REPORT FOR THE HEARING
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 the State Alcohol and Tobacco Company of Iceland

concerning rules on free movement of goods and competition within the EEA.

I Introduction

1. By a decision dated 4 May 2005, subsequently amended by a decision by the Supreme Court dated 7 June 2005, registered at the Court on the 17 June 2005, Héraðsdómur Reykjavíkur made a request for an advisory opinion in a case pending before it between HOB-vín (hereinafter the "Plaintiff") and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland, hereinafter "the ÁTVR") and the State of Iceland (hereinafter, jointly, the "Defendants").

II Facts and procedure

2. The case concerns a dispute regarding a requirement of ÁTVR to the effect that all suppliers should deliver alcoholic beverages for sale at the company's retail outlets on so-called EUR pallets and that the cost of these pallets should be included in the price of the goods.

3. The Plaintiff is an importer of alcoholic beverages, intended for retail sale, from EEA Contracting Parties. The Defendant, the ÁTVR, handles the import and purchase of ethyl alcohol, alcoholic beverages and tobacco, the distribution of these products and has the exclusive right to retail sale of alcoholic beverages. The ÁTVR, which operates under the supervision of the Icelandic Minister of Finance, is therefore the only customer of importers of alcoholic beverages intended for retail sale on the Icelandic market.

4. On 9 December 2004, the Plaintiff brought an action challenging the requirement by the ÁTVR, at Héraðsdómur Reykjavíkur. In the case before the national court it is not contested that the contracts concluded between the Plaintiff and the ÁTVR refer to 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"), including Section 4.9.

5. Héraðsdómur Reykjavíkur is of the opinion that an interpretation of the EEA rules as to whether Rules No 351/2004 constitute measures comparable to quantitative restrictions within the meaning of Articles 11, 16, 54(a) and 59 EEA would be of real significance to the Plaintiff's demand that ÁTVR's requirement be rescinded and thereby the outcome of the case.

III Questions

6. The following questions were referred to the Court:

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 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?

IV Legal background

National law

7. As described in the request, the wholesale and retail sale 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 amended, and by the Alcoholic Beverages Act No 75/1998 (*Áfengislög nr. 75/1998*, hereinafter the "Alcohol Act") as amended.

8. Importation of alcoholic beverages is regulated in Chapter III of the Alcohol Act, providing that importation 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 the

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 the ÁTVR exclusive right to the retail sale of alcoholic beverages in Iceland. Article 2 of the Alcohol and Tobacco Trading Act states that the ÁTVR shall treat all suppliers of alcoholic beverages and tobacco equally.

9. According to Article 14 of the Alcohol and Tobacco Trading Act, the Minister of Finance may provide greater detail for the enforcement of the Act by way of a regulation. Based on this authorisation, Regulation No 369/2003 on the State Alcohol and Tobacco Company (*reglugerð nr. 369/2003 um Áfengis- og tóbaksverslun ríkisins*, "the Regulation") was adopted. Chapter III of the Regulation concerns the purchase and sale of alcoholic beverages, including rules on how the selection of these beverages for provisional and long-term sale in retail outlets is to be undertaken. Article 10 of the Regulation provides for the board of the State Alcohol and Tobacco Company to set special rules for the selection of products for sale in retail outlets, which are to be approved by the Minister of Finance and published in the Icelandic Law and Ministerial Gazette.

10. Based on this authorisation, the Board passed Rules No 351/2004 ("the Rules"). The Rule state that the price to suppliers shall be determined by their contracts with the ÁTVR. The fourth section of the Rule contains various provisions concerning more detailed trade terms with suppliers. Section 4.9 of the Rules 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 value 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.*

EEA law

11. Article 8 EEA reads in paragraph 3:

> *3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*
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> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
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> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

12. Article 11 EEA reads:

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

13. 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.

14. 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.

15. 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.

16. 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.*
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> *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.*
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> *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.*

V Written Observations

17. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- 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.

