ADVISORY OPINION OF THE COURT

27 June 1997[*]

(Alcohol sales – State monopolies of a commercial character – Free movement of goods)

In Case E-6/96

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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

Tore Wilhelmsen AS

and

Oslo kommune

on the interpretation of Articles 11, 13 and 16 of the EEA Agreement

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson and Carl Baudenbacher (Rapporteur), Judges,

[*] Language of the request for an Advisory Opinion: Norwegian.

Registrar: Per Christiansen,

after considering the written observations submitted on behalf of:

– The plaintiff, Tore Wilhelmsen AS, represented by Counsel Bjørn Stordrange and Counsel Amund Brede Svendsen, Smith Grette Wille DA MNA;

– The Government of the Kingdom of Norway, represented by Didrik Tønseth, Office of the Attorney General, acting as Agent;

– The Government of the Kingdom of Sweden, represented by Erik Brattgård, Director for Legal Affairs, Ministry for Foreign Affairs, acting as Agent;

– The EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, assisted by Rolf Helmich Pedersen, Officer of that Department, acting as Agent;

– The EC Commission, represented by Richard B. Wainwright, Principal Legal Adviser, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Tore Wilhelmsen AS, the Norwegian Government, the Swedish Government, the EFTA Surveillance Authority and the EC Commission at the hearing on 7 March 1997,

gives the following

Advisory Opinion

1 By an order dated 26 July 1996, registered at the Court on 7 August 1996, Oslo byrett made a request for an Advisory Opinion in a case brought before it by Tore Wilhelmsen AS ("Wilhelmsen") against the municipality of Oslo ("Oslo kommune").

2 The case before the national court concerns the validity of the refusal of an application for a licence to sell beer containing more than 4.75% alcohol by volume ("strong beer"). On 10 May 1995, the plaintiff applied to Oslo kommune for a licence to sell such beer, which is covered by section 3-1, first paragraph, of the Norwegian Act no. 27 of 2 June 1989 on the sale of alcoholic beverages ("the Alcohol Act"). On 20 June 1995, Oslo kommune, acting in its capacity as the licensing authority under the Alcohol Act, decided not to process the application on the grounds that only retail outlets of A/S Vinmonopolet ("Vinmonopolet") could sell strong beer.

3 Under Norwegian legislation, the retail sale of alcoholic beverages containing more than 2.5% alcohol by volume is governed by a licensing system which leaves it to the respective municipalities to decide whether alcoholic beverages may be sold in the municipality, how many licences are to be granted, who is to receive such a licence, etc. However, according to section 3-1, first paragraph, of the Alcohol Act, licences to sell spirits, wine and strong beer may only be granted to Vinmonopolet, a wholly State-owned company. Thus, Vinmonopolet has an exclusive right to the retail sale of such products through its outlets, which currently number 112. By contrast, alcoholic beverages with less than 2.5% alcohol by volume may be sold freely, while licences to sell beer containing between 2.5% and 4.75% alcohol by volume ("medium-strength beer") may, according to section 3-1, second paragraph of the Alcohol Act, be granted to anyone who is entitled to trade under Norwegian trade legislation. Medium-strength beer is sold in approximately 4 500 stores.

4 Until 1 March 1993, strong beer was governed by the same rules as described above for medium-strength beer. Changes in the Norwegian Alcohol Act, introduced effective 1 March 1993, transferred the sale of all strong beer to the retail outlets of Vinmonopolet and away from private shops.

5 According to the Alcohol Act, Vinmonopolet may not itself produce or import alcoholic beverages containing more than 2.5% alcohol by volume. Vinmonopolet may only purchase such beverages from someone holding a production or wholesale licence granted by Norwegian authorities. A production licence gives the holder the right to engage in import and wholesale sales of the same type of product for which the production licence has been granted.

6 The procurement by Vinmonopolet and its product ranges for retail sale are governed by detailed rules, see in particular Regulation of 30 November 1995 on A/S Vinmonopolet's Purchasing Activity etc. ("the Purchasing Regulation"), and Regulation of 16 January 1996 on a Board to Test A/S Vinmonopolet's Purchases etc. ("the Test Board Regulation"), both issued by the Ministry of Health and Social Affairs.

7 Section 3-1, fifth paragraph, of the Alcohol Act states that Vinmonopolet has an obligation not to discriminate between suppliers and products on the basis of nationality or country of origin. Section 1-1 of the Purchasing Regulation states further that Vinmonopolet's sales of spirits, wine and beer to the consumer shall, within the framework of the alcohol policy, take place on ordinary commercial terms and conditions and be adjusted to market demand and ensure equal treatment.

8 Under the Purchasing Regulation, products are allocated to one of four ranges of Vinmonopolet: the basic range, the limited-consignment range, the supplementary range and the test range. In addition, the retail monopoly is required to order any product requested by consumers which can be obtained from a wholesaler.

9 Purchases for the basic range and limited-consignment range are made by Vinmonopolet after offers have been invited. Offers, excluding prices, are to be recorded in a register. Vinmonopolet may decide that a sensory product judgement shall take place, which shall be undertaken by Vinmonopolet's sensory tasting agency. The regulation states explicitly that Vinmonopolet is to treat all offers for the supply of goods on equal terms and that the composition of the basic range and limited-consignment range is to be based on an assessment of current and expected demand. If sales of a product in the basic range fall below the prescribed minimum volume, no further purchases of the product are to be made.

10 Each retail outlet is to stock a supplementary range for products not included in the basic or limited-consignment ranges, the composition of which is to reflect local demand. Vinmonopolet sets guidelines for the supplementary range, but each retail outlet's choice of products forms the basis of the supplementary range of that outlet. For all other product ranges, Vinmonopolet decides on product procurement. In exceptional circumstances, the Ministry of Health and Social Affairs may order Vinmonopolet to refrain from including a product in the product range or to refrain from purchasing a product if there are weighty alcohol policy grounds for so doing.

