REPORT FOR THE HEARING
in Case E-9/00

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, that the Kingdom of Norway has failed to comply with the following provisions of the EEA Agreement:

– Article 16, by applying two forms of sale at the retail level where beer with an alcohol content [of] between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside the outlets of the State-controlled wine and spirits monopoly ("Vinmonopolet"), while other alcoholic beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly; and

– Article 11, by applying more restrictive measures regarding licences to serve alcoholic beverages with an alcoholic content [of] between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13 EEA.

I. Introduction

1. The EFTA Surveillance Authority and the Norwegian authorities are in disagreement as to the scope of the *Gundersen* ruling of the EFTA Court.[1] In the view of the EFTA Surveillance Authority, that ruling implies that, in principle, there must be equal treatment of alcoholic beverages containing between 2.5% and 4.75% alcohol by volume.[2] The view of the Norwegian authorities is that the ruling allows for differential treatment of beer with the same alcohol content, on the one hand, and other beverages with the same alcohol content, on the other.

II. Legal background, pre-litigation procedure and procedure before the Court

Legal background

EEA law

2. As regards licences for sale at the retail level, the plea in law of the EFTA Surveillance Authority is that there is discriminatory treatment between beer with an alcoholic content of between 2.5% and 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, mostly imported, and that this discrimination is contrary to Article 16 EEA.

3. As regards licences to serve, the plea is that there is discrimination between beer with an alcohol content of up to 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, contrary to Article 11 EEA, and that this discrimination cannot be justified under Article 13 EEA and the according to the judgment in *Cassis de Dijon*.[3]

4. Article 11 EEA provides that quantitative restrictions on imports and all measures having equivalent effect are to be prohibited between the Contracting Parties.

5. Article 13 EEA provides *inter alia* that Article 11 EEA does not preclude prohibitions justified on grounds of protection of human health, as long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade.

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1 Case E-1/97 *Gundersen* v *Oslo kommune* [1997] EFTA Court Report 110 (hereinafter "*Gundersen*").

2 The pleas of the EFTA Surveillance Authority relate only to products which are covered by the EEA Agreement.

3 See *inter alia* Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*").

6. Under Article 16 EEA, the Contracting Parties are to ensure that any State monopoly of a commercial character is 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.

The contested national provisions

7. The Norwegian Act No. 27 of 2 June 1989 on the sale of alcoholic beverages (the "Alcohol Act"), in Chapter 1, defines alcoholic beverages as beverages which contain more than 2.5% alcohol by volume. Alcoholic beverages are furthermore divided into beer, wines and spirits. Alcoholic beverages containing between 2.5% and 4.75% alcohol by volume which cannot be considered as beer, i.e., which are not produced from malt, are to be regarded as wine or spirits. Chapter 3 of the Act provides that the State alcohol retail monopoly (hereinafter variously "Vinmonopolet" or the "monopoly") has the exclusive right to carry on the retail sale of all alcoholic beverages, except for beer containing between 2.5% and 4.75% alcohol by volume, which may be sold by grocery stores under a municipal licence. The number of Vinmonopolet outlets is said to be around 120, whilst the number of grocery stores selling beer is around 4 400.

8. Chapter 4 of the Alcohol Act regulates permission to serve alcoholic beverages. Alcoholic beverages may only be served by a holder of a municipal licence granted for that purpose. A licence may cover different types of alcoholic beverages, i.e., beer, wine or spirits, and is not a function of the alcoholic content of the beverage. A licence to serve beer containing 2.5% to 4.75% alcohol by volume does not give the right to serve other alcoholic beverages with the same alcohol content.

9. Chapter 1 of the Alcohol Act states that beer can be served to persons of 18 years of age, whilst spirits may be served only to persons of 20 years of age or older.

10. The consumption of beer in Norway accounts for over half of the total alcohol consumption, calculated in litres of pure alcohol, and about 83%, calculated in litres of the product. Beer containing between 3.75% and 4.75% alcohol by volume accounts for roughly 95% of all beer consumed. Virtually all of the beer consumed is domestically produced, and 68% reaches the consumers through grocers' shops. Statistics indicate that beer is by far the alcoholic beverage most consumed by young people.

11. Certain types of beverages containing between 2.5% and 4.75% alcohol by volume are the so-called alcopops. There is not a common definition or understanding of alcopops in Norway or in the European Community. They may be described as beverages which, by their taste, presentation and name, may appeal in particular to young people.

12. There are no statistics on the consumption of alcopops in Norway, due to the lack of definition of that kind of beverage, and to the fact that the Norwegian term "rusbrus"[4] covers alcoholic beverages containing 2.5% to 4.75% by volume, regardless of whether they appeal to young people or not, and due to the fact that "rusbrus" may also cover cider, which is not the subject of the Application of the EFTA Surveillance Authority.[5]

Pre-litigation procedure

13. After the *Gundersen* ruling was handed down by the EFTA Court and a complaint was received by the EFTA Surveillance Authority, informal contacts were instituted between the EFTA Surveillance Authority and the Norwegian authorities. On 10 September 1998, the EFTA Surveillance Authority issued a letter of formal notice to Norway.

14. In the letter of formal notice, the EFTA Surveillance Authority expressed the view that the Norwegian legislation was contrary to the EEA Agreement on two points: (1) discriminatory treatment at the retail level for alcoholic beverages containing between 2.5% and 4.75% alcohol by volume; and (2) discriminatory treatment as regards licences to serve such alcoholic beverages.

15. The Norwegian authorities replied to the EFTA Surveillance Authority in a letter of 13 November 1998. In its reply, the Norwegian authorities introduced the notion of alcopops,[6] which have since been reappearing in the course of the administrative procedure. The Norwegian authorities stated that, in the light of the need to protect youth against such drinks, their conclusion was that neither of the two points raised by the EFTA Surveillance Authority in its letter of formal notice gave rise to concerns in relation to Articles 11, 13 and 16 EEA.

16. As the Norwegian authorities had stated in their reply that their position was corroborated by research, the EFTA Surveillance Authority sent a letter on 7 December 1998, requesting the relevant documentation. The Norwegian authorities sent the documentation by letter dated 18 December 1998.

17. The documentation did not convince the EFTA Surveillance Authority, however, who issued a reasoned opinion to Norway on 11 October 1999.

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4 A product type which consists of alcoholic beverages with an alcohol content identical or close to that of beer and which is the subject of the Norwegian surveys (footnote 8 in the Application of the EFTA Surveillance Authority)

5 Information submitted by the Government of Norway refers, however, to a calculated average per capita consumption measured in litres of pure alcohol for youth aged 15-20 years, which in 1999 was 3.96 litres, 0.35 litres of which were "rusbrus".