The Plaintiff

18. The Plaintiff argues that the conditions under which it must deliver its products to the ÁTVR are to be defined as “rules that lay down requirements to be met by goods” or “product related” as opposed to “selling arrangements” within the meaning of the judgment of the Court of Justice of the European

Communities in *Keck and Mithouard*.[1] The requirements of the ÁTVR concern the way the products are delivered, which is the same as or at least closely related to the packaging of the products. Furthermore, in the "post *Keck*" case law, when there is doubt as to whether a measure is "product related" or relates to a "selling arrangement", the Court of Justice of the European Communities is inclined towards the former. As a consequence, the requirements set by the ÁTVR when purchasing alcoholic beverages from the Plaintiff fall within the scope of Article 11 EEA without there being a need to consider whether the requirements are also discriminatory. These measures are equivalent to quantitative restrictions within the meaning of the case law of the Court and the Court of Justice of the European Communities.

19. Even if the Court should come to the conclusion that the requirements are not "product related", they are still discriminatory. The requirement to have to sell alcoholic beverages along with EUR pallets is obviously 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 market.

20. Furthermore, the Plaintiff claims that it has witnessed discriminatory behaviour by the ÁTVR in yet another way. It has seen, and was told, that Icelandic beer produced in Akureyri was delivered to the ÁTVR outlet in Akureyri on EUR pallets. The delivering lorry then retrieved as many pallets as had been delivered. This means that the Icelandic producer did not have to include the price of the pallets in the price of the beer.

21. Article 13 EEA is not applicable in this case.

22. As concerns Article 16 EEA, the Plaintiff considers that what has been presented concerning Article 11 EEA is applicable *mutatis mutandis* to Article 16 EEA. Therefore, the requirements of the ÁTVR are also in breach of Article 16 EEA.

23. As regards the second question, the Plaintiff argues that Article 59 EEA should be read together with Article 54 EEA. The Plaintiff further suggests that the arguments set forth regarding the first question show that the requirements set by the ÁTVR, when purchasing alcoholic beverages from the Plaintiff, constitute unfair purchase pricing and unfair trading conditions within the meaning of Article 54 (a) EEA.

24. The Plaintiff suggests answering the questions as follows:

> *(1) 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 the*

[1] Case C-267/91, *Keck and Mithouard* [1993] ECR I-6097, para 15.

enterprise alcoholic beverages for retail sale on a specific type of pallet (EUR pallet) and also that the price of the pallet be included in the product price.

(2) Article 59 in conjunction with Article 54 (a) prevents a state enterprise that 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 that the price of the pallet be included in the product price.

The Defendants

25. As regards the facts of the case, the Defendants submit that Section 4.9 of the Rule is applied without discrimination to all suppliers. Therefore, the Plaintiff's arguments are based upon a factually incorrect presumption.

26. The requirement in Section 4.9 of the Rule that a product shall be delivered on EUR pallets is of a practical nature. The product must be on a pallet because of its storage in the warehouse and transfer in and out of the warehouse. The storage and handling of alcoholic beverages in the ÁTVR's warehouse has become highly organised and mechanised with a very advanced computerised booking system, where all employees carry a terminal which enables them to register all the merchandise as it is received and dispatched. Forklifts pick up the products directly from inside the transport trucks and place them on storage shelves, often at considerable height, where they are stored until handled further. By combining both high capacity and minimum damage frequency, losses have been brought to a minimum of only around 0.035%. Thereby, Section 4.9 of the Rule is in accordance with the technical demands for European warehouses today. The ÁTVR's warehouse was designed specifically with EUR pallets in mind.