11 Vinmonopolet is to stock a test range and products from that range are to be stocked for sale by a representative portion of Vinmonopolet's retail outlets. If a product achieves a higher sale volume than a prescribed minimum, the product is to be purchased for inclusion in the basic range, but if the product achieves a lower sale volume than the prescribed minimum, unsold stocks are to be returned to the wholesaler for his account.

12 Vinmonopolet may require the wholesaler to deliver products to all retail outlets in the country and at the same price. Vinmonopolet sets prices, which are to be

calculated on the basis of the wholesaler's delivery price plus a mark-up to cover costs and profit. Under the Test Board Regulation, a special board of four members has the powers to revoke any decision taken by Vinmonopolet in regard to price-setting, purchasing of a product or halting of further purchases, but the board may not test the commercial judgement of Vinmonopolet exercised within the framework of the Purchasing Regulation.

13 Under section 9-2 of the Alcohol Act, all advertising of alcoholic beverages is prohibited in Norway. The Ministry of Health and Social Affairs may issue regulations to delimit, supplement and implement the provision on prohibition of advertising of alcoholic beverages and may make exemptions from the prohibitions when special reasons so justify. All products of Vinmonopolet as described in Vinmonopolet's price list must, however, be available to everyone.

14 The Purchasing Regulation states that Vinmonopolet is to prepare an annual marketing and product plan, which is to be available to the public; likewise for the register of offers kept by Vinmonopolet. For the order range, section 6-1 stipulates that wholesalers are entitled to have products recorded in a special price list which is to be available at all outlets. There are no provisions in the Regulation allowing Vinmonopolet to advertise alcoholic beverages.

15 Oslo byrett, considering that it was necessary to interpret provisions of the EEA Agreement in order for it to reach a decision and pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement"), submitted a request to the EFTA Court for an Advisory Opinion on the following questions:

> *1. Is a refusal to grant a licence to sell beer containing more than 4.75 per cent alcohol by volume, with reference to the established exclusive right of Vinmonopolet, compatible with Article 16 of the EEA Agreement on State monopolies of commercial character?*
>
> *2. Is a refusal to grant a licence to sell beer containing more than 4.75 per cent alcohol by volume, with reference to the established exclusive right of Vinmonopolet, compatible with the principles of free movement of goods in Articles 11 and 13 of the EEA Agreement?*
>
> *3. Do EEA rules stipulate, to what extent it is the State or the municipality that is competent to decide applications for licences to sell alcohol, regardless of the content of the national legislative provisions on the competence given to municipalities to decide certain cases?*

4. Do EEA rules contain substantive provisions on the unconditional right of individuals to sell alcohol to the general public, regardless of national legislation stipulating a licensing system for the sale of all types of alcohol to the general public?

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

Material scope of the EEA Agreement

17 Before the specific questions referred to the Court are addressed, some discussion of the rules on product coverage, which determine whether a specific product falls within the scope of the Agreement, is necessary.

18 Article 8(3) EEA provides that, unless otherwise specified, the Agreement applies only to: (a) products falling within Chapters 25 to 97 of the so-called "Harmonized System" (HS), established in the International Convention on Harmonized Commodity Description and Coding System of 1983, excluding the products listed in Protocol 2 EEA; and (b) products specified in Protocol 3 EEA, subject to specific arrangements as set out in that Protocol.

19 Beer is not among the products listed in the above-mentioned Chapters of the HS, although "beer made from malt" is listed as product 2203 in Table I to Protocol 3 EEA.

20 Article 1 of Protocol 3 reads as follows:

> "Subject to the provisions of this Protocol and unless otherwise specified in the Agreement, the provisions of the Agreement shall apply to products listed in Tables I and II."

21 Chapter II of Protocol 3 (Articles 2 to 9) deals with "Price compensation arrangements". Article 2(1) reads:

> "In order to take account of differences in the cost of the agricultural raw materials used in the manufacture of the products specified in Table I, the Agreement does not preclude the application of price compensation measures to these products; that is the levying of variable components upon import and the granting of refunds upon export."

22 The price compensation arrangement dealt with in Chapter II of Protocol 3 has not been brought to completion.

23 The situation in which the conditions for applying the price compensation system set out in Articles 3 to 9 of Protocol 3 EEA are not fulfilled is dealt with in Article 11 of Protocol 3 EEA, which states *inter alia:*

> "In so far as trade between an EFTA State and the Community in a product covered by the respective Table of Protocol No 2 of the Free Trade Agreement is concerned ... the provisions of the Protocol No 2 and Protocol No 3 of the respective Free Trade Agreement as well as all other relevant provisions of the Free Trade Agreement shall apply:
> – if the product is listed in Table I but the conditions for the application of the system set out in Articles 3 to 9 are not fulfilled, or
> – if the product falls within HS Chapters 1 to 24 but is not listed in Table I or II, or
> – if the product is listed in Protocol 2 of this Agreement."

24 The relationship between the EEA Agreement and the agreements before it came into force is regulated by Article 120 of the EEA Agreement which states *inter alia:*

> "Unless otherwise provided in this Agreement ... the application of the provisions of this Agreement shall prevail over provisions in existing bilateral or multilateral agreements binding the European Economic Community, on the one hand, and one or more EFTA States, on the other, to the extent that the same subject matter is governed by this Agreement."

25 Among the joint declarations attached to the EEA Agreement there is a "Joint Declaration on the Relation between the EEA Agreement and Existing Agreements" which stipulates :

> "The EEA Agreement shall not affect rights assured through existing agreements binding one or more EC Member States, on the one hand, and one or more EFTA States, on the other, or two or more EFTA States, such as among other agreements concerning individuals, economic operators, regional cooperation and administrative arrangements, until at least equivalent rights have been achieved under the Agreement."

