



## JUDGMENT OF THE COURT

17 January 2006\*

*(Free movement of goods – State monopolies of a commercial character – requirements to supply goods on pallets and to include the pallet price in the price of the goods – discrimination against importers of alcoholic beverages – abuse of a dominant position)*

In Case E-4/05,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland, in a case pending before it between

**HOB-vín**

and

**The Icelandic State and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland)**

on the interpretation of Articles 11, 16, 54 and 59 EEA,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges,

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\* Language of the Request: Icelandic.

Registrar: Henning Harborg,

having considered the written observations submitted on behalf of:

- the Plaintiff, represented by Stefán Geir Þórisson, hrl. (Supreme Court Advocate), Forum Lögmenn, Reykjavík;
- the Defendants, represented by Óskar Thorarensen, hrl. (Supreme Court Advocate), Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Senior Legal Officer, and Arne Torsten Andersen, Legal Officer, acting as Agents; and
- the Commission of the European Communities, represented by Xavier Lewis, Member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by its Agent Stefán Geir Þórisson, the Defendants, represented by their Agent Óskar Thorarensen, the EFTA Surveillance Authority, represented by its Agent Arne Torsten Andersen, and the Commission of the European Communities, represented by its Agent Xavier Lewis, at the hearing on 18 November 2005,

gives the following

## **Judgment**

### **I Facts and procedure**

- 1 By a decision dated 4 May 2005, amended by a judgment of Hæstiréttur Íslands (the Supreme Court of Iceland) of 7 June 2005, and registered at the Court on the 17 June 2005, Héraðsdómur Reykjavíkur referred to the Court questions on the interpretation of Articles 11, 16 and 59 EEA. They arose in a dispute concerning Áfengis- og Tóbaksverslun Ríkisins (hereinafter “ÁTVR”) requirements that merchandise has to be delivered on so-called EUR pallets and that the price of these pallets is to be included in the price of the product delivered.
- 2 The Plaintiff in the proceedings before the national court is an importer of alcoholic beverages procured in other EEA countries and intended for retail sale in Iceland.

- 3 ÁTVR handles the import and purchase of ethyl alcohol, alcoholic beverages and tobacco and the distribution of these products and has the exclusive right to retail sale of alcoholic beverages in Iceland. Operating under the supervision of the Icelandic Minister of Finance, it is therefore the only customer of importers of alcoholic beverages intended for retail sale on the Icelandic market.
- 4 The contracts concluded between the Plaintiff and ÁTVR refer to the latter's Rule No 351/2004 on the purchase and sale of alcoholic beverages and trade terms with suppliers (reglur nr. 351/2004 um innkaup og sölu áfengis og skilmálar í viðskiptum við birgja, hereinafter the "Rule"). In Section 4.9 of the Rule, it is stated that the merchandise has to be delivered on so-called EUR pallets and that the price of these pallets is to be included in the price of the product delivered. This amounts to an obligation to sell the pallets to ÁTVR at the price originally paid to the supplier of the pallets.
- 5 According to an assertion not contested by the Plaintiff, in practice suppliers to the ÁTVR are not required to deliver goods on EUR pallets in cases where the volume concerned is so low that it could be placed in a single layer on a pallet (9 cases of beer or 9-25 cases of wine). In this case ÁTVR provides the supplier with a pallet free of charge. On the other hand, EUR pallets of the size 60 x 80 cm (so called ½ EUR pallets) are rejected by ÁTVR.
- 6 According to uncontested information submitted by the Defendants, the vast majority of pallets are delivered together with the merchandise to liquor stores, from where they are subsequently returned empty. While damaged pallets are disposed of, some 29,000 pallets of some 35,000 received annually, are sold to Icelandic beverage production and transport companies.
- 7 The Plaintiff reacted to the Defendant's demands to deliver products on EUR pallets and to calculate the price accordingly by challenging Section 4.9 of the Rule before Héraðsdómur Reykjavíkur on 9 December 2004. Héraðsdómur Reykjavíkur decided to refer the following question to the Court:

*Is a state enterprise, which holds exclusive right to the retail sale of alcoholic beverages, entitled to demand that its suppliers deliver to the enterprise alcoholic beverages for retail sale on a special type of pallet (EUR pallet), and furthermore that the price of the pallet be included in the product price, cf. Articles 11 and 16 of the EEA Agreement, on the one hand and, on the other hand, Article 59, cf. in particular Article 54(a) of the EEA Agreement?*

- 8 Hæstiréttur Íslands, by judgment rendered on appeal on 7 June 2005, amended the wording of the question referred. The original question was replaced by the following two questions:

*1. Do Articles 11 and 16 of the Agreement on the European Economic Area prevent a state enterprise, which holds exclusive right to the retail sale of alcoholic beverages, from demanding that its suppliers deliver to*

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*the enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet), and furthermore that that the price of the pallet be included in the product price?*

*2. Does Article 59 of the Agreement prevent requirements of this sort?*

- 9 By a ruling of 13 October 2005, Héraðsdómur Reykjavíkur accepted the Plaintiff's application to hear two witnesses on certain alleged infringements of Rule No 351/2004 in the Akureyri branch of ÁTVR. This ruling was invalidated by Hæstiréttur Íslands by judgment of 25 October 2005.
- 10 At the oral hearing, the Plaintiff stated that it is not opposed to the requirement that the goods be delivered on EUR pallets, but only to the requirement of having to include the price of the pallets in the price of the products.

## **II Legal background**

### *National law*

- 11 The wholesale and retail sales of alcoholic beverages in Iceland are governed by the Alcoholic Beverages and Tobacco Trading Act No 63/1969 (lög nr. 63/1969 um verslun með áfengi og tóbak, hereinafter the "Alcohol and Tobacco Trading Act") as subsequently amended, and by the Alcoholic Beverages Act No 75/1998 (Áfengislög nr. 75/1998, hereinafter the "Alcohol Act") as subsequently amended.
- 12 Importation of alcoholic beverages on a commercial scale is subject to authorisation from the National Commissioner of the Icelandic Police. Such authorisation allows an importer to sell or deliver imported alcoholic beverages to parties licensed to produce, sell or serve alcoholic beverages on a commercial basis. Articles 2 and 5 of the Alcohol and Tobacco Trading Act provide that ÁTVR handles the importing and purchasing of ethyl alcohol, alcoholic beverages and tobacco, and their distribution and sale on the Icelandic market, while Article 10 of the Alcohol Act gives ÁTVR the exclusive right to the retail sale of alcoholic beverages in Iceland. The company is thus the only customer of enterprises importing alcoholic beverages intended for retail sale on the Icelandic market. Article 2 of the Alcohol and Tobacco Trading Act states that ÁTVR shall treat equally all suppliers of alcoholic beverages and tobacco.
- 13 Based on the authorisation in Article 14 of the Alcohol and Tobacco Trading Act, Regulation No 369/2003 on the State Alcohol and Tobacco Company (reglugerð nr. 369/2003 um Áfengis- og tóbaksverslun ríkisins, "the Regulation") was adopted. Article 10 of the Regulation authorizes the board of ÁTVR to set special rules for the selection of products for sale in retail outlets, which are to be approved by the Minister of Finance.

Based on that Article, the board passed Rule No 351/2004 (“the Rule”). The Rule states that the price to suppliers shall be determined by their contracts with ÁTVR. Section 4.9 of the Rule states that:

If the quantity of the product being delivered is more than the amount handled on a goods pallet in one load, the product shall be delivered on a EUR pallet. The cost of the pallet shall be included in the product price. The maximum weight of product and pallet shall be 900 kg and the maximum height 150 cm. If the pallet load is more than 70 cm high, the product shall be wrapped in plastic.

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If these regulations are not complied with, the State Alcohol and Tobacco Company may refuse to accept delivery of the product.

- 14 According to the Defendants’ pleading, Rule 351/2004 has been replaced, as from 22 July 2005, with Rule 698/2005 where the word “EUR” in Section 4.9 has been deleted.

*EEA law*

- 15 Article 11 EEA reads:

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

- 16 Article 13 EEA reads:

The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.

- 17 Article 16 EEA reads:

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.

18 Article 54 EEA reads:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

19 Article 59 EEA reads:

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.