27. The Defendants further deny that foreign suppliers must buy new pallets. The supplier imports the product and agrees with the producer on how the product leaves the producer (e.g. regarding packaging and pallets). The ÁTVR has no part in that arrangement, which is directly between the importer and the producer. The great majority of alcoholic products from abroad are transferred to the ÁTVR's warehouse on the pallets they were on when they were imported from abroad. The pallets are therefore in most cases from the producer. According to a survey carried out in 2004, 5% of the pallets from foreign producers and 28% of the domestic producers' pallets are new. No pallets having the same technical specifications as EUR pallets will be denied access to the warehouse if they are 120 x 80 cm in size and can accommodate the product being transported. On the other hand, EUR pallets of the size 60 x 80 cm (so called ½ EUR pallets) are rejected, because they do not fit in the ÁTVR's warehouse.

28. In the case of small deliveries, where the product quantity amounts to less than one layer on a pallet, the ÁTVR does not require the product to be delivered on a separate pallet. In this case the ÁTVR supplies the supplier with a pallet free of charge.

29. Furthermore, the Defendants argue that the inclusion of the pallet price in the product price is dictated by practical reasons and experience. It is simple in practice and reduces working hours to the benefit of consumers. 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, making it necessary to keep track of who is the owner of every single pallet. If the pallets were to be returned to the supplier it 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.

30. As to the law, the Defendants argue that the provision in Section 4.9 of the Rule is in complete accordance with the provisions of the EEA Agreement. The Rule has a satisfactory legal basis in Act No 63/1969 on Trade in Alcohol and Tobacco, Article 2 of which states that all suppliers of alcoholic beverages shall be treated equally. This fundamental principle is the guiding light behind the provisions in the Rule. The provisions apply equally to all suppliers of alcoholic beverages - both domestic and foreign - regardless of whether a domestic or foreign product is involved.

31. With regard to Articles 11 and 16 EEA, the Defendants maintain that only Article 16 EEA is applicable in this case. It follows from both the case law of the Court and the Court of Justice of the European Communities that rules relating to the existence and operation of a monopoly must be examined with reference to Article 16 EEA (or Article 31 EC respectively). Article 16 EEA is *lex specialis* in relation to other Articles of the EEA Agreement,[2] and is specifically applicable to the exercise by a domestic commercial monopoly of its exclusive right. On the other hand, provisions of domestic legislation, having an effect on intra-EEA trade, separable from the operation of the monopoly, should be examined under Article 11 EEA.[3] The requirement of the ÁTVR regarding the deliveries relates directly to the monopoly and as such falls under Article 16 EEA.

32. Article 16 EEA requires that a State monopoly be organised in such a way that discrimination between nationals of Member States is precluded.[4] The

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2 Case E-1/97 *Gundersen* [1997] EFTA Court Report 110, para 10 and Case 91/78 *Hansen GmbH & Co.* v *Hauptzollamt Flensburg* [1979] ECR 935.

3 Case E-1/97 *Gundersen*, para 17 and Case C-189/95 *Franzén* [1997] ECR-I 5909, paras 35 and 36.

4 Cases E-1/97 *Gundersen*, para 21, E-1/94 *Restamark* [1994-95] EFTA Court Report 17, para 63 et seq.; E-6/96 *Wilhelmsen* [1997] EFTA Court Report 56, para 96 and 97 and C-189/95 *Franzén*, para 40.

Defendants contend that the requirement by the ÁTVR that all its suppliers are to deliver on a pallet to its premises alcoholic beverages for retail sale that exceed a certain quantity, and that the price of the pallet shall be included in the product price, does not constitute discrimination between the nationals of the Member States as regards conditions of supply and sale.

33. Should the Court, however, find that Article 11 EEA is applicable, the Defendants submit that the Rule does not violate that provision, since it does not discriminate between domestic or foreign suppliers, or domestic or foreign producers. Neither does the Rule provide for trade barriers, nor is it irrelevant or unfair in any way.[5] Moreover, the Rule contains provisions that must be regarded as selling arrangements falling outside the scope of Article 11 EEA.[6] In any case, restrictions are justifiable under Article 13 EEA and mandatory requirements of general interest, because they are essential in goods transportation and trade, and do not surpass what is necessary with a view to the proportionality principle.