26 The Stockholm Convention and the Free Trade Agreements have not been terminated even if their application is limited as set out in Article 120 EEA or specially dealt with as in Article 11 of Protocol 3 of EEA. The lists of products in the Free Trade Agreements and the rules of origin are not exactly identical to what is found in the EEA Agreement. Protocol 2 to the Free Trade Agreement of 1973 between the EEC and Norway regulated the tariff treatment and internal price compensation arrangements for certain processed agricultural products. Table II to that protocol lists "beer made from malt" and lays down basic duties of NOK 2.00 per litre for beer in bottles and NOK 1.80 for beer in other containers.

27 It is common ground among the parties who have submitted observations to the Court that, in the present situation, the Contracting Parties may continue to apply the price compensation measures under the respective Free Trade Agreements.

28 However, it is disputed whether in this situation products listed in Table I to Protocol 3 EEA are generally excluded from the scope of the EEA Agreement until a new price compensation system has been agreed on – and are governed entirely by the above-mentioned instruments - or whether the general rules of the EEA Agreement apply, subject to the possibility of price compensation measures being applied under the respective Free Trade Agreements.

29 The first alternative is advocated by the *Government of Norway*, which *inter alia* submits that the limitations set out in Article 8 EEA are in accordance with the fact that the parties to the EEA Agreement did not intend to include agricultural policy in the ordinary co-operation of the European Economic Area and that market access for products listed in Protocol 3 was to be achieved in accordance with the conditions listed in that Protocol. It would be inconsistent to apply the general rules of the EEA Agreement as long as the price compensation measures in Protocol 3 are not yet applicable, as this would distort the carefully negotiated balance between rights and obligations relating to each of the products listed. Moreover, this view is in keeping with general principles of international law as set out in Article 44 of the Vienna Convention on the Law of Treaties concerning the separability of treaty provisions and according to which treaty provisions may not be separable unless the treaty itself provides for such a solution or the Contracting Parties so agree. Based on this, Article 11 of Protocol 3 EEA solves the issue by clearly providing that the Free Trade Agreement will be applicable under such conditions. As it follows from Article 108 EEA and Article 34 of the Surveillance and Court Agreement that the Free Trade Agreement may not be interpreted by the EFTA Court, the Government of Norway invites the Court to declare the request from Oslo byrett inadmissible pursuant to Articles 88(1) and 96(2) of the Rules of Procedure of the EFTA Court.

30 *Wilhelmsen*, the *EFTA Surveillance Authority* and the *EC Commission* submit that the general rules of the EEA Agreement are applicable to products listed in Table I to Protocol 3 EEA, although the Contracting Parties may, pursuant to Article 11 of that Protocol, apply the price compensation measures provided for in the respective Free Trade Agreements until a new system has been negotiated and agreed upon. The main rule set out in Article 1 of Protocol 3 is not conditional upon concrete arrangements being negotiated for products in Table I, and the wording of Article 2(1) of the Protocol indicates that such measures are not required, only possible. The object and purpose of the EEA Agreement points to the same conclusion. The tables in Protocol 3 include goods of such importance to the overall working of the EEA system that their exclusion, even temporary, as advocated by the Norwegian Government, would upset the balance of benefits set out in the Agreement.

31 The *Court* finds that the wording of Article 8(3)(b) EEA ("subject to the specific arrangements set out in that Protocol") could, read in isolation, be interpreted in the way suggested by the Government of Norway. However, the Court has not found such an interpretation to be tenable. Similarly, and even more clearly, the Court finds that the wording of Article 11 of Protocol 3 EEA should be interpreted as not excluding the application of Article 11 EEA.

32 Thus, it becomes necessary for the Court to render an interpretation of the provisions in question. The Court finds it appropriate to focus on the object and purpose of the EEA Agreement. An interpretation resulting in the exclusion of the products listed in Table I to Protocol 3 EEA would mean that an important part of the product coverage of the Agreement would not come into force, or rather be postponed for a period of time, even if the exclusion were to be temporary. On the basis of Article 11 of Protocol 3, certain provisions of the Free Trade Agreement that were in force when the EEA Agreement entered into force would continue to apply, while provisions such as Article 11 EEA would not apply. Such a state of affairs would hardly be reconcilable with the purpose of the Agreement as set out in its preamble and reflected in its text as a whole, unless the will of the Contracting Parties was clearly expressed. It would also be in discord with Article 120 EEA.

33 Consequently, the Court finds that beer, being a product listed in Table I to Protocol 3 EEA, is governed by Articles 11, 13 and 16 EEA, subject to the special arrangements set out in Protocol 3 and subject to the possibility of the Contracting Parties applying the price compensation measures under the respective Free Trade Agreements between the Community and the EFTA States.

Admissibility of the third and fourth questions

34 Under Article 34, second paragraph, of the Surveillance and Court Agreement, a national court in an EFTA State may, if it considers it necessary to enable it to give judgment, request an advisory opinion from the EFTA Court.

35 In the present case, the national court explained its need for an advisory opinion with the observation that it is decisive for that court to know whether the refusal to grant licences to sell strong beer is compatible with the EEA Agreement.

36 It follows from the request that *Oslo kommune* has requested that the EFTA Court also give an opinion on question 3 and 4 above.

37 The *EFTA Surveillance Authority*, referring to the wording and the purpose of Article 34 of the Surveillance and Court Agreement, states that questions 3 and 4

are general and hypothetical and without relevance to the determination of the issue to be ruled on by the national court. By contrast, the relevance of answers to questions 1 and 2 for the determination of the issues to be ruled on by Oslo byrett is clear from the information contained in the reference to the EFTA Court.