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

### III Findings of the Court

#### *The first question*

- 21 By its first question, the national court essentially seeks to ascertain whether the two requirements imposed by a State monopoly on its contractual partners, namely to make it mandatory that merchandise is to be delivered to the warehouse on EUR pallets and that the price of these pallets is to be included in the product price, contravene Articles 11 and 16 EEA. The Court will first deal with the question of which of the two provisions is applicable.

#### *Applicability of Article 11 or Article 16 EEA*

##### Submissions by the parties

- 22 The Plaintiff submits that both Articles 11 and 16 EEA apply in the case at hand, as the requirements to deliver products on EUR pallets and to have the price of the pallets included in the price of the product have nothing to do with the operation or organization of the monopoly. If Article 11 EEA were not applied to the two requirements in question, the means of interference by this monopoly would be treated more favourably than if both Articles were applied. The dividing line to be drawn between the two provisions remains unclear in the view of the Plaintiff.
- 23 The Defendants argue that only Article 16 EEA is applicable. In their view, the requirements regarding the delivery of goods relate directly to the functioning of the monopoly. Both the EFTA Surveillance Authority (hereinafter “ESA”) and the Commission of the European Communities (hereinafter “the Commission”) concur with the Defendants’ submission. The Commission doubts that a distinction can be drawn between the method by which a monopoly selects products from suppliers and the terms and conditions on which the same monopoly actually purchases those products from the selected suppliers. At the oral hearing, the agent for the Commission suggested a test whereby a given measure should be deemed to fall under the ambit of Article 16 EEA in cases where it would not exist without the monopoly.

##### Findings of the Court

- 24 According to the case law of the Court of Justice of the European Communities, Articles 28 and 31 EC, the provisions on which Articles 11 and 16 EEA have been modelled, are to be understood as applying exclusively rather than cumulatively. Following this approach, each provision covers different aspects of State monopolies of a commercial character. Whereas Article 31 EC applies to rules relating to the existence and operation of the monopoly and, more specifically, to the exercise by a domestic commercial monopoly of its exclusive rights, the effect on intra-Community trade of the other provisions of domestic

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legislation, which are separable from the operation of the monopoly although they have a bearing upon it, fall to be examined under Article 28 EC (Case C-189/95 *Franzén* [1997] ECR I-5909, paragraphs 35-36). The Court has followed this line of argument when defining the relationship between Articles 11 and 16 EEA in Cases E-1/97 *Gundersen v Oslo commune* [1997] EFTA Court Report 108, paragraph 17-18, and E-4/01 *Karlsson v Iceland* [2002] EFTA Court Report 240, paragraphs 15 and 22.

- 25 In the case at hand, the contested requirements do not relate to the existence but to the operation of ÁTVR. Consequently, the applicability of Articles 16 and 11 EEA respectively, in cases such as the one at hand, depends on whether the requirements are inseparably linked to the operation of the monopoly or can be separated from the latter. As to the dividing line in the case at hand, the crucial factor must be that the statutory requirements allowing for standardized product handling and storage only apply to ÁTVR and not to other undertakings that are operating warehouses. Since they exclusively regulate ÁTVR's contractual relationships, the requirements at issue are to be considered inseparable from the operation of the monopoly.
- 26 Consequently, the first question referred by the national court is to be dealt with under Article 16 EEA and not under Article 11 EEA.

#### *Violation of Article 16 EEA*

##### Submissions by the parties

- 27 As regards the question of whether or not Article 16 EEA has been violated in the case at hand, the Plaintiff maintains that the requirements to deliver goods on a EUR pallet and to include the price of the pallet into the product price lead to discrimination against imported goods. In general, the inclusion makes the beverages more expensive. This will be more of a burden to the seller or distributor of smaller quantities of products – which are in practice almost exclusively non-Icelandic products, i.e. products that have just entered the Icelandic market. They are sometimes delivered on other types of pallet, or the pallets on which the goods are delivered have to be sent back to their country of origin according to the terms of delivery of the exporter.
- 28 Moreover, the Plaintiff claims that there is also de facto discrimination in the way the requirement is practiced by ÁTVR. The Plaintiff refers to an alleged incident where a lorry belonging to a local brewery delivered goods to ÁTVR and on returning retrieved as many pallets as had been delivered. The Plaintiff alleges that local breweries are allowed to take the pallets back with them and do not have to include the price of the pallets in the product price. This, it contends, makes imported products more expensive than domestic products.
- 29 The Defendants contest that there has been any factual discrimination and state that they have no knowledge of incidents such as the one allegedly witnessed by the Plaintiff. As to the requirement that the products shall be delivered on EUR