34. As regards the second question, the Defendants allege that Article 16 EEA is *lex specialis* regarding prohibition of discrimination by State monopolies.[7] Furthermore, the applicability of the competition rules of the EEA Agreement requires an assessment of the relevant factual, economic and legal circumstances prevailing in the particular case which is for the national court to conduct. Given the absence of such an assessment, the Defendants find it impossible to discuss the compatibility of these measures with Articles 53 to 63 EEA.

The EFTA Surveillance Authority

35. With regard to the first question,[8] the EFTA Surveillance Authority (hereinafter "ESA") considers Article 16 EEA on State monopolies *lex specialis* to Articles 11 and 13 EEA.[9] It is concluded that a provision in national law that is to be considered under Article 16 EEA is not subject to Articles 11 and 13 EEA. The requirement of delivering goods on a specific type of pallet set by the

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5 Joined Cases 51 to 54/71, *International Fruit Company* [1971] ECR 1107; Cases 8/74 *Dassonville* [1974] ECR 837; 249/81 *Commission* v *Ireland* [1982] ECR 4005; 2/82 *Apple and Pear Development Council* [1983] ECR 4083; 113/80 *Commission* v *Ireland* [1981] ECR 1625; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, paras 16-17.

6 Cases 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8; 69/88 *Krantz* [1990] ECR I-583; C-391/92 *Commission* v *Greece* [1995] ECR I-1621; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP* v *Comune di Bassano del Grappa and others* [1995] ECR I-3257; C-44/98 *BASF* [1999] ECR I-6269.

7 Case E-1/97 *Gundersen*, para 10.

8 It follows from Case E-4/01 *Karl K. Karlsson* [2002] EFTA Court Report 240 that the Icelandic alcohol and tobacco monopoly is a State monopoly of a commercial character subject to Article 16 EEA.

9 AG *Léger* in Case C-438/02 *Hanner*, Opinion of 25 May 2004, not yet reported, para 25, Case 120/78 *Rewe*, para 7, Case 119/78 *Peureux II* [1979] ECR 975, para 27, and Case C-387/93 *Banchero* [1995] ECR I-4663, para 26. As regards the relationship with the rules on State Aid; Case 91/78 *Hansen* [1979] ECR 935, para 10; Case E-1/94 *Restamark*; Case E-9/00 *EFTA Surveillance Authority* v *Norway* [2002] EFTA Court Report 72; Case E-4/01 *Karl K. Karlsson*.

monopoly towards it suppliers is a measure relating to the existence and operation of the monopoly.[10] That requirement should, consequently, be examined under Article 16 EEA.

36. ESA further submits that Article 16 EEA does not, unlike the provisions on the free movement of goods, cover non-discriminatory measures that are liable to hinder trade between Member States. In the case at hand, there appears to be no discrimination between domestic and foreign products.[11] It follows from Article 2 of the Alcohol and Tobacco Trading Act that the ÁTVR shall treat all its suppliers of alcoholic beverages equally and the pallet requirement in question applies to all suppliers and all products, regardless of whether the products delivered are produced in Iceland or imported. Moreover, even if it is 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. The required quality for pallets used for domestic products might correspondingly be lower than the quality required for pallets carrying imported products. Taking the geographical position of Iceland into consideration, this aspect is one of several which may make transportation costs higher for importers than for suppliers of domestic products. This is not discriminatory in itself.[12] Unless additional evidence proving otherwise is available before the national court, there can be no breach of Article 16 EEA.

37. As to the second question, ESA considers the general conditions for applying Article 59 EEA fulfilled in the present case. First, the ÁTVR is a public undertaking to which Iceland has granted exclusive rights. Second, Section 4.9 of the Rule, adopted by the ÁTVR, qualifies as measures taken by the State in connection with the monopoly, bearing in mind that, according to requirements in Article 10 of Regulation No 369/2003 on the State Alcohol and Tobacco Company, they must be approved by the Minister of Finance. There is thus a causal link between the State's legislative or administrative intervention and possible abuse by the undertaking.[13] However, taking the case law from the Court of Justice of the European Communities, on the relation between Article 31 EC and 86 EC (the provision mirroring Articles 16 and 59 EEA respectively), into account, it is not necessary to examine a measure by a State monopoly under Article 59 EEA when the measure already has been examined under Article 16

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[10] Case C-189/95 *Franzén*.