38 In the view of the EFTA Surveillance Authority, questions 3 and 4 should be declared inadmissible.

39 The *Court* notes that it is not apparent from the request why the national court would need an answer to questions 3 and 4 to give judgment in the case pending before it. The facts submitted to the EFTA Court concerning the first and second questions are clear and accurate. By contrast, there is no information in the case file concerning questions 3 and 4. In stating the need for an advisory opinion on these two questions, the national court only refers to a request by one of the parties that these questions also be referred to the EFTA Court and offers no further clarification.

40 Under the circumstances, and bearing in mind that the advisory opinion is a specially-established means of co-operation between the EFTA Court and national courts aimed at providing the latter with necessary elements of EEA law to decide on the cases before them, but not a procedure to answer general or hypothetical questions, the request to answer questions 3 and 4 is found to be inadmissible.

The second question

a) Article 11 EEA

41 By its second question, which the Court finds should be dealt with first, the referring court seeks, *inter alia*, to ascertain whether the exclusive right of Vinmonopolet to sell beer containing more than 4.75% alcohol by volume is a measure prohibited by Article 11 of the EEA Agreement.

42 Article 11 EEA reads as follows:

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

43 Article 11 EEA is identical in substance to Article 30 EC. Thus Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 11 EEA.

44 With regard to Article 30 EC, the ECJ has consistently held that any measure which is capable of, directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction within the meaning of that provision: see, in particular, Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 (hereinafter "*Dassonville*").

45 The ECJ has further held that trade between Member States is not likely to be impeded, directly or indirectly, actually or potentially, within the meaning of the *Dassonville* judgment, cited above, by the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Where those conditions are fulfilled, the application of such rules to the sale of products from other Member States which meet the rules laid down by that State is not by nature such as to prevent access to the market or to impede access any more than it impedes the access of domestic products. Such rules, therefore, fall outside the scope of Article 11 EEA: see the judgments of the ECJ in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 (hereinafter "*Keck*"), paragraphs 16 and 17; Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 21; Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179; Case C-63/94 *Belgapom ITM and Vocarex* [1995] ECR I-2467, paragraph 12; and Case C-387/93 *Banchero* [1995] ECR I-4663 (hereinafter "*Banchero*").

46 The ECJ has also held in *Banchero*, cited above, that the reasoning in *Keck* could be applied to the Italian prohibition on the retail sale of manufactured tobacco products otherwise than through authorised outlets. The fact that the legislation was limited to specific products, namely manufactured tobacco products, did not prevent from being considered as concerning a selling arrangement.

47 The ECJ adopted a similar approach in Case C-391/92, *Commission* v *Greece* [1995] ECR I-1621, concerning a requirement under Greek law that processed milk for infants should be sold exclusively by pharmacies.

48 In the opinion of *Wilhelmsen*, the retail monopoly of Vinmonopolet does not satisfy the conditions set out in the above-mentioned judgment in *Keck*. This view is based on a number of circumstances, most essentially that the relevant legislation contains product requirements, as opposed to selling arrangements, that the *Keck* exemption is not applicable where there is a clear restriction on trade, and that both the legislation and the practices of Vinmonopolet contain elements that discriminate against strong beer imported from other EEA States as compared to strong beer produced in Norway.

49 The *Norwegian Government*, the *Swedish Government*, the *EFTA Surveillance Authority* and the *EC Commission* all submit that the monopoly should be assessed in accordance with the criteria established by the ECJ in *Keck* and subsequent judgments applying the same principles, and that the retail monopoly is not contrary to Article 11 EEA so long as, in law and in fact, the national rules in question do not distinguish between domestic products and products imported from other EEA States and all traders are affected in the same way.

50 The *Court* finds that it is not necessary to state whether the Norwegian legislation setting out 4.75% alcohol by volume as a dividing line deals solely with a selling arrangement or not. As set out below, the Court has come to the conclusion that there are certain aspects of the Norwegian system, including the 4.75% demarcation, which give rise to discrimination between foreign and local beer brands. Accordingly, it becomes necessary in this case to deal with Articles 11 and 13 EEA.

51 Even if the legislation does restrict the volume of sales and thereby also the volume of sales of products from other EEA States, the relevant question is whether it impedes the access to the market of products from other EEA States any more than it impedes the access of domestic products.

52 With respect to strong beer then, the question is whether the Norwegian system for distribution of strong beer affects in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States.

53 Counsel for Wilhelmsen have pointed to several elements of the Norwegian legislation which, in their opinion, amount to discrimination against beer originating from other EEA States as compared to beer produced in Norway.

54 First, Wilhelmsen argues that the Norwegian legislation setting the limit between medium-strength beer and strong beer at 4.75% alcohol by volume is without a logical or technical basis and is arbitrary compared to the rules applied in the rest of the EEA Member States. Medium-strength beer, in many countries, contains between 4.5% and 6.0% alcohol by volume. In their written observations, counsel for Wilhelmsen have argued that the limit is a non-discriminatory measure having a restrictive effect on trade. At the oral hearing, they expressed the opinion that this has a discriminatory effect since, even though it is legally neutral, it gives rise to de facto discrimination against the European brewery industry.

55 As already described in paragraph 3 *et seq* of this Advisory Opinion, in Norway medium-strength beer is sold to consumers in groceries and other types of commercial establishments that have been granted a sales licence by the

municipality where they are located. It appears from the case file that the number of licensed outlets is now roughly 4 500. Strong beer is sold only in Vinmonopolet outlets, which at present number 112 in all. It is clear that it is, in practice, more difficult to buy strong beer than the weaker beer products.