pallets, the Defendants refer to the mechanized nature of the storage and handling at ÁTVR's warehouse. Requiring standardised pallets is the only way to meet the needs of highly organised operation routines in a warehouse specifically designed for EUR pallets. In most cases the pallets stem from the producer of the goods. In any event ÁTVR has no part in the arrangement between the importer and the producer regarding packaging and pallets.

- 30 Also, the requirement that the price of the pallet be included in the product price does not, in the view of the Defendants, constitute discrimination. The pallets are regarded as an integral part of the product packaging. In light of experience, it is not considered desirable that the price of the pallets, or other packaging, be isolated from the price of the product. If this were the case, it would be necessary to keep track of ownership of every single pallet. A system under which the pallets were to be returned to the supplier would cause discrimination between foreign and domestic suppliers, because such return would have to be at the expense of the original sender of the goods.
- 31 ESA is of the view that there appears to be no discrimination between domestic and foreign products. In that respect, reference is made to Article 2 of the Alcohol and Tobacco Trading Act. Even if it were proved that used EUR pallets are more easily acquired second-hand at a lower price in Iceland, this could be explained by the fact that the distance over which domestic goods have to be transported is shorter as compared to the transport distance for imported products. Taking the geographical situation of Iceland into consideration, this aspect may contribute to making transportation costs higher for importers than for suppliers of domestic products. This, however, ESA concludes, is not in itself discriminatory.
- 32 The Commission fails to see any discrimination or differentiation between domestic and foreign products in the case at hand. The pallet requirement applies to all suppliers and all products, regardless of whether the products delivered are produced in Iceland or imported, as stipulated in Article 2 of the Alcohol and Tobacco Trading Act. Furthermore, there is no evidence that would support a claim that the pallet requirement puts foreign products at a disadvantage on the grounds that it is easier for a supplier of domestically produced goods than for an importer to acquire second-hand pallets at a lower price. Finally, the Commission cannot see how the requirement that the price of the pallet is included in the price of the alcoholic beverages is contrary to Article 16 EEA. This means that the Plaintiff can pass on the price of the pallet to the ÁTVR. How the price of the pallet is charged to the purchaser is immaterial, provided that it can be passed on to the purchaser in all circumstances, as the case would seem to be.

#### Findings of the Court

- 33 Article 16 EEA requires monopolies of a commercial character to be adjusted so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Contracting Parties (see Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, paragraphs

63-65, and E-6/96 *Wilhelmsen v Oslo commune* [1997] EFTA Court Report 53, paragraph 96). Consequently, the State is under an obligation to ensure that operators and trade in goods from other Contracting Parties are not put at a disadvantage, in law or in fact, as compared to domestic operators and trade in domestic goods respectively, and that competition between the economies of the Contracting Parties is not distorted (see Cases E-1/97 *Gundersen v Oslo commune* [1997] EFTA Court Report 108, paragraph 21, and E-9/00 *EFTA Surveillance Authority v Norway* [2002] EFTA Court Report 72, paragraph 36).