[11] Cases C-189/95 *Franzén*, para 39 et seq.; C-438/02 *Hanner,* paras 35 et seq.; E-4/01 *Karl K. Karlsson,* para 20; 13/70 *Cinzano* [1970] ECR 1096, para 9; and 45/75 *Rewe* [1976] ECR 197 para 27.

[12] Case C-189/95 *Franzén*, para 49.

[13] Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783, para 43. ÁTVR should in any case be considered as an undertaking within the meaning of Article 54 EEA. See AG *Jacobs* in Case C-67/96 *Albany International BV* [1999] ECR I-5751, para 338.

EEA.[14] Therefore, since it has been established that there is no breach of Article 16 EEA, it is not necessary to consider a possible justification under Article 59(2) EEA.

38. ESA is of the opinion that only Article 54 EEA, and not Article 53 EEA, can be considered relevant. The disputed trade term is adopted by the ÁTVR itself. It does not follow from an agreement, decision or concerted practice with other undertakings. Hence, the disputed provision is based on the unilateral action of the ÁTVR. Therefore the relevant question is whether the Icelandic State infringes Article 59(1) EEA in conjunction with Article 54 EEA, by approving the trade terms of the ÁTVR, because a situation is created in which the ÁTVR cannot avoid abusing its dominant position.[15]

39. ESA argues, however, that the requirement of the ÁTVR that supplies should be delivered on EUR pallets and that the costs of pallets has to be included in the product price, does not constitute an abuse of a dominant position by the monopoly.[16] Article 54 EEA non-exhaustively lists examples of what could constitute abusive behaviour.[17] The disputed trade terms do not induce the ÁTVR to act abusively towards its suppliers by discriminating among different trading parties,[18] nor do the trade terms qualify as a tying agreement.[19] The use of standardised pallets appears connected to the subject of the contracts as it ensures efficient and safe handling and storage of the products supplied to the ÁTVR. As to the question of whether the ÁTVR is applying the trade terms in order to enrich itself by allowing the suppliers to include the cost of the pallets in the price of the products they offer to the ÁTVR, Article 54 EEA alone would be the relevant legal basis for assessing whether such a practice constitutes abuse, as such abuse would not follow directly from the public rule a such. This part, therefore, falls outside the scope of the question regarding Article 59 EEA.

40. Finally, ESA stresses that a proper analysis of the circumstances of the case under Article 54 EEA requires a thorough understanding of the factual circumstances underlying the relevant market.[20] The limited information

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14 Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD), acting for Sydhavnens Sten & Grus ApS* [2000] ECR I-3743, para 31.

15 Cases C-387/93 *Banchero*, para 51; C-179/90 *Porto di Genova* [1991] ECR I-5889, para 17; C-323/93 *La Crespelle* [1994] ECR I-5077, para 18; C-242/95 *GT-Link A/S* [1997] ECR I-4449, para 33; C-203/96 *Chemische Afvalstoffen Dusseldorp BV* [1998] ECR I-4075, para 61; C-340/99 *TNT Traco* [2001] ECR I-4109, para 44; and C-462/99 *Connect Austria* [2003] ECR I-5197, para 80.

16 Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, para 91.

17 Cases 6/72 *Continental Can* [1973] ECR 215, para 26, C-395/96 P *Compagnie Belge Transports SA* [2000] ECR I-1365, para 112.

