



REPORT FOR THE HEARING

in Case E-6/96

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo byrett (Oslo City Court) for an advisory opinion in the case pending before it between

Tore Wilhelmsen AS

and

Oslo kommune

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

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I. Introduction

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

II. Legal background

2. The questions submitted by the Norwegian court concern the interpretation of Article 11, 13 and 16 of the EEA Agreement (EEA).

3. Article 11 EEA , which mirrors Article 30 of the EC Treaty (EC) provides:

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

4. Article 13 of the EEA provides a derogation from Article 11 EEA under the same conditions as Article 36 EC:

"The provisions of Article 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".

5. Article 16 of the EEA corresponds to Art. 37 EC:

"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 produced and marketed will exist between nationals of EC Member States and EFTA States.

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".

III. Facts and Procedure

6. The case before the national court concerns the validity of the refusal of an application for a licence to sell beer containing more than 4.75 % alcohol by volume. The plaintiff applied to the municipality of Oslo (Oslo kommune) for a licence to sell beer covered by Section 3-1. paragraph 1 of the Norwegian Alcohol Act. In June 1995, Oslo kommune, acting in its capacity as the licencing authority under the Alcohol Act, decided not to handle the application on the basis that only AS Vinmonopolet's retail outlets could sell strong beer.

7. The Norwegian Act No. 27 of 2 June 1989 on the sale of Alcoholic Beverages as amended at the relevant time, provides in section 3-1:

"Sale of spirits, wine and beer containing more than 4.75 per cent alcohol by volume (strong beer) to the consumer may only be carried out by A/S Vinmonopolet on the basis of a municipal licence. If a licence has been granted to sell spirits and/or wine, such licence shall apply for beer as mentioned in this paragraph.

Subject to the exceptions of sections 6-3 and 6-4, beer other than beer as mentioned in the first paragraph may only be sold by persons entitled to trade under the Trading Act, on the basis of municipal licence. This shall also apply where such sale is to be carried out by a company that is wholly or partly owned by the municipality.

A licensee may not hold more than one licence.

A licence to sell spirits, wine and/or strong beer to A/S Vinmonopolet may only be granted provided a licence to sell beer containing less than 4.76 per cent alcohol by volume has been granted in the municipality".

8. The Norwegian Alcohol Act was amended, effective 1 March 1993, so that beer in category 3 was from then on to be sold only in the retail outlets of Vinmonopolet, but not in private stores. Vinmonopolet has 112 retail outlets in Norway at present.

9. Following a legislative amendment in 1995, there is no longer a monopoly on the import, export and wholesale trade of alcohol products. Vinmonopolet may not import on its own.

10. According to the description of the organisation of the sale of beer and other alcoholic beverages in Norway given by the *Norwegian Government*, Vinmonopolet, which is a wholly state-owned company, has an exclusive right on the retail sale of wine and spirits which contain more than 2.5 % alcohol by volume. Since 1 March 1993, the monopoly has also included beer containing more than 4.75 % alcohol by volume (strong beer).

11. It is expressly stated in the Alcohol Act that Vinmonopolet has an obligation not to discriminate between suppliers and products on the basis of nationality or country origin.

12. Reference is made to the Regulation of 30 November 1995, on Vinmonopolet's purchasing activity. Accordingly, products will be allocated to one of four ranges of Vinmonopolet: the basic range, the limited-consignment range, the supplementary range and the test range. In addition, the retail monopoly is required to order any product requested which can be obtained from a licensed wholesaler. The pricing system also ensures equal treatment. The various categories of beverages are priced according to the same criteria regardless of the origin of the products.