6 "An important share of the beverages covered by the EEA Agreement, and with a content of alcohol between 2.5% and 4.75% by volume, is the so-called 'alcopops'. This product group is both by appearance and taste designed to attract young people." See letter of 13 November 1998, p. 3, Annex 4 to the Application of the EFTA Surveillance Authority.

18. The Norwegian authorities reacted to the reasoned opinion by letter of 10 December 1999. In their reply, the Norwegian authorities stated that there was no competitive relationship between beer, on the one hand, and spirits or wine-based beverages with the same alcoholic content, on the other. According to the Norwegian authorities, proof of this was to be found in the fact that young people consumed alcopops in addition to beer. The Norwegian authorities contended that it would be difficult to accept that a gin and tonic ready made by the producer should be treated differently than a gin and tonic mixed by the consumer himself or on the premises of a bar. The Norwegian authorities further stated that, following the *Gundersen*[7] ruling, they had considered different criteria carefully to find the most transparent and objective dividing lines between drinks to be sold within or outside Vinmonopolet. However, it had turned out to be difficult to draw lines other than the existing ones. The Norwegian authorities added that, in Sweden, all alcoholic beverages above 2.25% are sold through the Swedish alcohol retail monopoly (Systembolaget), whilst beer with an alcoholic content of between 2.25% and 3.5% may also be sold outside that monopoly. Lastly, the Norwegian authorities stated that they considered the issue of licences to serve alcoholic beverages to be outside the scope of Article 11 EEA.[8]

19. After the expiry of the time-limit set by the EFTA Surveillance Authority in the reasoned opinion, there were again informal contacts between the EFTA Surveillance Authority and representatives of the Norwegian authorities.

Procedure before the Court

20. Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed the Application in question here, which was lodged at the Court Registry on 21 December 2000.

III. Forms of order sought by the parties

21. The EFTA Surveillance Authority claims that the Court should:

> declare that Norway has failed to comply with the following provisions of the EEA Agreement:
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> (i) Article 16, by applying two forms of sale at the retail level where beer with an alcohol content [of] between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside the outlets of the State-controlled wine and spirits monopoly ("Vinmonopolet"), while other alcoholic beverages with the same

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7 See footnote 1, *Gundersen*.

8 See *inter alia* Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 (hereinafter "*Keck and Mithouard*").

alcohol content, mostly imported from other EEA States, may only be sold through the monopoly, and

(ii) Article 11, by applying more restrictive measures regarding licences to serve alcoholic beverages with an alcoholic content [of] between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13 EEA.

22. The Kingdom of Norway contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the EFTA Surveillance Authority to bear the costs.

IV. Written procedure

23. Written arguments have been received from the parties:

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs Department, acting as Agent, assisted by Michael Sanchez Rydelski, Officer, Legal and Executive Affairs Department, acting as Agent;
– the Government of Norway, represented by Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Co-Agent.

24. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

– the Government of Iceland, represented by Dr Magnús Hannesson, Legal Adviser, Trade Department, Ministry of Foreign Affairs, acting as Agent;
– the Commission of the European Communities, represented by Lena Ström, Member of its Legal Service, acting as Agent.

V. Summary of the pleas in law and arguments

The EFTA Surveillance Authority

25. The plea in law of the EFTA Surveillance Authority is that, as regards sales at the retail level, there is discriminatory treatment between beer with an alcoholic content of between 2.5% and 4.75%, mostly produced domestically,

and other alcoholic beverages with the same alcohol content, mostly imported, and that this discrimination is contrary to Article 16 EEA.

26. As concerns licences to serve, the plea is that there is discrimination between beer with an alcohol content of up to 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, contrary to Article 11 EEA, and that this discrimination cannot be justified under Article 13 EEA and according to the judgment in *Cassis de Dijon*.[9]

27. The pleas of the EFTA Surveillance Authority relate only to products which are covered by the EEA Agreement. It follows from Article 8(3) EEA and the case-law of the EFTA Court that products listed in Protocol 3 to the EEA Agreement are covered by the Agreement.

28. Spirits-based drinks are covered under heading no. 2208 of the Harmonized Commodity Description and Coding System, which is part of Protocol 3 to the EEA Agreement, whilst vermouth and other wine of fresh grapes flavoured with plants or aromatic substances are covered under heading no. 2205 of the same system.

29. It follows from the case-law of the EFTA Court that Article 16 EEA also covers products not originating from within the EEA which are traded between the EEA States.[10] It follows directly from Protocol 8 to the EEA Agreement that Article 16 EEA applies to wine (heading no. 2204 of the Harmonized Commodity Description and Coding System). Article 16 EEA also applies to beer, spirits and other alcoholic beverages.

30. Beverages with an alcoholic content of between 2.5% and 4.75% which fall under heading no. 2206 of the Harmonized Commodity Description and Coding System, such as cider, do not come within the scope of the EEA Agreement.

31. With respect to the question of whether there is a competitive relationship between the products, the EFTA Surveillance Authority observes that, in *Gundersen*, the EFTA Court stated that the Norwegian legislation institutes discriminatory measures between beer, on the one hand, and wine and wine products, as well as other products with an alcoholic content, on the other.[11] The assumption appears to be that the products discriminated against are identical or similar to each other.

32. However, in case the EFTA Surveillance Authority should be wrong in its reading of the case-law, it should be observed, firstly, that drinks mixed and produced industrially are not identical to what the end consumer may mix.

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9 See footnote 3, *Cassis de Dijon*.

10 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 17, at paragraph 37.

11 See footnote 1, *Gundersen*, at paragraph 29.

33. The category of beverages concerned is extremely broad and contains a wide variety of drinks with different characteristics and flavours. Moreover, most of the spirits-based products at issue are based on distilled ethyl spirits.

34. Secondly, it is common ground that alcohol is, to a very large extent, associated or connected with social situations. If beer is the only alcoholic drink easily available for this purpose, then the choice will evidently fall on beer. If other beverages are available, the choice may fall upon them.

35. Thirdly, the reasons which have led the EFTA Court and the Court of Justice of the European Communities[12] to consider that there is a competitive relationship between beer and low-grade wine are equally valid in this context.

36. The Norwegian authorities have also argued that the fact that young people's consumption of other alcoholic beverages is additional to beer consumption is evidence of the absence of a competitive relationship. The EFTA Surveillance Authority replies to this argument by observing that there is no evidence to support this assertion. Even if there were, the EFTA Surveillance Authority submits that the material produced in the reply of the Norwegian authorities to the reasoned opinion shows that overall consumption of alcohol has increased among youth.[13] That alcohol consumption is growing appears to be common knowledge.[14] Furthermore, it appears that, in periods of increasing consumption, new products are consumed in addition to traditional ones.[15] Thus, one cannot conclude from a possible additional consumption that beer and other alcoholic beverages with the same alcohol content as beer are not in a competitive relationship.