18 Case T-139/98 *Amministratzione Autonoma dei Monopoli de Stato* [2001] ECR II-3413, paras 51-54.

19 Case C-333/94 P *Tetra Pak International* [1996] ECR I-5951.

20 Cases C-266/96 *Corsica Ferries France* [1998] ECR I-3949, para 21-28, C-72/03 *Carbonati Apuani Srl*, judgment of 9 September 2004, paras 9-14; C-134/03 *Viacom Outdoor*, judgment of

available in the request does not indicate that the ÁTVR, by applying Section 4.9 of the Rule, is predisposed to abuse its dominant position.

41. ESA suggests answering the questions as follows:

(1) Article 16 of the Agreement on the European Economic Area does not prevent a state enterprise that holds exclusive right to the retail sale of alcoholic beverages from demanding that its suppliers deliver alcoholic beverages for retail sale to it on a specific type of pallet (EUR pallet) and that the price of the pallet be included in the product price. Such requirements would be excluded only where it puts at a disadvantage, in law or in fact, trade in goods from other EEA States as compared with trade in domestic goods.

(2) Article 59 of the Agreement on the European Economic Area read in conjunction with Article 54 thereof, 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 that the price of the pallet be included in the product price.

The Commission of the European Communities

42. In examining the first question, the Commission of the European Communities (hereinafter, the "Commission") first submits that there is no doubt that the ÁTVR is a State monopoly of a commercial nature within the ambit of Article 16 EEA.[21] Furthermore, the case law shows that Article 16 EEA is a specific rule in relation to the general provisions on the free movement of goods contained in Articles 11 and 13 EEA. Therefore, the contested requirement is to be scrutinised under Article 16 EEA alone.[22]

43. In the case law, those national provisions which are to be examined under Article 16 EEA (Article 31 EC) are distinguished from those which are to be examined under Articles 11 and 13 EEA (Articles 28 and 30 EC). The cases *Restamark*[23] and *Franzén*[24] provide guidance on how to draw a distinction between different provisions concerning State monopolies.[25] The Commission submits that the terms and conditions on which the ÁTVR purchases alcoholic

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17 February 2005; and Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito* [2004] ECR I-1605, paras 7-13.

21 Case E-4/01 *Karl K. Karlsson*, para 23.

22 Case C-387/93 *Banchero*, para 26.

23 Case E-1/94 *Restamark*.

24 Case C-189/95 *Franzén*.

25 Cases C-189/95 *Franzen*, paras 35-77; E-4/01 *Karlsson;* and E-9/00 *EFTA Surveillance Authority v Norway*.

beverages relate to the operation of the monopoly even if they do not relate to its existence. It is difficult to draw a meaningful distinction 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. The Commission therefore proposes that the contested requirement to sell to the ÁTVR on standardised pallets is a rule concerning the suppliers with whom the monopolist will trade. Consequently, discrimination requires a difference in treatment of suppliers of domestic products and suppliers of products from other EEA States.[26] The Court of Justice of the European Communities has found no discrimination within the meaning of Article 31 EC when the imported product is subject to the same conditions as the domestic product by the monopoly.[27] In the present case, it is clear from the request that the pallet requirement applies to all suppliers and all products, regardless of whether the products delivered are produced in Iceland or imported. The request also states that Article 2 of the Alcohol and Tobacco Trading Act provides that the ÁTVR shall treat all its suppliers of alcoholic beverages equally. Consequently, there appears to be no discrimination or differentiation between domestic and foreign products.

44. The Commission points out that there is also no evidence provided to support a claim that the pallet requirement means disadvantages for foreign products on the grounds that it is easier for a supplier of domestically produced goods than for importers to acquire second-hand pallets at a lower price. Further, the Commission cannot see how the requirement that the cost 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 cost of the pallet to the ÁTVR but not as a separate item on the invoice. How the cost of the pallet is charged to the purchaser is immaterial, provided that the cost can be passed on to the purchaser in all circumstances, as would seem to be the case. Indeed, according to the request, the same obligation to include the value of the pallets in the product price applies to both domestic and foreign suppliers and to the supply of domestic and foreign beverages. Finally, there is no evidence that Icelandic suppliers or Icelandic producers of alcoholic beverages are less innovative than foreign ones when it comes to the introduction of new products, especially those that are only sold to the ÁTVR in smaller quantities. Consequently, the Commission cannot see how such a claim could lead to a finding that the requirement of shipment on standardized pallets could lead to an infringement of Article 16 EEA on that ground.[28]