13. Reference is made to the Regulation establishing a board to test A/S Vinmonopolet's purchases.

14. According to *Wilhelmsen* the rules applied by Vinmonopolet do not give suppliers and manufacturers an unconditional market access. Manufacturers abroad may not deliver goods directly to Vinmonopolet. This follows from the fact that Vinmonopolet is not allowed to import the products itself. Furthermore, a foreign producer has to be represented in Norway by a company or a person with an import and wholesale licence in order for the products in question to be offered for sale to consumers through Vinmonopolet. The conditions for obtaining a wholesale licence are strict. Even if a foreign producer has a representative (importer) in Norway, it is difficult to obtain sales to Vinmonopolet. Correspondence between Egersunds Mineralvandfabrik AS and Vinmonopolet shows that Vinmonopolet did not respond to letters offering sale of Danish beer. When Vinmonopolet finally accepted "a registration for the test range" after 15 months, it was communicated that it would take another 27 months before any sale could take place.

15. Oslo byrett has based its decision to request an advisory opinion on the observation that the main issue in the case before the national court is whether the refusal to grant a licence to the plaintiff to sell beer containing more than 4.75 % alcohol by volume, is compatible with the EEA Agreement.

16. Oslo kommune has requested that the EFTA Court also give an opinion on questions 3 and 4 below.

IV. Question

17. The following questions were referred to the EFTA Court:

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

V. Written observations

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

- The plaintiff, Tore Wilhelmsen AS, represented by Advocate Bjørn Stordrange, Counsel, Smith Grette Wille DA MNA;
- The Government of the Kingdom of Norway, represented by Didrik Tønseth, Advocate, Attorney General's office, acting as an agent for the Norwegian Government;

- The Government of the Kingdom of Sweden, represented by Erik Brattgård, Director for Legal Affairs, Ministry for Foreign Affairs, acting as an agent for the Swedish Government;
- The EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, assisted by Rolf Helmich Pedersen, Officer of that Department, acting as an agent;
- The European Commission, represented by Richard B. Wainwright, Principal Legal Adviser, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as an agent.

Oslo kommune has stated that it does not wish to make any comments regarding the questions referred to the EFTA Court.

1. General observations

A. Scope of the EEA Agreement

19. According to the *Norwegian Government*, it follows from the wording and the position of Article 8 (3) EEA that this provision limits the substantive scope of the EEA Agreement in general. Products manufactured on the basis of agricultural products are not listed in the relevant chapter of the Harmonized Commodity Description and Coding System mentioned in Article 8 (3) EEA. Such products are excluded from the scope of the EEA Agreement unless otherwise provided therein.

20. Market access for products listed in Protocol 3 was to be achieved in accordance with the conditions listed in that protocol. For products listed in Table I the intention of the parties was to establish price compensation arrangements following the reasons given in Article 2 of Protocol 3. The price compensation system under Article 3 (1) of Protocol 3 has not been negotiated.

21. Furthermore, the general provision of Article 3 (2) of Protocol 3 on the abolition of customs duties or other fixed amounts on imported goods, unless otherwise provided for in Article 1 of Appendix 1, has not been put into effect by the Contracting Parties.

22. As a consequence of these circumstances the Contracting parties are still applying the price compensation system of Protocol 2 of the Free Trade Agreements or Annex D of the Stockholm Convention to the products listed in Table 1, insofar as these products are also covered by these two provisions.

Furthermore, since Appendix 1 of Protocol 3 is not in force, the Contracting Parties have not embarked on the foreseen reduction of customs duties provided for in that Appendix.

23. Reference is made to Article 44 of the Vienna Convention on the law of Treaties concerning the separability of treaty provisions. Neither the EEA Agreement nor the general provisions of its Protocol 3 provide for the partial application of Protocol 3 to certain products.

24. For the interpretation of the provisions relating to the free movement of goods under the Free Trade Agreements, the Government of Norway refers to ECJ's *Polydor*¹ and *Kupferberg*² judgments.

25. The conclusion for the Norwegian Government is that beer falls outside the scope of application of the EEA Agreement as long as Protocol 3 Table 1 does not apply. Therefore the Norwegian Government submits to decide the present case solely on this ground.

