that this should be for the national court. It remains therefore for the referring court to determine whether a less restrictive ban on alcohol advertising might not contribute as effectively to the aim of reducing alcohol consumption. Finally, the Commission of the European Communities submits that there is no evidence of scientific uncertainty as to the existence or the extent of the risk to human health caused by excessive alcohol consumption, and hence the issue of the application of the precautionary principle in the present case is less pertinent than that of proportionality.

56. The Commission of the European Communities suggests answering the questions as follows:

> *(1) Articles 8(3), 11 18, 23 of the EEA Agreement should be interpreted to mean that Article 11 does not apply to wine and to advertisements relating to wine. However, Article 36 of the EEA Agreement should be interpreted to mean that it applies to the provision of advertising services irrespective of whether the subject matter of the advertisement is wine.*
>
> *(2) Article 11 and Article 36 of the EEA Agreement should be interpreted to mean that national legislation containing a general prohibition against the advertising of alcoholic beverages, such as in the Norwegian Act on the sale of alcoholic beverages, section 9-2 et al is a restriction on trade within the meaning of those provisions.*
>
> *(3) Articles 11 and 13 of the EEA Agreement and Articles 36 and 39 of the EEA Agreement do not preclude a prohibition on the advertising of*

*alcoholic beverages such as that laid down in Section 9-2 of the Norwegian Alcohol Act unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Contracting Party concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on trade between the Contracting Parties.*

*The Republic of Iceland*

57. In the view of the Republic of Iceland, the Court's judgment in *Gundersen* is pertinent when answering the first question as to the product coverage of the EEA Agreement with respect to wine.[18] It concludes that wine falls outside of the general scope of the EEA Agreement and that Article 11 EEA in particular does not apply to trade in wine. As regards the applicability of Article 36 EEA, the Republic of Iceland, notwithstanding the ruling of the Court of Justice of the European Communities in *Gourmet*, infers from the wording of Article 8(3) EEA and the jurisprudence of the EFTA Court that the provisions of the EEA Agreement do not apply to wine. Furthermore, the wording of Article 8(3) EEA refers to the provisions of the EEA Agreement as a whole, and not only to the provisions on the free movement of goods. On the other hand, the Republic of Iceland mentions that the right of a publisher established in one Contracting Party to offer advertising space in their publications to potential advertisers established in another Contracting Party could, irrespective of the contents of such advertisements, be an independent right to provide services pursuant to Article 36 EEA and therefore have no bearing on trade in wine. However, as the wording of the question only refers to whether Article 36 EEA can apply to wine, the Republic of Iceland suggests an answer in the negative.

58. The second and the third questions are discussed together by the Republic of Iceland, since they concern the same general issue, i.e. the question of whether a national prohibition against advertising of alcoholic beverages is in line with the EEA Agreement. It is recalled that these questions refer to all alcoholic beverages and not only to wine. Article 11 of the EEA Agreement applies to both beer and spirits.[19] As to a restriction on both the free movement of goods and the freedom to provide services, reference is made to the *Gourmet* judgment of the Court of Justice of the European Communities. As to the proportionality requirement, the Republic of Iceland considers it necessary to analyse the specific situation in each EEA State and to take account of the particular circumstances, both of law and fact. As market circumstances can vary, so can the effect that such measures have, both as regards combating alcohol abuse and on the trade in alcoholic beverages within the EEA. Consequently, even though a prohibition on the advertising of alcoholic beverages could be considered disproportionate in one EEA State, similar measures could be found to be

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18 Reference is made to Case E-1/97 *Gundersen*, paras 8-11, and Case E-9/00 *EFTA Surveillance Authority* v *Norway* [2002] EFTA Ct. Rep. 72, para 30.

19 Case E-9/00 *EFTA Surveillance Authority* v *Norway*, para 30.

proportionate in another. Therefore, the national courts are considered to be in the best position to carry out the analysis in their respective States. Finally, as concerns any role to be played by the precautionary principle, the Republic of Iceland invokes the judgment of the Court in Case E-3/00 *EFTA Surveillance Authority* v *Norway*.[20] As, however, both the Court and the Court of Justice of the European Communities have acknowledged that combating alcohol abuse constitutes a public health concern[21], it can hardly be said that there is any scientific uncertainty as to what risks are associated with the excessive consumption of alcohol. In view of the serious effects that the consumption of alcohol has on human health, and as there is no harmonization of rules as concerns the advertisement of alcoholic beverages, it must be for the Contracting Parties to decide what degree of protection of human health they intend to assure when it comes to combating alcoholic abuse. A prohibition on the advertising of alcoholic beverages must therefore be one of the policy tools to which the EEA States can resort when combating this major health scourge. Even though there is no scientific certainty to what degree a prohibition on the advertising of alcoholic beverages reduces the threat of alcohol abuse, that is not in itself a sufficient reason to consider such a ban to be in breach of the EEA Agreement. The precautionary principle would therefore support the conclusion that the provisions of the EEA Agreement do not preclude a prohibition on the advertising of alcoholic beverages.

59. The Republic of Iceland suggests answering the questions as follows:

> *(1) Article 11 and Article 36 of the EEA Agreement are not applicable to wine*
>
> *(2) Articles 11 and 13 and Articles 36 and 39 of the EEA Agreement do not preclude a prohibition on the advertising of alcoholic beverages, unless it is apparent that, in the circumstances of law and of fact which characterize the situation in the EFTA State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on trade within the EEA.*

*The Republic of Poland*

60. By its observations, the Republic of Poland intends to support the Respondent's position in the case at hand. It refers, initially, to the principle laid down in Article 30 EC as well as in Article 10 of the Agreement between the Republic of Poland and the EFTA Member States, pursuant to which restrictions to the import of goods are lawful to the extent they are justified by the objective of protecting public health and do not constitute a means of arbitrary discrimination or disguised restrictions on trade. Reference is made to the case law of the Court of Justice of the European Communities to the effect that

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[20] Case E-3/00 *EFTA Surveillance Authority* v *Norway* [2000-2001] Ct. Rep. 73.

[21] Reference is made to Case E-6/96 *Wilhelmsen* and Case C-176/90 *Aragonesa*.

legislation like the one at issue in the present case constitutes a restriction on the free movement of goods, but is justifiable by the requirement to protect public health.[22] It is emphasized that the Court of Justice of the European Communities left the assessment of the proportionality of the measures at issue to the national courts and thereby adjudged that advertisement restrictions are lawful if they serve to protect health. Moreover, it is up to the Contracting Parties to decide on which measures are appropriate and proportionate in order to achieve this goal.

61. It is finally emphasised that the provisions in Polish law on prohibitions and limitations of advertising of alcoholic beverages are in line with the rules and the case law invoked.

Carl Baudenbacher
Judge-Rapporteur

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[22] Reference is made to Case 152/78 *Commission* v *France*; Joined Cases C-1/90 and C-176/90 *Aragonesa*; and Case C-405/98 *Gourmet*.