37. Furthermore, if the argument of the Norwegian authorities were accepted, it would lead to a freezing of consumer habits. Thus, the EFTA Surveillance Authority fails to see that a possible preference of young people for other

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12 See Case 171/78 *Commission* v *Denmark* [1980] ECR 447, at paragraph 6, where the Court stated: "(…) it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put." See also Case 169/78 *Commission* v *Italy* [1980] ECR 385, at paragraph 5, where the Court stated: "(…) it is necessary to consider as similar products which have similar characteristics and meet the same needs from the point of view of the consumer."

13 According to the material submitted, the calculated average consumption measured in pure alcohol for the age group 15-20 years has increased from 2.90 litres in 1990 to 3.96 litres in 1999.

14 In the Nordic Review for Alcohol Studies (*Nordisk Alkohol- & Narkotikatidsskrift*) (hereinafter "NAN") and its English Supplement, NSAD, articles testify to this development, see, for instance, Astrid Skretting, "Where does the responsibility lie for youth drinking?" (Hvor ligger ansvaret for at ungdom drikker?), NAN 1999, at p. 333, and Gestur Guðmundsson, "The required meeting of youth research and alcohol and drug research", NSAD 2000, at p. 6. On the website of the Norwegian Directorate for the Prevention of Alcohol and Drug Problems, quoted previously, it is indicated that consumption amongst youth in the beginning of the 1990s was around 3 litres, measured in pure alcohol, and, in 1999, 4 litres.

15 Jussi Simpura, "Drinking patterns and alcohol policy: Prospects and limitations of a policy approach", NSAD 1999, at pp. 42-3.

alcoholic beverages, if they have the choice between beer and those beverages, should indicate that there is no competitive relationship between beer and the beverages.

38. The provisions of the Norwegian legislation at issue relating to sales at the retail level define the scope and product coverage of Vinmonopolet's exclusive right for the sale of alcoholic beverages. Consequently, those provisions fall to be examined under Article 16 EEA.[16]

39. The EFTA Surveillance Authority does not contest the wide freedom that EFTA States have in the implementation of their respective alcohol policies. However, the issue here is whether the two different dividing lines chosen to determine which alcohol beverages are to be sold through Vinmonopolet give rise to discrimination contrary to Article 16 EEA. It follows from the *Gundersen* ruling that, in so far as the chosen dividing line, i.e., 4.75% alcohol by volume, is intended to ensure equal treatment between beer and wine with a higher alcohol content which is in competition with beer, that dividing line must be strictly applied.

40. Beer containing between 2.5% and 4.75% alcohol by volume may be sold by any holder of a valid municipal licence who is entitled to trade in Norway. All other alcoholic beverages, even if they contain identical percentages of alcohol by volume, can only be sold by Vinmonopolet. The importance for sales volumes of a product of not being in Vinmonopolet is clearly seen from the decline of sales suffered by so-called "strong beer" after being placed in Vinmonopolet.

41. Beer sold in Norway is overwhelmingly domestically produced, whilst other alcoholic beverages with the same alcoholic content are mostly imported.

42. The more limited availability at the retail level for those products compared to beer constitutes discrimination, since trade in goods from other EEA States is put at a disadvantage as compared to trade in domestically-produced goods. The national arrangements are, therefore, contrary to Article 16 EEA.

43. The case-law of the Court of Justice of the European Communities would indicate that national measures contrary to Article 16 EEA cannot be justified under Article 13 EEA.[17]

44. Difficulties in finding a non-discriminatory dividing line for sales to be within or outside Vinmonopolet do not justify non-compliance with the EEA Agreement. As to the Norwegian authorities' remarks concerning the situation in Sweden, the EFTA Surveillance Authority observes that the applicable limits in Sweden are different, as beer containing 3.5% alcohol by volume and other

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16 See footnote 1, *Gundersen*, at paragraph 19.

17 See Case C-159/94 *Commission* v *France* [1997] ECR I-5815, at paragraph 41; and Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, at paragraph 33.

beverages containing more than 2.25% alcohol by volume are sold in the Swedish alcohol retail monopoly, and the beverages at issue in this case in practice contain around 4.0% or more alcohol by volume. Furthermore, it is settled case-law that possible non-compliance by one EEA State does not justify non-compliance by another EEA State.

45. The provisions of the Norwegian legislation concerning the serving of alcoholic beverages are not related to Vinmonopolet's exclusive right to sell alcoholic beverages. Consequently, this issue must be assessed under Article 11 EEA.

46. The principles laid down by the Court of Justice of the European Communities in *Keck and Mithouard* lead to the conclusion that the national "selling arrangement" in question is contrary to Article 11 EEA, since the national legislation discriminates between the marketing of domestic products (beer) and products from other EEA States. The EFTA Court established in the *Gundersen* ruling that the relevant provisions of the Norwegian legislation favour the marketing of beer with an alcohol content of between 2.5 and 4.75% as compared to other alcoholic beverages with the same alcohol content. Therefore, the assertion that the ruling in *Keck and Mithouard* on "selling arrangements" applies to the case at hand cannot be accepted.

47. The Court of Justice of the European Communities has held that the legislation of a Member State must not crystallise or favour given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them.[18]

48. The EFTA Surveillance Authority submits that the Norwegian measures at issue fall within the scope of the prohibition set out in Article 11 EEA.

49. If one is considering a possible justification under Article 13 EEA, the issue is whether the measures taken by the Norwegian authorities are justified and necessary for the attainment of the objective pursued and whether the objective is not capable of being achieved by measures which are less restrictive of intra-EEA trade.

50. The EFTA Surveillance Authority remarks that the Norwegian authorities seem to operate with a very broad notion of "youth". Furthermore, not all alcoholic beverages containing between 2.5% and 4.75% alcohol by volume may be considered as alcopops which appeal in particular to youth. If one were to prevent young people from consuming alcohol, it would seem more appropriate to target the consumption of beer, which is the alcoholic beverage most consumed by youth. Lastly, the EFTA Surveillance Authority points out that Norwegian legislation does not allow alcoholic beverages to be served or passed

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18 See Case 178/84 *Commission* v *Germany* [1987] ECR 1227, at paragraph 32.

on by the licensees to anyone under the age of 18.[19] Thus, in establishments with a licence to serve alcohol, Norwegian law does not allow any form of alcohol to be served to minors. Consequently, enforcing the national legal provisions within the framework of the EEA Agreement would be one alternative and proportionate measure for achieving the desired goals.