B. Article 59 of the EEA Agreement

26. Counsel for *Wilhelmsen* refers to Article 59 EEA, which corresponds to Article 90 EC, for the purpose of assessing the lawfulness of the retail monopoly. The exclusive right of Vinmonopolet brings it under the definition in Article 59 EEA. The exception clause of this provision has no application here.

27. Counsel for *Wilhelmsen* states that all measures taken by a member state, which entail that an undertaking will necessarily violate any of the provisions in the EC Treaty, are in violation of the Treaty. It is also forbidden for a member state to grant exclusive rights to an undertaking which is manifestly incapable of satisfying demand for a product or service.

28. Reference is made to ECJ's *Höfner*³ and *France v. Commission*⁴ rulings.

29. The needs of all those consumers who prefer brands other than those traded by Vinmonopolet, are not met by the monopoly. The fact that a system has

¹ Case C-270/80 *Polydor* [1982] ECR 329

² Case C-104/81 *Kupferberg* [1982] ECR 3641

³ Case C-41/90 *Höfner* [1991] ECR I-1979

⁴ Case C-202/88 *France V. Commission* [1991] ECR I-1223

been established that makes it possible for consumers to procure goods not traded by Vinmonopolet, does not change this fact.

30. In the opinion of *Wilhelmsen* it is obvious that the exclusive right entails that Vinmonopolet has a dominant position in the meaning which determined in Article 54 EEA .

31. In case *Banchero*⁵ the ECJ attaches importance to the fact that the different retail outlets which had been licensed by the Italian state monopoly for tobacco were easily accessible for consumers all over Italy. Vinmonopolet has only approximately 110 retail outlets and it is for the manager of each outlet to decide which products from the additional range shall be traded in the outlet. Vinmonopolet is not capable of handling and offering all those goods which different producers wish to sell in the Norwegian market. The requirement that a product has to be included in one of the ranges, entails that all non-included products are denied access to the market.

32. The exclusive right of Vinmonopolet enables it to use its dominant position to limit the market contrary to the interests of consumers. The exclusive right of Vinmonopolet to retail sales of beer in class 3 is so structured that parallel imports do not and will not take place. In addition to representing a restriction on trade between the Contracting Parties to the EEA Agreement, this is also a restriction on competition, because it obstacles the access to the market through a parallel channel for those goods imported by distributors of the foreign producers. An effective division of markets is upheld, which is characterised by the importers avoiding competition of the brands in which they trade. Neither an interbrand nor an intrabrand competition does take place. From these points of view the exclusive rights arrangement is contrary to Article 54 (2) lit. b EEA .

2. The first question referred to the Court

Tore Wilhelmsen A/S

33. Counsel for *Wilhelmsen*, reiterating the arguments of the Norwegian Government put forward in the written observation states that the Norwegian Government accepts article 16 EEA applying to Vinmonopolet. Vinmonopolet's practice in respect of not buying beers from foreign breweries represents a clear discrimination of foreign strong beers.

⁵ Case C-387/93 *Banchero* [1995] ECR I-4663

34. In Wilhelmsen's view it follows from the wording of Article 37 EC and with regard to considerations of consistency and harmony, that potential discrimination should be covered, too. It is contended that Article 16 EEA should be interpreted correspondingly.

35. In this connection it is of no relevance that Vinmonopolet may not on purpose impose these disadvantages on foreign strong beers in particular.

36. The alternative that the retail monopoly should not be found to be discriminating, it is contended that it is, in any event, potentially discriminating and that, therefore Article 16 EEA applies.

37. Reference is made to Advocate General's opinions in *Manghera*⁶ and *France v. Commission*⁷ cases.

38. There is no basis to draw from ECJ's *Commission v. Greece*⁸ ruling the conclusion that Article 36 EC can be invoked as a basis for an exception from Article 37 EC. In that respect, reference is also made to the Opinion of the Advocate General in this case⁹.