45. In the alternative, should the Court find Article 11 EEA applicable, the Commission submits that the practical result is no different thereunder. Since the contested requirement relates directly to the terms and conditions on which the

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[26] Case C-438/02, *Hanner*, paras 34-35 and 38.

[27] Case 13/70 *Cinzano*, para 9, and Case 45/75 *Rewe*, para 27.

[28] Case C-189/95 *Franzen*, para 49

ÁTVR purchases goods from its suppliers, the requirement can be characterised as a "selling arrangement" as defined in the case *Keck and Mithouard*, and it is thus outside the scope of the prohibition contained in Article 11 EEA.[29] The mere fact that packaging on pallets is involved does not exclude the measure in question from being a selling arrangement, since it should lead to a change or alteration to be made to the imported products for it to fall outside the scope of the definition of a "selling arrangement".[30] Finally, the Commission submits that the contested requirement applies to all products purchased by the ÁTVR whatever their source.

46. As to the second question, the Commission recalls that the Court of Justice of the European Communities has found it unnecessary to examine a measure by a state monopoly under 86 EC when it already has been examined under Article 31 EC.[31] The issue of a possible justification under Article 59(2) EEA therefore does not arise.

47. For the sake of completeness, however, the Commission addresses the issue as to whether the contested requirement to use standardised pallets can be considered to be contrary to Article 59(1) EEA in conjunction with Articles 53 and 54 EEA. The Commission fails to see the pertinence for resolving this litigation under Article 53 EEA concerning agreements and concerted practices that restrict competition. The contested requirement seems to be a standard clause that the ÁTVR seeks to impose on all of its suppliers and the latter have little choice but to accept it. The matter should therefore be dealt with by considering whether the contested requirement constitutes abusive conduct imposed by the ÁTVR because of the monopsony which it enjoys.

48. Under the case law of the Court of Justice of the European Communities, a Member State is in breach of the EC Treaty if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights cannot avoid abusing its dominant position.[32] The Commission submits that there is no such abuse of a dominant position in this particular case and consequently, no breach of Article 59 EEA. The Court of Justice of the European Communities has consistently held that an abuse of a dominant position is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of

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[29] Joined Cases C-267/91 and 268/91 *Keck and Mithouard*.

[30] Case C-12/00 *Commission* v *Spain* [2003] ECR I-459, para 76.

[31] Case C-209/98 *Sydhavnens Sten & Grus*, para 31.

[32] Case C-462/99 *Connect Austria*, para 80.

competition still existing in the market or the growth of that competition.[33] However, 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 the ÁTVR. The Commission also fails to see evidence of any discrimination between trading partners in this case.[34] Nor can the Commission see, on the basis of the facts stated that the contested requirement leads to any advantage which accrues to the ÁTVR to the detriment of any of its suppliers. It appears that the cost of the standardised pallets is actually borne by the ÁTVR and not by the suppliers.

49. The Commission suggests answering the questions as follows:

(1) Article 16 of the Agreement on the European Economic Area does not preclude 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 it can be demonstrated that such requirements place trade in goods from other EEA States at a disadvantage, in law or in fact, as compared with trade in domestic goods.

(2) Article 59 of the Agreement on the European Economic Area does not prohibit 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 that the price of the pallet be included in the product price.

Carl Baudenbacher
Judge-Rapporteur

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33 Case 85/76 *Hoffmann-La Roche,* para 91.

34 Reference is made to Case C-82/01 *Aéroports de Paris* [2002] I-9297, para 60.