51. Lastly, the Norwegian authorities may invoke restrictions for certain products if they can be justified and are proportionate under Article 13 EEA in individual cases. However, the ruling of the EFTA Court in *Gundersen* must be respected. The point of departure must, therefore, be that imported beverages containing between 2.5% and 4.75% alcohol by volume are to receive the same treatment as domestically-produced beer.

The Government of Norway

52. The Government of Norway requests the Court to declare the application as unfounded. To begin with, there is no competitive relationship between beer and the products in question which would entitle them to equal treatment. The only common feature between the two groups is their alcohol content. Reference is made to the case-law of the EFTA Court[20] and the Court of Justice of the European Communities.[21] The latter Court has never found potential competition or substitution to be sufficient. The competition or substitution between the products in question in the present case is not present and real.

53. The crucial question is whether beer and the products in question are substitutes for each other in a situation where the relative availability of the beverages changes. More specifically, the question is whether the consumer will switch from beer to the products in question if they become more available in places where beer is available, i.e., outside the retail monopoly.

54. In the present case, it is the EFTA Surveillance Authority, in submitting an application pursuant to Article 31(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, which has the burden of proving the existence of a competitive relationship and possible differential treatment, whilst it is for the Government of Norway to establish justification for such differential treatment on grounds of health.

55. A great deal of research has been carried out on the effects on alcohol consumption of liberalisation of the selling arrangements for table wine and beer. The main conclusion from the research is that consumption of table wine

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19 For spirits, the minimum age is 20.

20 See Case E-6/96 *Wilhelmsen* v *Oslo kommune*, [1997] EFTA Court Report 53 (hereinafter "*Wilhelmsen*"); and footnote 1, *Gundersen*.

21 Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935; Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91; Case C-391/92 *Commission* v *Greece* [1995] ECR I-162; Case C-171/78 *Commission* v *Denmark* [1980] ECR 447.

increases, in some cases considerably, when the product is moved to grocers' shops. Moreover, none of the reports indicate any switch from beer to wine. The consumption of beer was not significantly affected by the liberalisation of selling arrangements for wine. The research indicates that substitution from one major beverage category to another is not a predominant occurrence when new beverages are introduced or made more available.

56. Consequently, relative changes in the availability of wine and beer have no effect, or at least no more than a marginal effect, on the distribution of alcohol consumption in a particular society. More specifically, if the selling arrangements for wine become equivalent to the selling arrangements for medium-strength beer, a switch from beer to wine will most likely not occur.

57. Furthermore, the patterns of use seen today in relation to alcopops provide further indication of what to expect if their availability is greatly increased. From the research in Norway and the comparative studies carried out in other countries, it appears clear that the consumption of alcopops is additional to beer or other types of alcoholic beverages.[22]

58. Secondly, by applying two forms of sale at the retail level where beer with an alcohol content of between 2.5% and 4.75% alcohol by volume may be sold outside the outlets of the retail monopoly, while all other alcoholic beverages with the same alcohol content may only be sold through the retail monopoly, the Government has based itself on a non-discriminatory and indistinctly applicable rule.[23] All the products in question, whether produced domestically or imported from other EEA States, are treated in the same manner. No differential treatment, in law or in fact, can be established.

59. Should the EFTA Court come to the conclusion that there exists a competitive relationship between the products in question and beer with the same alcohol content, the products are, as described by the Court in *Gundersen*,[24] entitled to equal treatment.

60. The Government of Norway contends that the system does not give rise to any discrimination, in law or in fact,[25] and is – if the Court should find differential treatment – in any event justified on grounds of health.

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22 The most recent summary of national research shows that the consumption of alcopops has gained a certain degree of popularity without resulting in any decrease in the consumption of either beer or other types of alcohol beverages. (See Astrid Skretting, "Youth and intoxicating substances" (*Ungdom og Rusmidler*) 2000 and "Alcohol and Drugs in Norway" 2000).

23 A system of treating beverage categories differently is common and accepted in many other countries.

24 See footnote 1, *Gundersen*, at paragraph 25.

25 The current market situation shows that only one brand, Scanavino Moscato d'Asti, from Italy, contains less than 4.76% alcohol.

61. The Court of Justice of the European Communities and the EFTA Court have held that the rules relating to the existence and operation of a monopoly must be examined with reference to Article 31 EC/Article 16 EEA, which are specifically applicable to the exercise by a domestic commercial monopoly of its exclusive right. On the other hand, the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the retail monopoly although they have a bearing upon it, fall to be examined under Article 28 EC.[26]

62. The Court of Justice of the European Communities and the EFTA Court have furthermore stated that the purpose of these provisions is to reconcile the possibility for EEA States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. Article 31 EC/Article 16 EEA aim at eliminating obstacles to the free movement of goods, save for restrictions on trade which are inherent in the existence of the monopolies in question.[27]

63. Thus, Article 31 EC/Article 16 EEA require that the organisation and operation of the retail monopoly be arranged so as to exclude any discrimination between nationals of EEA States as regards conditions of supply and outlets, so that trade in goods from other EEA States is not put at a disadvantage, in law or in fact, and that competition between the economies of the EEA States is not distorted.[28]

64. The selling arrangements through the retail monopoly are not based on the place of origin of the goods. It applies to all products and all traders and, thus, the legislation applies without distinction as to place of origin.

65. The Alcohol Act prescribes a dividing line at 4.75% alcohol by volume for beer and 2.5% alcohol by volume for other alcoholic beverages. This line applies to both domestic products and imported products in the sense that imported as well as domestic medium-strength beer with less than 4.75% alcohol by volume may be sold outside the retail monopoly, and domestic as well as imported alcopops which contain more than 2.5% alcohol by volume, are sold through the retail monopoly. Thus, the criteria set out in the legislation are completely neutral and objective. The legislation is not designed to regulate trade in goods between the EEA States.[29] On the contrary, the sole purpose is to

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26 See Case C-189/95 *Franzén* [1997] ECR I-5909 (hereinafter "*Franzén*"), at paragraphs 35 and 36; and footnote 1, *Gundersen*.