- 34 It is therefore necessary to consider whether the way in which the State monopoly is organised and operates in law and practice is liable to place operators or products from other Contracting Parties at a disadvantage (see for comparison the judgment of the Court of Justice of the European Communities in Case C-438/02 *Hanner*, judgment of 31 May 2005, paragraph 38).
- 35 With regard to possible disadvantages resulting from the law itself, the Court notes that neither the requirement to deliver the goods on EUR pallets nor the one to include the price of the pallets in the price of the goods differentiates between domestic and foreign operators or products. Moreover, Article 2 of Act 63/1969 explicitly provides that all suppliers of alcoholic beverages shall be treated equally.
- 36 The requirement to deliver merchandise on EUR pallets aims at increasing the operating efficiency of modern storage systems by way of standardization. The requirement to include the price of the pallets in the sales price appears to entail that the purchase price can be fully passed on to ÁTVR. Furthermore, even if it should be established by the national court that imported alcoholic beverages often come in smaller quantities than domestically produced beverages, it is to be noted that the requirement to deliver merchandise on EUR pallets is not upheld against smaller quantities, as pointed out in paragraph 5 above. The State monopoly must have a certain margin of discretion with regard to exactly where to draw the line in this respect, based on practical considerations. Thus, the practice in question appears justified with regard to the freedom of choice which the monopoly has in its commercial policy (see Case C-189/95 *Franzén*, paragraph 49).
- 37 With regard to a possible factual discrimination in the way the rule is applied, the Court recalls that such discrimination can happen not only in obvious ways, but also in day-to-day decisions in areas such as pricing, advertising and deliveries (see Case E-6/96 *Wilhelmsen v Oslo commune* [1997] EFTA Court Report 53, paragraph 106). The Plaintiff referred to an incident allegedly observed at the ÁTVR's warehouse in Akureyri, where a domestic supplier was allegedly allowed to retrieve the pallets he had brought. The Plaintiff argues that since domestic suppliers, as a consequence of this, are not required to include the pallet price in the sales price, they can sell at a lower price and thereby gain an advantage over imported products. Whether this was in fact the case, is again for the national court to establish. As a matter of principle the Court notes in this context that in enduring contractual relations, such as those at issue in the case at

hand, one incident of minor importance, even if it had discriminatory effect, will not suffice to establish an infringement of Article 16 EEA on the part of the State monopoly. To be relevant, such incidents would have to be part of the policy of the monopoly or of its outlets or a consequence of failure to enforce the monopoly's rules.

- 38 Accordingly, the Court holds that Article 16 EEA does not prevent a State enterprise, which holds exclusive right to the retail sale of alcoholic beverages, from demanding that its suppliers deliver to the enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet), and furthermore that the price of the pallet be included in the product price, unless the national court finds, based on the facts before it, that as part of the policy of the monopoly or of its outlets or as a consequence of failure to enforce the monopoly's rules, importers are in fact treated differently from domestic producers.

### *The second question*

#### Submissions by the Parties

- 39 By its second question, the national court essentially asks whether the two requirements laid down in the Rule, and as applied by the State monopoly in its contractual relations with trading partners, are prohibited by Article 59 EEA and the provisions to which it refers.
- 40 The Plaintiff argues that Article 59 EEA, read together with Article 54(a) and (d) EEA, prevents ÁTVR from applying the two requirements in question, as they impose unfair purchase prices and trading conditions within the meaning of Article 54(a) EEA. As regards the requirement for suppliers to deliver their products on a EUR pallet, the Plaintiff claims that this amounts to tying as prohibited under Article 54(d) EEA. In the Plaintiff's view, these requirements are harmful to competitors, as well as to consumers, since they lead to an increased retail price of alcohol in Iceland.
- 41 The Defendants argue that the application of the EEA competition rules requires an assessment of the relevant factual, economic and legal circumstances prevailing in the particular case which the national court has to carry out. Given the absence of such an assessment, the Defendants find it impossible to discuss the compatibility of these measures with Articles 53 et seq. EEA. Nevertheless, the Defendants emphasize that the requirements imposed by ÁTVR are standard trading requirements which do not imply an abuse of a dominant position or unfair business practices.
- 42 ESA submits that the general conditions for the application of Article 59 EEA are fulfilled in the present case. Referring to the judgment of the Court of Justice of the European Communities in Case C-209/98 *Sydhavns Sten & Grus* [2000] ECR I-3743, paragraph 31, ESA takes the view that it is not necessary to examine a measure by a State monopoly under Article 59 EEA in conjunction with the provisions on free movement of goods, when the measure has already been

examined under Article 16 EEA. Moreover, there is no need to consider a possible justification under Article 59(2) EEA in the absence of a breach of Article 16 EEA.