39. Wilhelmsen states *inter alia* that the avoidance of the ECJ of taking a position on the issue of whether Article 36 EC may form the basis for a derogation from Article 37 EC, should give reasons for the conclusion that there is no possibility to justify a discriminating retail monopoly on the basis of Article 36.

40. Counsel for Wilhelmsen refers to ECJ's *Bauhuis*¹⁰ and *Marimex*¹¹ rulings in which it was found that Article 36 EC could not be understood in such a way as to permit measures of any other nature than those listed in Article 30-34 EC.

41. Counsel for Wilhelmsen proposes that the first question should be answered as follows:

⁶ Opinion of Advocate General Warner in case C-59/75 *Manghera* [1976] ECR 107

⁷ Opinion of Advocate General Tesauo in case C-202/88 *France v. Commission* [1991] ECR I-1248

⁸ Case C-347/88 *Commission v. Greece* [1990] ECR I-4747

⁹ Opinion of Advocate General Tesauo in case C-347/88 *Commission v. Greece* [1990] ECR I-4775

¹⁰ Case C-46/76 *Bauhuis* [1977] ECR 5

¹¹ Case C-29/72 *Marimex* [1972] ECR 1309

"Article 16 of the EEA Agreement should be understood to entail an obligation for the Contracting Parties to adjust state monopolies of a commercial character so that no discrimination of nationals from the Contracting Parties can take place, in respect of the conditions for supply and marketing. When the exclusive right to retail sales of a product held by a state monopoly of a commercial character is so structured as to force goods produced in another Contracting Party to be distributed through an additional level of distribution as compared to the case for domestic products, this obligation has not been fulfilled. A system of exclusive retail distribution of beers in class 3 through the state-owned Vinmonopolet is contrary to Article 16 of the EEA Agreement. The EFTA Court needs not to take a standpoint on the question of whether the refusal of the application in question was justified"

The Government of the the Kingdom of Norway

42. In the Opinion of the *Norwegian Government* it follows from the wording of Article 16 EEA and also from the relevant case law of the ECJ related to Article 37 EC that state monopolies of a commercial character do not have to be abolished but simply adjusted so that no discrimination takes place.

43. The retail monopoly such as that of Vinmonopolet is designed in a way that no discrimination shall exist between imported and national products. The purchasing system ensures all economic operators access to the shops of the monopoly on equal and commercial terms.

44. The Norwegian Government proposes the following answer to the first question posed by the national court:

An exclusive right of a state monopoly to sell strong beer is compatible with Article 16 of the EEA Agreement, provided that its practices are non-discriminatory.

The Government of the Kingdom of Sweden

45. The *Swedish Government* refers to ECJ's *Manghera*¹² and *Commission v. Italy*¹³ rulings. According to these rulings the EC Treaty does not demand that the

¹² Case C-59/75 *Manghera* [1976] ECR 91

¹³ Case C-78/82 *Commission v. Italy* [1983] ECR 1955

state trade monopolies be abolished, only that they be adjusted in such a way that every type of discrimination of nationals of Member States regarding the conditions under which goods are procured and marketed be precluded.

46. If a retail trading monopoly is adjusted in such a way that it precludes discrimination of products from other Member States and sufficient measures are introduced to ensure the functioning and monitoring of the monopoly, the requirements applicable under Article 16 EEA are fulfilled.

47. Reference is also made to the facts and legal arguments put forward in the Case C-189/95 at the ECJ concerning the Swedish National Monopoly for retail Sale of Alcoholic Beverages (Systembolaget).

48. The Swedish Government propose that the first question referred by the Oslo byrett should be answered in the affirmative.