27 See footnote 26, *Franzén*, at paragraph 39.

28 See footnote 26, *Franzén*, at paragraph 40.

29 See Case C-391/92 *Commission* v *Greece*, [1995] ECR I-1621, at paragraph 11; and footnote 8, *Keck and Mithouard*.

achieve a public interest aimed at protecting public health against the harm caused by alcohol.[30]

66. The Government of Norway agrees that the Alcohol Act limits the commercial freedom for producers as products are channelled to the retail monopoly. As held by the Court of Justice of the European Communities in *Commission* v *Greece*,[31] such legislation may restrict the volume of sales of alcopops in general and hence the volume of sales of alcopops originating in other EEA States. Thus, the mere fact that the sales volume decreases (or does not reach is full potential) does not imply that there is differential treatment in fact.

67. The Government of Norway acknowledges that virtually all of the beer sold in Norway is produced domestically, whilst wine and other products are, to a large extent, imported. It argues, however, that a mere reference to this truism is not sufficient to establish differential treatment in fact.

68. Due to climatic and historical factors, there is no wine production in Norway. Furthermore, there is presently no domestic production of the products in question. Moreover, it is no coincidence that there is no domestic production in Norway of the products in question. As the Court of Justice of the European Communities has held, national legislation for retail sale which concerns all the products at stake without distinction cannot depend on such a purely fortuitous factual circumstance, which may, moreover, change with the passage of time.[32]

69. The dividing lines for sale at the retail level are exclusively based on alcohol policy. The dividing lines do not change based on what products domestic and foreign manufacturers may produce. The Government of Norway notes, as the European Court of Justice held in *Commission* v *Greece*,[33] that this would have the illogical consequence that the same legislation for retail sale would fall under Article 16 EEA in certain EEA States, but fall outside the scope of that provision in other EEA States.

70. In conclusion, the Government of Norway is of the view that there is equal treatment in fact.

71. If the EFTA Court were nevertheless to find that the retail monopoly gives rise to differential treatment in law or in fact of nationals of EC and EFTA States, the Government of Norway submits that this treatment is, in any event, justified on grounds of public health and is thus not contrary to Article 16 EEA.

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30 See footnote 26, *Franzén*, at paragraph 41.

31 See footnote 29, Case C-391/92 *Commission* v *Greece*.

32 See footnote 29, Case C-391/92 *Commission* v *Greece*, at paragraph 17.

33 See footnote 29, *Commission* v *Greece*, at paragraph 17.

72. The Government of Norway argues that it would be self-contradictory if the health considerations which form a fundamental part of Article 13 EEA were not to be considered an inherent part of Article 16 EEA. Thus, it is not a question of whether a breach of Article 16 EEA can be justified by reference to Article 13 EEA, but rather whether the principles underlying Article 13 EEA can be seen as forming an inherent part of Article 16 EEA. It must be emphasised that the retail monopoly in question in this case has been established with the sole purpose of protecting public health.

73. This interpretation has been confirmed by the EFTA Court in the *Gundersen* ruling,[34] in which the Court held that the system of two dividing lines, in the absence of any grounds for the differential treatment, must be considered to be contrary to Article 16 EEA. One of those grounds is justification on grounds of public health.

74. In addition, the Government of Norway refers to the judgment of the Court of Justice of the European Communities in *Chemical Farmaceutici*.[35] The reasoning of that Court in that case is based on a willingness to accept objective justifications where the national policy is acceptable from the Community's standpoint, even if it benefits domestic traders more than importers.

75. For these reasons, the health considerations which form a fundamental part of Article 13 EEA should be considered as forming an inherent part of Article 16 EEA.

76. Furthermore, the Government of Norway refers to the *Wilhelmsen* ruling,[36] in which the EFTA Court held that combating alcohol abuse constitutes a public health concern which, if necessary and proportionate, may justify a measure restricting the free movement of goods.

77. There is reason to expect that increased availability of the products in question will lead to an increase in consumption among young people.[37] Consumers accustomed to drinking beer will enjoy the additional and experimental alcopop or pre-mixed drinks. Consumers who are not yet accustomed to the distinct taste of beer, and therefore the lack of alternatives, might abstain or moderate their intake, or would most likely increase their consumption if sweet-tasting alcoholic beverages were to be made available in grocers' shops. Those consumers include girls and the youngest age group.[38] In

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34 See footnote 1, *Gundersen*, at paragraph 31.

35 Case C- 140/79 *Chemical Farmaceutici SpA* v *DAF SpA*, [1981] ECR 1.

36 See footnote 20, *Wilhelmsen.*

37 See 1999 ESPAD Report.

38 In this connection, the Government of Norway notes that Advocate General Jacobs in Case C-405/98 *Konsumentombudsmannen* v *Gourmet International Products Aktiebolag* (hereinafter "*Konsumentombudsmannen*"), in his Opinion of 14 December 2000 concluded that the Swedish advertising restrictions on alcohol ran contrary to Article 30 of the EC Treaty (now, after

its Recommendation on Young People and Alcohol, the Commission of the European Communities emphasises that females are generally more vulnerable to alcohol than are males, and experience more problems over a shorter time-span from the same quantities.[39] Furthermore, it is now common knowledge that earlier onset of drinking leads to a relatively larger intake of alcohol later on.

78. It is generally recognised in the recent ECAS[40] and the WHO reports[41] that excessive alcohol consumption causes health problems, as well as considerable social problems, and that the cost to the individual and to society from the misuse of alcohol is high.

79. Furthermore, it is generally accepted and confirmed by considerable research that there is a direct link between availability and the harmful effects caused by the consumption of alcohol.

80. In 1996, annual sales of alcohol in Norway amounted to 4.93 litres of pure alcohol per inhabitant aged 15 years and over. In 1997 and 1998, that figure was 5.35 litres. The corresponding figure for 1999 is estimated at 5.47 litres. The Government of Norway thus observes a clear trend towards increased consumption among the population in general. Furthermore, the estimated average consumption in recent years among young people aged 15-20 years has risen significantly, from 2.8 litres of pure alcohol in 1995 to 4.8 litres in 2000. At the same time, there is growing evidence of changing drinking patterns among young people in all European countries.

81. On the basis of the 1999 ESPAD Report, the most intoxication-oriented drinking pattern among 15-16 year-olds was found in Finland, Sweden and Norway.[42] Later research shows that the proportion of students who report to have had at least five drinks in a row (binge drinking) is increasing in Norway.

82. Most European countries are now struggling to come up with measures to address "the alarming increase in binge and heavy drinking by minors", as the Commission expresses it. Beer consumption among the young population is a major problem that the Government of Norway needs to address, as do many other countries.

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amendment, Article 28 EC) . In the discussion of a possible justification, however, he stated at paragraph 54: "With a view to discouraging the recruitment to alcohol of those who would not otherwise be inclined to drink it, I can also see a possible justification for a ban on the advertising of, for instance, alcopops – alcoholic drinks designed specifically to appeal to those (including no doubt young people and even children) whose preferred beverage is sweet and carbonated."