56 It appears that the demarcation between strong and medium-strength beer – 4.75% alcohol by volume – was introduced early this century as a dividing line between two different tax categories and not with the purpose of discriminating against imported beer. The established dividing line was also found to be suitable for the demarcation of stronger beer which was to be made subject to specific sales restrictions. Such a demarcation is necessarily a matter of discretion, and it is to be noted that other countries have discretionarily used other percentages: Iceland, for instance, has set a corresponding dividing line at 2.25%.

57 Nevertheless, if a legally neutral dividing line can be shown to affect domestic and foreign products differently because of elements inherent in the patterns of production in different States, this may amount to discrimination between domestic and foreign products. The Court assumes that the predominant alcohol content of beer produced in the Member States of the European Union is somewhere in the area of 5% to 5.5% (see European Commission Case IV/M.582 - Orkla/Volvo - OJ No L 66, 16.3.96, page 17). Although the production patterns for beer would primarily be attuned to the preferences of the local consumer markets, a retail system which severely restricts the marketing in Norway of important parts of the production in EU and other EEA countries must, under the circumstances of this case, be considered to give rise to discrimination against foreign products contrary to Article 11 EEA. Consequently, it becomes necessary to examine whether that discrimination is justified under Article 13 of the EEA Agreement, see below.

58 Secondly, it is submitted that the Norwegian legislation forces goods produced in another EEA State to be distributed through an additional level of distribution as compared to domestic products.

59 This submission of Wilhelmsen refers to the fact that Vinmonopolet may not import on its own and is only allowed by law to purchase products from a holder of a wholesale or production licence granted by Norwegian authorities. The conditions for obtaining a wholesale or production licence are set out in Chapter 3 A of the Alcohol Act. A wholesale licence gives the right to engage in import, export and wholesale sales of all alcoholic beverages in Norway (unless restricted to certain product types). A production licence gives the right to produce the designated products and, additionally, a wholesale licence for its own products as well as for other products of the same type as covered by the production licence. It follows that a holder of a Norwegian production licence may sell its products

directly to Vinmonopolet, whereas a producer in another EEA State would either have to obtain a Norwegian wholesale licence or go through a licensed wholesaler in Norway in order to sell its products to Vinmonopolet.

60 Wilhelmsen also contends that the Regulation of 30 November 1995 on Wholesales and Production of Beverages Containing Alcohol, supplementing chapter 3A in the Alcohol Act, and guidelines issued by the Norwegian Directorate for the Prevention of Alcohol and Drug Problems impose strict conditions for obtaining a wholesale licence. This, combined with the way the authorities practise the licensing conditions, make it impossible for a foreign company to get a wholesale licence in Norway. Consequently, a foreign manufacturer has to be represented in Norway by a company or an individual with a wholesale licence in order for its products to be offered for sale to Vinmonopolet and thereby resale to consumers.

61 As for the first of these arguments, it is evident that the licensing provisions make a distinction between domestic and foreign producers of beer, inasmuch as domestic producers do not need to go through the procedures of applying separately for a wholesale licence or, alternatively, to sell through another wholesale licence holder in order to sell strong beer to Vinmonopolet.

62 When national legislation provides for a wholesale licence, which is required to sell a product to Vinmonopolet, to be automatically granted to domestic producers of the product, this constitutes discrimination contrary to Article 11 EEA. It must also be considered, in this respect, that a foreign producer is subject to additional costs compared to a domestic producer, if it manages to get a wholesale licence in Norway at all. The provision is apt to place a foreign producer at a disadvantage in the marketing of its product, as the retail price is determined based on a wholesaler's delivery price.

63 With this finding, it becomes necessary to examine whether such discrimination is justified under Article 13 EEA, see below.

64 As for Wilhelmsen's second group of arguments, it would clearly constitute discrimination and therefore a violation of Article 11 EEA if it were to be proven that the way in which the authorities practise the licensing conditions for obtaining a wholesale licence makes it impossible for a foreign company to get a wholesale licence in Norway.

65 The Court notes that there does not appear to be any distinction in the relevant legislation between domestic or foreign applicants, or between domestic and foreign products. There is no requirement of nationality, domicile, nor of representation or establishing a place of business in Norway. The Court also notes,

as stated above, that Vinmonopolet has a statutory obligation not to discriminate between suppliers and products on the basis of nationality or country of origin.

66 Even if no discrimination can be found in law, there is still the possibility that foreign companies are discriminated against in the authorities' licensing practices. There is no evidence in the facts before this Court to support the contention that foreign applicants are discriminated against. It will be for the national court to ascertain whether there is evidence of any discrimination, in law or in fact, in the authorities' practice.

67 The Court adds that Wilhelmsen's arguments also contain a contention that foreign brewers, on account of the licensing and procurement system, are forced to establish a representation in Norway as an extra step in the sale of strong beer to Vinmonopolet. As pointed out above, no such requirement appears to be contained in the relevant provisions. However, there is still a possibility that this becomes a necessity in fact. There are no facts presented to this Court to support such a contention, but an indication may be seen in the fact that all sellers of foreign beer seem to have chosen to operate through a Norwegian licence holder. Again, it must be up to the national court to investigate and assess the facts.

68 Thirdly, Wilhelmsen submits that Vinmonopolet carries on a practice of not buying beers from foreign breweries, which constitutes clear discrimination against foreign strong beers. Wilhelmsen refers to the annual report of Vinmonopolet to substantiate that out of 796 000 litres of strong beer sold through Vinmonopolet in 1995, only 1.1% were of foreign origin and the rest (98.9%) were produced in Norway. At the oral hearing, counsel for Wilhelmsen quoted the most recent price list of Vinmonopolet, showing that out of 17 beer brands, seven were foreign brands and ten were Norwegian brands.