- 43 As to a possible infringement of Article 59(1) EEA in conjunction with Article 54 EEA, ESA suggests focusing on the question of whether the Icelandic State, by approving the trade terms of ÁTVR, created a situation in which ÁTVR cannot avoid abusing its dominant position. ESA argues that the requirement that goods must be delivered on EUR pallets and that the price of pallets has to be included in the product price, does not constitute an abuse of a dominant position by the monopoly. The disputed trade terms do not induce ÁTVR to act abusively towards its suppliers by discriminating among different trading parties, nor do the trade terms qualify as a tying agreement under Article 54(d) EEA. The use of standardised pallets appears to be connected to the subject of the contracts as it ensures efficient and safe handling and storage of the products delivered to ÁTVR. Finally, ESA is not aware of circumstances supporting the conclusion that the monopoly enriches itself through the application of the trade terms, e.g. by acquiring the pallets at unfairly low prices or against no remuneration at all. However, a proper analysis of the circumstances of the case under Article 54 EEA would in ESA's view require a thorough understanding of the factual circumstances underlying the relevant market.
- 44 As to the relationship between Article 59 EEA and the provisions on free movement of goods, the Commission also refers to the judgment of the Court of Justice of the European Communities in Case C-209/98 *Sydhavnens Sten & Grus* and submits that it is unnecessary to examine a measure by a State monopoly under these rules when it already has been examined under Article 16 EEA. In any case, the issue of a possible justification under Article 59(2) EEA does not arise.
- 45 With regard to the competition rules, the Commission submits that the contested requirements seem to be standard clauses that ÁTVR seeks to impose on all of its suppliers. The latter have little choice but to accept them. The matter should therefore be dealt with by considering whether the contested requirements constitute abusive conduct imposed by ÁTVR because of the monopsony which it enjoys. It is not contested that ÁTVR enjoys a dominant position on the alcoholic drinks market in Iceland. However, in the Commission's view, there is no abuse of the dominant position in this particular case and consequently, no breach of Article 59 EEA read in conjunction with Article 54 EEA. The use of standardised pallets is connected to the subject of the contracts as it ensures efficient and safe handling and storage of the products supplied to ÁTVR. Further, there is no evidence of any discrimination between trading partners or of any advantage which accrues to ÁTVR, to the detriment of any of its suppliers, through the contested requirements. It appears that the cost of the standardised pallets is actually borne by ÁTVR and not by the suppliers.

## Findings of the Court

- 46 The Court recalls, at the outset, that Article 59(1) EEA declares the rules contained in the EEA Agreement, in particular Articles 4 and 53 to 63 thereof, to be applicable to public undertakings and undertakings to which the Contracting Parties grant special or exclusive rights. Article 59(2) EEA provides for a justification applicable to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly. The reference by the national court to Article 59 EEA must be understood as relating to the first paragraph of that Article.
- 47 All those who have submitted observations concur in principle that Article 59(1) EEA, in conjunction with the competition rules, does apply to the case at issue. Taking into account the different rationale of the rules on free movement of goods and the rules on competition respectively, the Court holds that the application of Article 59(1) EEA read in conjunction with the EEA provisions on competition is not excluded by the fact that Article 16 EEA also applies.
- 48 ÁTVR must be regarded as an undertaking to which Iceland has granted an exclusive right within the meaning of Article 59(1) EEA. Therefore, Iceland is obliged to ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in the EEA Agreement, in particular those on competition. As the case at issue does not involve agreements between undertakings, decisions by associations of undertakings or concerted practices, but rather unilateral imposing of purchase conditions and prices, the provision applicable here is Article 54 EEA, and not Article 53 EEA.
- 49 Even though, as a matter of principle, it is for the national court to define the market for the products at issue, it is clear from the file that ÁTVR, having the exclusive right to retail sale of alcoholic beverages in Iceland and therefore being the only customer of importers of alcoholic beverages intended for retail sale on the Icelandic market, holds a dominant position on both the markets for sales and for purchase of alcoholic beverages in Iceland, and thereby in a substantial part of the territory covered by the EEA Agreement. The condition that trade between Contracting Parties may be affected is clearly fulfilled in the case at hand.
- 50 It therefore must be determined whether imposing the two contested requirements constitutes an abuse within the meaning of Article 54 EEA. In that respect, the Court recalls that a Member State violates Article 54 EEA if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking, enjoying exclusive rights within the meaning of Article 59(1) EEA, cannot avoid abusing its dominant position or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses (compare Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR 5889, paragraph 17).