39 Annex 17 to the Written Observations of the Government of Norway, at page 4.

40 The ECAS Report 2000.

41 The WHO Report.

42 The ECAS Report 2000, at page 90.

83. The EFTA Court must not however, be under the impression that moving medium-strength beer to the alcohol retail monopoly is a real option for the Government. The reason for this is that there is not the public support necessary to further restrict the availability of beer which traditionally is widely consumed by adults.

84. With respect to the new category of alcoholic beverages, especially those targeting young people and creating considerable international frustration, however, Norway has chosen the single most effective way of reducing consumption. Placing such products in the alcohol retail monopoly is strongly supported by the Norwegian Parliament, which has twice rejected private bills calling for equal treatment of beer and "wine" containing between 2.5% and 4.75% alcohol by volume.[43]

85. Based on the foregoing, the conclusion is that the retail monopoly scheme for the products in question is an appropriate means of pursuing health and social aims.

86. The aim of the Norwegian alcohol policy is to curb to the greatest possible extent the harm to society and the individual that may result from the consumption of alcoholic beverages. The means used to achieve that aim are implemented through a number of comprehensive measures designed to limit the overall consumption of alcohol in the population. Such measures are: preventive work, information strategies, prohibition of advertisement of alcoholic beverages, high taxes and restrictions on the availability of alcoholic beverages through the alcohol retail monopoly, and licensing schemes. The classification of alcoholic beverages into different categories, and the different treatment according to classification with regard to age limits, retail sale and serving licences form the basis of this comprehensive strategy.

87. As a consequence of this policy, consumption of alcohol in Norway is low compared to other European countries, and health problems are fewer. The alcohol retail monopoly is second only to taxation among the Government's most important instruments for reducing overall consumption of alcohol among the population. The Government of Norway adds that there appears to be no other means than those already being implemented in Norway which are capable of achieving the aim of reducing alcohol consumption to the same extent as the alcohol retail monopoly.

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43 2 June 1998 and 28 March 2000, respectively.

88. European integration has inspired considerable changes in the operation of the alcohol retail monopoly. However, the essence of the monopoly has not been compromised as regards product selection and the elimination of point-of-sale marketing. Considering the characteristics of the products at stake,[44] this is of vital importance.

89. Channelling the products to the alcohol retail monopoly furthermore eliminates purchases made on impulse, and fosters social awareness of the harmful effects of alcohol.

90. The Government of Norway adds that the shop assistants of the alcohol retail monopoly are in direct contact with their customers, creating optimal conditions for exercising social and formal control. The company runs constant campaigns to check the age of purchasers, and its staff are very aware of this requirement. A large number of young people are refused service every year because they cannot show valid proof of age. The same applies to people who are visibly drunk. Thus, the retail monopoly is particularly suited to controlling drinking among young and under-aged people. Another important factor in this context is the fact that monopoly employees are typically unionised career employees, compared with the employees of corner stores and supermarkets, who are paid much less and are often younger and more transient people. Rules concerning under-age purchasers and other conditions of sale are more likely to be adhered to in a unitary system with permanent employees.[45]

91. In addition, the Government of Norway points to the fact that the alcohol retail monopoly, unlike the grocery stores, is based on a policy which eliminates private profit interests.

92. The Government of Norway concludes from the foregoing that the alcohol retail monopoly is more effective than licensing schemes in enforcing the aim of pursuing health and social objectives by restricting the availability of alcopops and other beverages based on wine and spirits, and is, therefore, proportional.

93. The Government of Norway shares the view of the EFTA Surveillance Authority when stating that the provisions of the Norwegian legislation concerning the serving of alcoholic beverages are not related to the alcohol retail monopoly's exclusive right to sell alcoholic beverages other than beer, and thus must be examined separately under Article 11 EEA.

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44 See Margaret C. Jackson, Gerard Hastings, Colin Wheeler, Douglas Eadie & Anne Marie MacKintosh, "Marketing alcohol to young people: implication for industry regulation and research policy", published in Addition (2000).

45 This observation also applies with regard to sales made through the postal services.

94. With regard to Article 28 EC, the Court of Justice of the European Communities 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.[46]

95. The Court of Justice of the European Communities and the EFTA Court have further held that trade between EEA States is not likely to be impeded within the meaning of the *Dassonville* judgment by the application to products from other EEA 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 EEA States. Where those conditions are fulfilled, the application of such rules to the sale of products from other EEA 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.[47]

96. The licence to serve is a "selling arrangement" and falls outside the scope of Article 11 EEA.

97. The Government of Norway argues that the licensing scheme in the case at hand does not entail any requirement to be met by the products themselves.[48] On the contrary, the system only channels the sale of the products in question to those entitled to a licence. Therefore, the licensing scheme must be viewed as a marketing regulation and not a regulation of alcohol as a product.

98. In the case at hand, the crucial question is whether the provisions on the licensing scheme affect in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States.

99. The Government of Norway submits that the assessment of whether the provisions affect the different products in the same matter, in law or in fact, must be carried out in parallel with the assessment of whether the channelling through the alcohol retail monopoly constitutes differential treatment, in law or in fact. Reference is made to the discussion above, in which the conclusion was that there is equal treatment in law and in fact. Accordingly, the Norwegian legislation for licences to serve alcohol is compatible with Article 11 EEA.

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46 See, in particular, Case 8/74 *Dassonville* [1974] ECR 837 (hereinafter "*Dassonville*").

47 See footnote 8, *Keck and Mithouard*, at paragraphs 16 and 17; Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, at paragraph 21 and Case C-387/93 *Banchero* [1995] ECR I-4663 (hereinafter "*Banchero*").

48 These include requirements as to designation, form, size, weight, composition, presentation, labelling and packaging.

100. If the Court were nevertheless to consider that the licence to serve constitutes differential treatment in law or in fact, the Government of Norway submits that this treatment is, in any event, justified on grounds of public health under Article 13 EEA.