69 These arguments have been countered by the Norwegian Government, supported by the Swedish Government, on the basis that the Alcohol Act expressly states that Vinmonopolet has an obligation not to discriminate between suppliers and products on the basis of nationality or country of origin. This is ensured through a transparent system and access to the market is ensured on the basis of demand. The present detailed rules are set out in the Regulation of 30 November 1995. Price competition at the production, import and wholesale levels is reflected at the retail level. The fact that Norwegian strong beer accounts for most of the sale does not contradict the non-discriminatory character of the monopoly. Throughout Europe, the beer market is heavily dominated by domestic producers. The sales of foreign beers in the majority of the countries in the European Union appear to account for only a very small percentage of the total beer sales.

70 The procurement and marketing system of Vinmonopolet is described above. The Court finds that the contentions of the Norwegian Government regarding the transparency of the system and its reflection of the market choice have not been successfully contradicted. There is no evidence before this Court that Vinmonopolet pursues a policy of not buying foreign-produced beer. Nor has it been established that the pricing of products sold through Vinmonopolet, which is calculated on the basis of the wholesalers' delivery prices plus a mark-up to cover Vinmonopolet's costs and profit, puts foreign beer producers at a disadvantage compared to domestic ones. The information on these points would appear not to be exhaustive, however, and it is thus for the referring court to ascertain the facts and assess their relevance.

71 The Court notes that Wilhelmsen documented an instance where correspondence between Vinmonopolet and producers wishing to sell their products on the Norwegian market had taken a long time (in the example brought forth, 15 months before acceptance of a Danish beer could be registered in the test range and 27 months before any sale could take place). However, it was not shown that correspondence takes longer between foreign producers and Vinmonopolet than it takes when domestic producers are concerned, or that there is a difference in practice relating to domestic and foreign products.

72 Fourthly, Wilhelmsen contends that the prohibition of advertising affects the sale of domestic and imported products in different ways.

73 The Court notes that the promotion and advertisement of products is essential if markets without discriminatory restrictions are to be found for imported products. The concept of non-discrimination is to be understood in a broad context. Even if exactly the same restrictions on advertising apply to both national and imported products, they may be discriminatory with respect to imported products which are not known on the national market. It is not the formulation of the provisions that counts but rather their effect on the free movement of goods. Importers have to be ensured equal opportunities in the field of promoting and advertising their products.

74 As far as the prohibition of advertising is concerned, the national court will have to consider whether discrimination against foreign products follows from the fact that they are not known on the Norwegian market and, if so, whether the discrimination can be justified under Article 13.

b) Article 13 EEA

75 In so far as the legislation governing the activities of Vinmonopolet or the marketing of strong beer gives rise to discrimination which brings it within the scope of Article 11 EEA, it becomes necessary to examine the possible applicability of an exemption under Article 13 EEA.

76 Article 13 EEA provides:

> "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."

77 Article 13 is identical in substance to Article 36 EC. Thus Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 13 EEA.

The 4.75% limit

78 As concluded above, this limitation must be seen as constituting discrimination in the context of Article 11 and the *Keck* exemption.

79 *Wilhelmsen* contends that it cannot be right that the need for control which is connected to the health argument must be attained by having beers containing more than 4.75% alcohol by volume sold through Vinmonopolet, whereas other types of control measures which may be combined with sales in groceries are sufficient if the beer has an alcohol content of less than 4.75%. Thus, Wilhelmsen contends that the public health argument cannot be invoked to justify the provisions establishing the retail monopoly. Wilhelmsen submits that the retail sale monopoly of strong beer is not proportionate to the aims it is meant to serve, as less restrictive measures, such as a licensing system, could serve the same end.

80 The *Norwegian Government* and the *Swedish Government* contend that even if a State retail monopoly for strong beer such as Vinmonopolet is found to restrict imports or to discriminate between domestic and foreign products, it will at any rate be justified under Article 13 EEA.

81 The Norwegian Government submits that it is generally recognised that excessive alcohol consumption causes health problems and social problems, and that it is

generally accepted that there is a direct link between availability and the harmful effects caused by the consumption of alcoholic beverages.

82 The Norwegian Government refers to WHO's report "Health for All by the Year 2000", adopted in 1980, in support of an established link between availability and consumption, as well as to WHO's recommendation to Member States to reduce alcohol consumption by 25% by the year 2000. The same objectives underlie the European Alcohol Action Plan of 1992, endorsed by WHO's European Member States.

83 The Norwegian Government emphasizes that alcohol policy has not been harmonized either in the EU or in the EEA, leaving it up to each Member State to pursue an alcohol policy sensitive to health protection.

84 Regarding strong beer in particular, the Norwegian Government submits that over the last forty years the sale of strong beer in Norway has been in a continuous decline, falling from 33% of total beer consumption in 1955 to 1% in 1995. The Norwegian Government contends that a major step towards limiting the sale of strong beer was introduced in 1990, when strong beer was no longer sold by means of self-service. The channelling of the retail sale of strong beer through Vinmonopolet is a further step in the same direction.

85 The *Court* notes that the ECJ has confirmed that combating alcohol abuse constitutes a public health concern: see Joined Cases C-1/90 and C-176/90 *Aragonesa and Publivia* [1991] ECR I-4151. Under the EEA Agreement, a measure that is seen as restricting the free movement of goods may be justified when necessary and proportionate. This follows from Article 13 EEA with respect to the protection of health and life of humans.

86 The Court sees no reason to doubt that there are social and health considerations behind the Norwegian alcohol policy and that a monopoly system for the retail sale of alcoholic beverages is motivated by those concerns. Further, the Norwegian Government emphasizes that when the retail sale to consumers of strong beer was exclusively granted to Vinmonopolet as of 1 March 1993, the aim was to reduce availability and thereby the consumption of strong beer. This is clearly stated in the preparatory work relating to this amendment (Ot. prp. nr. 19 (1992-1993)).