- 51 Like the concept of restriction of competition, the notion of abuse of a dominant position under Article 54 EEA is a legal notion that must be examined in the light of economic considerations (see, with regard to Article 53 EEA, Cases E-8/00 *Landsorganisasjonen* [2002] EFTA Court Report 114, paragraph 77, and E-7/01 *Hegelstad* [2002] EFTA Court Report 310, paragraph 27).
- 52 The list provided in Article 54(a)-(d) EEA is non-exhaustive and provides mere indications of what may constitute abusive behaviour. In any case, an assessment under Article 54 EEA requires a comprehensive approach taking into account all the circumstances prevailing on a given market. In a situation such as the one at hand, where the dominant undertaking, which has been accused of an abuse of buying power, holds a statutory monopoly, the effects on competition in upstream markets, i.e. on suppliers, as well as in downstream markets, i.e. on consumers, will have to be taken into account.
- 53 As regards the Plaintiff's claim that the requirement for suppliers to deliver their products on EUR pallets constitutes tying as prohibited under Article 54(d) EEA, the national court will have to take account of the fact that such behaviour may be dictated by standardization requirements. Such requirements typically contribute to improvements in the storing and handling of incoming and outgoing merchandise to the benefit ultimately also of the consumers and therefore create efficiencies that may outweigh restrictions of competition in the upstream market. Under those circumstances, the requirement would not negatively affect competition and would not constitute tying as prohibited under Article 54(d) EEA. Whether this is in fact the case, must be established by the national court.
- 54 As to the requirement to include the price of the pallets in the price of the goods, the Court notes that, as a matter of principle, the application of Article 54(a) EEA to the setting of prices involves complex economic assessments. Unfair prices, for the purposes of Article 54(a) EEA, are prices which have no reasonable relation to the economic value of the goods or services supplied and eventually lead to an exploitation of suppliers or consumers. The Plaintiff has not argued in the case at hand that the price offered and paid by ÁTVR is exploitative. Rather, a price surcharge that consists in a mere reimbursement of costs incurred will not normally qualify as imposing unfair purchase prices under Article 54(a) EEA. The Court cannot see that the rule requiring the pallet price to be included in the product price, and not listed as a separate invoice item, could in itself violate Article 54 EEA. Again, it is for the national court to establish any anti-competitive effects of the requirement in question and to examine whether such effects may be outweighed by increased efficiency.
- 55 Based on the foregoing considerations, the Court holds that Articles 59(1) and 54 of the Agreement on the European Economic Area, do not prevent a State enterprise, which holds exclusive right to the retail sale of alcoholic beverages, from requiring that its suppliers deliver to the enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet), and that the price of the pallet be included in the product price, unless the national court finds that such requirements negatively affect competition.

#### **IV Costs**

56 It follows from Article 97(5) of the Rules of Procedure that it shall be for the national court to decide as to the costs of the reference for the parties to the main proceedings. The costs incurred by ESA and the Commission which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Héraðsdómur Reykjavíkur, hereby gives the following Advisory Opinion:

- 1. Article 16 of the Agreement on the European Economic Area does not prevent a State enterprise, which holds the exclusive right to the retail sale of alcoholic beverages, from demanding that its suppliers deliver to the enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet), and furthermore that the price of the pallet be included in the product price, unless the national court finds, based on the facts before it, that as part of the policy of the monopoly or of its outlets or as a consequence of failure to enforce the monopoly's rules, importers are in fact treated differently from domestic producers.**
  
- 2. Articles 59(1) and 54 of the Agreement on the European Economic Area do not prohibit a State enterprise, which holds the exclusive right to the retail sale of alcoholic beverages, from requiring that its suppliers deliver to the enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet), and that the price of the pallet be included in the product price, unless the national court finds that such requirements negatively affect competition.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 17 January 2006.

Henning Harborg  
Registrar

Carl Baudenbacher  
President