101. In accordance with settled case-law, the national provisions in question must be proportionate to the aim pursued and not attainable by measures less restrictive of intra-EEA trade. Furthermore, the Court of Justice of the European Communities and the EFTA Court have held that Article 30 EC/Article 13 EEA must be interpreted strictly, since they constitute a derogation from the fundamental principle of the elimination of all obstacles to the free movement of goods between EEA States.[49] The Court of Justice of the European Communities and the EFTA Court have also held that, in order for the exemption to apply, the competent national authorities have the burden of proving that the measure is justified.[50]

102. The Government of Norway submits that, like the alcohol retail monopoly, the licence-to-serve scheme for the products at stake is necessary to pursue the aim of reducing alcohol-related public health and social problems. The Government of Norway emphasises that different legislation providing for the equal treatment of beer and spirits-based beverages would pave the way for the eradication of the distinction between beer and spirits.[51]

103. The question in the case at hand is not whether it would be more appropriate to target beer consumption. The case at hand relates to a new category of alcoholic beverages targeting especially young people and creating considerable international frustration. The main point is that the licensing scheme reduces the availability of those products, which in turn results in lower alcohol consumption, thereby ultimately reducing public health and social problems.[52]

The Government of Iceland

104. The Government of Iceland refers to the case-law of the Court of Justice of the European Communities and the EFTA Court.[53] Following those judgments, a distinction may be drawn between rules relating to the movement of goods which set conditions on how the goods can reach the market in terms of their

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49 Case 46/76 *W. J. G. Bauhuis* v *The Netherlands State* [1977] ECR 5; and Case E-5/96, *Ullensaker kommune and Others* v *Nille AS* [1997] EFTA Court Report 30 (hereinafter "*Nille*").

50 Case 304/84 *Ministère public* v *Muller* [1986] ECR 1521; and footnote 49, *Nille.*

51 Of a total of 6252 licences to serve in 1999, 2327 did not encompass the serving of spirits and spirits-based beverages. If all 6252 licences to serve encompassed the serving of spirits-based beverages, a significant increase in availability and consumption would result.

52 Enforcing age-limit regulations are one of many important factors in place for achieving the aim of the Norwegian alcohol policy. However, such regulations alone are far from sufficient in order to attain that goal.

53 See footnote 1, *Gundersen*.

nature, composition, packing, presentation and advertisement,[54] and rules which have been described as governing "selling arrangements". The latter do not contain measures which hamper or hinder the access of the goods, but rather regulate or decide through which channels they must go in order to enter the retail market.[55]

105. The Government of Iceland submits that the Norwegian legislation concerning the retail sale of beer and alcopops must be regarded as governing selling arrangements, because it does not impede the access of the products in question to the market.

106. Beer and alcopops are different goods under the international system of classification of goods.[56] Alcopops may be described as "end products", because they are not used as a basis for making other drinks. Consequently, alcopops can be distinguished from beer and wine. It is also questionable whether alcopops and beer meet the same need.[57] Reference is made to the *United Brands* case,[58] in which the Court of Justice of the European Communities held that bananas could not be regarded as substitutes for other fruits.

107. The Government of Iceland refers to the differences between the present case and the *Banchero* and *Commission* v *Greece* judgments.[59] The case at hand involves the question of whether to apply the same set of rules to alcopops as to other types of alcoholic beverages, while those two other cases concerned different selling arrangements. In this light, the Norwegian rules are less likely to be at variance with Article 28 EC than the Italian and Greek selling arrangements in the two aforementioned cases.

108. In any event, the Government of Iceland is of the view that the Norwegian legislation should be deemed lawful by virtue of Article 13 EEA. It is well recognised that it is up to the EEA States to combat alcohol abuse. Selling arrangements for alcohol come within that policy.[60]

109. Reference is made to the Opinion of Advocate General *Jacobs* in the *Konsumentombudsmannen* case.[61]

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54 See footnote 46, *Dassonville* and footnote 3, *Cassis de Dijon*.

55 See footnote 47, *Banchero*; and footnote 29, Case C-391/92 *Commission* v *Greece*.

56 Beer is classified under heading no. 2203 of the Harmonized Commodity Description and Coding System, whilst alcopops are classified under heading no. 2208.

57 Case 169/78 *Commission* v *Italy* [1980] ECR 385.

58 Case 27/76 *United Brands Co. and United Brands Continental BV* v *Commission* [1978] ECR 207.

59 See footnote 47, *Banchero*, and footnote 29, *Commission* v *Greece*.

60 See footnote 20, *Wilhelmsen*.

61 See footnote 38, *Konsumentombudsmannen*.

110. Like all other alcoholic beverages except beer, alcopops are sold in Vinmonopolet, so as to make it more difficult for young people to obtain them. The rule of proportionality has been fully respected.

111. Lastly, the Government of Norway was not in a position to take any other reasonable measures to limit the opportunities for young people to obtain alcopops without impeding that product's access to the market. The most sensible and practical means were adopted in this respect.

The Commission of the European Communities

112. The Commission of the European Communities is of the view that the application to the Court submitted by the EFTA Surveillance Authority would fall into the category of proceedings under Article 228 EC.

113. As regards product coverage, the Commission of the European Communities shares the view of the EFTA Surveillance Authority. Essentially two types of alcoholic beverages are at stake: the so-called "alcopops", i.e., low-alcohol mixed drinks, whether fermented or spirits-based, and the mild wines of the sort falling under heading no. 2205.

114. Reference is made to *Franzén*[62] and *Gundersen*[63] rulings. Applying the approach taken by the EFTA Court, the Commission of the European Communities is of the view that wine-based and spirits-based products are subject to "substantially different treatment by law", as compared to beer, as long as beer can be licensed to be sold outside the monopoly outlets, which is not possible for other alcoholic beverages of the same alcohol content.

115. As regards the competitive relationship, the Commission of the European Communities is of the view that it is not the criterion of the strictly identical nature of the products but of the similar and comparable use that is relevant.[64]

116. The Commission of the European Communities disagrees with the contention of the Government of Norway to the effect that alcopops, if made more readily available, would be consumed in addition to beer, and thus increase overall alcohol consumption among young people. Nothing has been put forth to indicate that young people would have more money to spend on drinks. The Commission submits that alcopops would tend to be consumed instead of beer or, more precisely, in a given situation, the absolute amount of alcohol consumed would not increase but, rather, one drink would be replaced with another. This also would tend to show the competitive interaction between the two products.

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62 See footnote 26, *Franzén*.

63 See footnote 1, *Gundersen*.

64 In a judgment in Case 169/78 *Commission* v *Italy* [1980] ECR 385, the Court of Justice of the European Communities considered as similar products those "which have similar characteristics and meet the same needs from the point of view of consumers".

The Commission of the European Communities takes the position that, from a consumer point of view, the different beverages, beer and wine and spirits-based alcoholic beverages, do “meet the same needs” and are interchangeable.

117. The EFTA Court has already found that medium-strength beer and wine are capable of meeting identical needs. This would also be the case regardless of whether those two types of beverages are intended to be consumed at the table or in socialising, particularly if the wine is a mild wine. The wine and spirits-based alcoholic beverages, including alcopops, would compete as social drinks. Consequently, the Commission of the European Communities takes the view that there is a competitive relationship between beer, mild wine and spirits- and wine-based alcoholic beverages as social drinks, and that they therefore warrant equal treatment.