87 With regard to the discretion of the Norwegian Government regarding its alcohol policy, the Court does not find that the measure of granting an exclusive right of retail sale of strong beer to Vinmonopolet is disproportionate to the policy aim of the Government. Neither can the measure be seen as constituting arbitrary discrimination or a disguised restriction within the meaning of Article 13. As

referred to above, all beer containing more than 4.75% alcohol by volume is to be sold through the outlets of Vinmonopolet, regardless of origin. Admittedly, the division between strong and weaker beer under the Norwegian regulations is necessarily discretionary. The Court does not find that this dividing line which, according to the Norwegian Government, originates in old legislation regarding different tax categories, is unreasonable in its distinguishing between strong and weaker beer, or that it is manifestly unnecessary to draw a dividing line as is presently done. Article 13 would only cease to be applicable if the national court were to find, based on evidence before it that has not come before the Court, that the measures in question were aimed at protecting domestic production as compared to foreign production or at restricting trade between the Member States in a disguised way.

The licensing system

88 As concluded above, the Court finds that a provision of national law which automatically grants a wholesale licence - a pre-condition for supplying beer to Vinmonopolet - to a domestically-established producer of beer and does not do so for a foreign producer constitutes a violation of Article 11 EEA.

89 The Court notes that the purpose of the licensing system appears from the conditions for obtaining licences. Section 3A-4, first paragraph of the Alcohol Act reads *inter alia* as follows:

> "A licence shall be granted if the following conditions are satisfied:
>
> 1. The licensee ... [has] a spotless reputation in relation to legislation of significance for the operation of the establishment, including alcohol legislation, customs legislation, tax and duty legislation, accounting and company legislation and foodstuff legislation.
> 2. Satisfactory security has been furnished for demands for payment of alcohol tax.
> 3. Stocks are satisfactorily secured.
> 4. The licensee is not engaged in other activity that is incompatible with wholesale trade in alcoholic beverages."

90 For such purposes as appear from these conditions, which are an integral part of the alcohol policy, the establishment of a licensing system for wholesale sales of strong beer must be seen as being justified under Article 13.

91 However, the question arises as to whether the discrimination established between domestic and foreign producers is a measure proportionate to the intended aims. In the view of the Court, such discrimination stands out as being unnecessary and disproportionate and cannot be justified under Article 13.

Other aspects of the distribution system

92 As pointed out above, there are several other aspects of the distribution system which should be explored further with a view to possible violations of Article 11 EEA. In the absence of the full factual picture, it is not possible for the Court to give more specific guidance on the various aspects that have been presented. However, it may serve as general guidance to point out that elements that are closely related to the policy of reducing the consumption of alcohol, such as prohibitions against advertising, may be justified under Article 13 even if the effects may be different for established or new brands, provided that the measure is proportionate to the aim.

The first question - Article 16 EEA

93 By its first question, the national court in essence seeks to ascertain whether the exclusive right of Vinmonopolet to sell beer containing more than 4.75% alcohol by volume is compatible with Article 16 of the EEA Agreement.

94 Article 16 EEA provides:

> "1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States.
>
> 2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others."

95 Article 16 EEA is identical in substance to Article 37(1) EC. Thus, Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement are applicable when interpreting Article 16 EEA.

96 It is established case law of the ECJ that Article 37 does not require the abolition of national monopolies of a commercial character but rather requires the monopolies to be adjusted so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States: see *inter alia* Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91; Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935; and Case 78/82 *Commission* v *Italy* [1983] ECR 1955. The Article is designed to ensure compliance with the fundamental rule of free movement of goods

throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect on trade between Member States and thereby to maintain normal conditions of competition between the economies of Member States where a given product is subject, in one or other of those States, to a national monopoly of a commercial character: see *Banchero*, cited above.

97 The EFTA Court has taken the same view in its *Restamark* ruling when it interpreted Article 16 EEA to mean that a State monopoly of a commercial character must be adjusted so as to eliminate the exclusive right of import from other Member States: see Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 17.

98 It follows from the answers to the second question above, that provisions regarding the granting of a wholesale licence by law to a domestically- established producer of beer, when this is not the case for foreign producers and when such a licence is a pre-condition for providing beer to Vinmonopolet, constitutes a discriminatory measure of the type prohibited by Article 11 EEA. The issue of whether such a measure is also contrary to Article 16 EEA must then be examined.

99 The *EFTA Surveillance Authority* and the *EC Commission* have argued that any discrimination against imported products found in this case should be shown to relate to the operation of the retail monopoly and not to other aspects of the legislation, such as the import stage. At the oral hearing, representatives of both the EFTA Surveillance Authority and the EC Commission argued that provisions concerning import and wholesale do not relate to the operation of the retail monopoly.

100 These contentions cannot be accepted. As already stated, an import licence is required as a condition for wholesale sales of beer to Vinmonopolet. These provisions are therefore so closely linked to the purchasing conditions of Vinmonopolet that they have to be seen as being subject to scrutiny in light of Article 16 EEA. It follows from the answer to the second question that provisions of the type described above are incompatible with Article 16 EEA.

101 Provisions granting an exclusive right for retail sale of beer containing more than 4.75% alcohol by volume to Vinmonopolet form an inherent part of the regulations designing the system. These provisions must, therefore, be examined in light of Article 16 EEA.

102 However, since the Court has come to the conclusion that this regulation forms a part of Norwegian alcohol policy and is, as such, justified under Article 13 EEA, the Court does not find it necessary to examine this issue further under Article 16.

103 As to the purchasing practises of Vinmonopolet within its exclusive rights which, it is not disputed, fall to be examined under Article 16, the Court refers to paragraphs 61 et seq. above. The Court notes in particular that, contrary to the submissions of Wilhelmsen, the view of the EC Commission must be upheld, i.e., the mere fact that the procurement practices of Vinmonopolet are centralized does not make the monopoly inherently contrary to Article 11, and the centralized character of Vinmonopolet is even less in violation of Article 16 EEA, in the absence of any discrimination in its procurement and marketing.

104 Even if the design of the retail monopoly essentially simulates market conditions, it does not follow from that fact alone that the express prohibition of discrimination between producers in the Alcohol Act can be or is complied with. Nor are there elements in the described purchasing and marketing system other than those discussed above which in law discriminate between domestic and foreign producers. The submissions of Wilhelmsen to the effect that Vinmonopolet discriminates in practice, that the system is not transparent and that some importers are not given the opportunity to offer their products for sale have not been substantiated in the present proceedings.

105 The Court notes that a retail monopoly may be maintained if it is adjusted in such a way that it functions as a mere distribution monopoly. To meet those requirements, the monopoly may not in any way influence intra-community trade. Marketing conditions must not just be uniform but also non-discriminatory. Vinmonopolet, which enjoys exclusive rights for marketing at the retail sale level, must stay in a commercially neutral position regarding the goods it is marketing. Producers and exporters from the other Member States must be guaranteed equal access to the market.

106 Furthermore, the national court must take into consideration the fact that Article 16 EEA relates to discrimination in law and in fact. A State retail monopoly that retains an exclusive right to sell products is in practice in a position to discriminate against goods from other countries. This can happen not only in obvious ways, but also in day-to-day decisions about pricing, advertising and deliveries.

107 The Court notes that for the time being there are seven foreign strong beer brands available on the Norwegian market compared to ten Norwegian ones. It is for the national court to assess whether this selection of products is based only on factors such as higher transport costs for foreign beer, local taste or whether it is a result of a discriminatory application of the retail monopoly. In this context, the national court must take into account whether the method of selection is able to replace the market mechanism to the fullest possible extent.

108 It is for the national court to assess if the purchasing practice as laid down in the Alcohol Act and secondary regulations operates in such a way as to result in discrimination between domestic producers and foreign producers of comparable products.

109 *Wilhelmsen* contends that Vinmonopolet has an advertising monopoly, as the prohibition on advertising alcoholic beverages pursuant to section 9-2 of the Alcohol Act does not prevent Vinmonopolet from issuing publications giving product information to the consumers. The *Court* finds that the product information issued by Vinmonopolet to consumers is an inherent and necessary part of the marketing practices of the monopoly and does not as such discriminate against foreign producers. This could only be otherwise if there were in practice found to be disparities in information given by Vinmonopolet regarding imported and domestic products which, under the marketing rules of Vinmonopolet, were offered for sale or otherwise available to the consumers through the different ranges of Vinmonopolet.

110 Lastly, the Court notes that Wilhelmsen has argued that the exclusive right of Vinmonopolet to sell beer containing more than 4.75% alcohol by volume is incompatible with Article 59 EEA, *inter alia* because Vinmonopolet is not able to meet demand in the market. The requesting court has not asked for an interpretation of Article 59 EEA in this case, nor has it set out facts and circumstances in that regard. Accordingly, the Court does not see a reason to examine the arguments put forward under Article 59 EEA.

111 It follows from the answers to the second question above, that provisions regarding the granting of a wholesale licence by law to a domestically-established producer of beer, when this is not the case for foreign producers and when such a licence is a condition for providing beer to Vinmonopolet, constitute a discriminatory measure prohibited by Articles 11 and 16 EEA. It also follows that defining the scope of Vinmonopolet's exclusive rights to include beer containing more than 4.75% alcohol by volume is discriminatory and prohibited by Articles 11 and 16 EEA taken alone. The measure is, however, justified under Article 13 EEA on grounds of public health if the dividing line of 4.75% alcohol by volume was not implemented to protect domestic products against foreign products. Other aspects of the retail distribution system of beer in different categories in Norway and the practice of the State monopoly have been found to contradict neither the principle of free movement of goods in Article 11 EEA nor, consequently, Article 16 EEA.

Costs

112 The costs incurred by the Government of the Kingdom of Norway, the Government of the Kingdom of Sweden, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Oslo byrett by an order of 26 July 1996, hereby gives the following Advisory Opinion:

1. A State retail monopoly for the sale of beer containing more than 4.75% alcohol by volume is compatible with Article 16 EEA if, in law and in fact, such an exclusive right does not give rise to discrimination between domestic products and products imported from other Member States.

2. A refusal to grant a licence to sell beer containing more than 4.75% alcohol by volume, with reference to the established exclusive right of a State alcohol retail monopoly, can lead to discrimination in law or in fact between domestic products and products imported from other Member States and is, in so far as it actually does so, incompatible with the principles of free movement of goods enunciated in Article 11 EEA.

A definition of the scope of the exclusive right of a State alcohol retail monopoly including beer containing more than 4.75% alcohol by volume is discriminatory and prohibited by Articles 11 and 16 EEA. However, the measure can be justified under Article 13 EEA on grounds of public health if the dividing line of 4.75% alcohol by volume was not implemented to protect domestic products against foreign products.

A provision of national law which automatically grants a wholesale licence – a pre-condition for supplying beer containing more than 4.75% alcohol by volume to a State alcohol retail monopoly in that State – to a domestically-established producer of beer and does not do so for a foreign producer of beer is a discriminatory measure prohibited by Articles 11 and 16 EEA which cannot be justified under Article 13 EEA as the measure is not proportionate to the aim of curtailing the availability of strong beer to consumers.

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 27 June 1997

Per Christiansen
Registrar

Bjørn Haug
President