118. The EC Treaty provision on monopolies reconciles the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of an aim of public interest, in this case the protection of health. The Commission of the European Communities maintains that a commercial monopoly must be operated so that trade in goods from other Member States is not put at a disadvantage, in law or in fact. Wine- and spirits-based beverages, mild wines and alcopops, all products covered by Article 16 EEA, seem to be mostly imported.

119. The characteristics of the wine- and spirits-based beverages, as a product type, hardly seem to be an objectively distinguishable product group because there is no common definition of those drinks, and particularly not of alcopops.

120. The Norwegian authorities have not given reasons for the exclusion of mild wines from the sphere of the exception to the retail monopoly. Even if those products should prove to be rather rare in the inventory of the monopoly, the availability of a grocery channel would serve as a catalyst to bring such products on the market.

121. As to the arguments put forward by the Government of Norway to justify why alcopops are subject to differential treatment, the Commission argues as follows. Leaving aside the difficulties of defining this product group, it is clear from the data in the Application of the EFTA Surveillance Authority relating to alcohol consumption in Norway that beer is the most commonly consumed alcoholic beverage. Almost all (95%) of the beer consumed in Norway have an alcohol content of less than 4.75% and, accordingly, benefit from the possibility of being sold in the grocers’ shops, in addition to the outlets of the monopoly. The data further show that alcopops account for no more than 9% of alcohol consumption for young people between 15 and 20 years of age. It follows that beer seems to be the prime source of any health or social problems which might result from the consumption of alcohol. At any rate, because of the huge difference in consumption in absolute and relative terms between beer and alcopops, the possibility that alcopops would contribute to such problems to a

lesser degree than beer, even if they were allowed to be sold in grocers' shops on the same footing as beer, should not be excluded. Based on the relevant data, it would appear more expedient, from a health viewpoint, to keep beer out of the grocers' shops.

122. The ready-mixed drinks of gin and tonic are presumably sold in bottles with another content (for instance 33 cl) than pure gin (for instance 70 cl). Gin will be mixed with other alcoholic beverages, bought in the monopoly outlets, or with different kinds of soft beverages, tonic waters, which can be purchased in any grocery shop. A ready-mixed gin and tonic drink has the same alcohol content, unlike self-mixed drinks, which can vary depending on the brand of gin, the brand of tonic water, and the volume of spirits. These different products cannot be considered as interchangeable and, therefore, do not warrant the same treatment.

123. In the view of the Commission of the European Communities, the argument of the Government of Norway to the effect that they have not been able to find other dividing lines for drinks to be sold within or outside the monopoly cannot be accepted.

124. The last argument submitted by the Government of Norway to the effect that another EEA State, Sweden, may be in breach of an EC Treaty provision does not justify a violation of the EEA Agreement by Norway. Each case must be assessed on its own merits. The Court of Justice of the European Communities has ruled that "[a] Member State cannot justify its failure to fulfil obligations under the [EC Treaty] by pointing to the fact that other Member States have also failed, and continue to fail, to fulfil their own obligations".[65] In addition, as far as the Commission is aware of the situation in Sweden, all beverages containing up to 3.5% alcohol by volume may be sold outside the Swedish retail monopoly.

125. The Commission of the European Communities is of the view that, in general, it seems difficult to maintain that it would be "inherent in the existence of the monopoly", a monopoly upheld on grounds of the protection of health from adverse effects of alcohol, to establish the dividing line based on product type and not on the level of alcohol content. Alcopops are not the only products which seem to be affected by the Norwegian system; there are also mild wines and other spirits-based beverages which are subject to the same differential treatment.

126. In the light of the foregoing, the Commission of the European Communities is of the view that the Norwegian system of differential treatment between beer containing between 2.5% and 4.75% of alcohol by volume and other beverages with the same content of alcohol indicates arbitrary discrimination which does not seem to be justified as being inherent in the

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[65] Case C-146/89 *Commission* v *UK* [1991] ECR I-3533; Case 52/75, *Commission* v *Italy* [1976] ECR 277.

existence or operation of the monopoly and, therefore, is contrary to Article16 EEA.

127. As regards possible breach of Article 11 EEA by the application of more restrictive measures regarding licences to serve alcoholic beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, as compared to beer with the same alcohol content, mainly produced domestically, the Commission shares the view of the EFTA Surveillance Authority, on reasons put forward above, that the domestically-produced beer products containing between 2.5% and 4.75% alcohol by volume are treated differently from mostly foreign-produced spirits-based beverages, which renders access to the Norwegian market more difficult for the latter. In other words, the Norwegian licensing system does not affect the marketing of domestic products and products from other EEA States in the same manner. Hence, the Commission of the European Communities is of the view that the Norwegian licensing system is contrary to Article 11 EEA and, therefore, must be assessed under Article 13 EEA if justification is to be found.

128. The grounds for justification under Article 13 EEA are not the subject of dispute between the parties to the present case. Rather, the dispute relates to the protection of health. Accordingly, the assessment of whether the Norwegian measures are in violation of Article 11 EEA must focus on whether the measures are necessary and proportionate for attaining the objective of health protection.

129. The Commission of the European Communities notes that, according to the Application of the EFTA Surveillance Authority, beer is by far the beverage most consumed by young people.[66] Under the licensing system, beer may only be served to persons of 18 years of age or older, and spirits may only be served to persons of 20 years of age or more.

130. The Norwegian concerns are mainly focused on alcopops, which, as asserted, by taste, name and bottle are designed to attract young people. If these are spirits-based beverages, they will fall under the licensing condition to be served only to persons of 20 years and more. The Commission of the European Communities does not know what age restriction applies to the serving of wines (in the product coverage) and whether the approximately 2 500 more licences which permit the serving of beer but not of spirits are related to establishments frequented particularly by teenagers. Such a differentiation related to the establishments would be acceptable, but the licensing would, in that case, be linked to the granting of the licence and the target group visiting the restaurant/establishment, rather than the alcohol content of the beverages.

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[66] 62.3% for boys 15-20 years of age, and 55% for girls 15-20 years of age.

131. The Commission of the European Communities takes the position that the licensing for the serving of alcoholic beverages containing between 2.5% and 4.75% alcohol by volume is a selling arrangement which, due to the differential treatment of domestic and foreign products with the same alcohol content, falls under the prohibition laid down in Article 11 EEA, and does not appear to be justified under Article 13 EEA.

Carl Baudenbacher
Judge-Rapporteur