The EFTA Surveillance Authority

49. ESA refers to Article 16 EEA and states that AS Vinmonopolet is a State monopoly for the purpose of this provision.

50. It follows from the wording of Article 16 EEA and it is in line with ECJ's *Commission v. Italy*¹⁴ ruling that this provision does not require the abolition of a national monopoly having a commercial character. It only has to be adjusted in such a way as to ensure that no discrimination exists between national of the EEA States regarding the conditions under which goods are procured and marketed .

51. Reference is also made to ECJ's *Manghera*¹⁵ ruling. Following this ruling, ESA states that accordingly, Article 16 EEA is closely linked with the articles in the EEA Agreement concerning the free movement of goods.

52. In ESA's opinion an exclusive right of the kind concerned is not in itself contrary to Article 16 EEA. This provision would be infringed only if such an exclusive right were to be designed or exercised so as to imply discrimination between nationals of EEA States with regard to the conditions under which the products concerned are procured and marketed.

53. The Norwegian legislation concerning Vinmonopolet applies equally to domestic traders and traders of other EEA States. On the basis of the facts

¹⁴ See Footnote 13

¹⁵ See Footnote 12

presently available, there is nothing to show that products from other EEA States are affected any differently from Norwegian products.

54. ESA proposes to answer the first question as follows:

"Article 16 of the EEA Agreement is to be interpreted as not precluding national legislation which grants to an entity such as Vinmonopolet the exclusive right to sell beer containing more than 4.75 per cent alcohol by volume to consumers, provided that the legislation is not designed or applied so as to result in the discrimination of products from other EEA States".

The Commission of the European Communities

55. The *Commission* referring to ECJ's *Commission v. Italy*¹⁶ ruling, states that only exclusive rights of importation are inherently contrary to Article 37 EC. On the other hand, a retail sale monopoly, in the absence of any discrimination as to the procurement and marketing of goods, is not excluded by that provision.

56. Referring to the request of the national court it is the understanding of the Commission that the legislative amendment 1995 prohibits Vinmonopolet from discriminating between suppliers and products on the basis of nationality or country origin. It also seeks to ensure, to the greatest extent possible in the circumstances, that purchases made by Vinmonopolet should be subject to ordinary commercial terms and should be demand-led.

57. Accordingly, to the extent that Vinmonopolet is not permitted, in its procurement and marketing of strong beer to discriminate between suppliers and products on the basis of nationality and country of origin, and does not so in fact, then the retail monopoly for strong beer (underlying the refusal to grant the licence in question) is lacking in discrimination and was not excluded by Article 16 EEA .

58. The Commission also considers as worth noting a reference from a Swedish court currently before the ECJ concerning the compatibility of the Swedish retail monopoly on the sale of alcohol with Article 30 and 37 EC¹⁷.

59. The Commission proposes that the reply to the first question submitted by the national court should be as follows:

¹⁶ See Footnote 13

¹⁷ Case C-189/95 *Franzen* Pending case

"Article 16 of the EEA Agreement does not preclude national legislation, according to which the retail sale of beer containing more than 4.75 per cent alcohol by volume is reserved to a State monopoly, provided that in law and fact such an exclusive right does not give rise to discrimination between domestic products and products imported from other States party to the EEA Agreement".

3. The second question referred to the Court

Tore Wilhelmsen A/S

60. Counsel for *Wilhelmsen* makes reference to corresponding provisions of the EC Treaty¹⁸ and to the *Dassonville*¹⁹ ruling.

61. Following the ECJ's case law²⁰ *Wilhelmsen* states that there is no requirement that the measures in question should be of binding nature.

62. Furthermore, *Wilhelmsen* refers to ECJ's *Cassis de Dijon*²¹ ruling and a communication of EC Commission²² concerning the question whether non-discriminating measures could be regarded as "measures having an equivalent effect" and the issue of mandatory requirements.

63. Analysing several rulings²³ up to the *Keck* ruling, *Wilhelmsen* comes to the conclusion that non-discriminating measures, which apply equally to domestic and imported products, may nevertheless be liable to hinder or restrict trade between the parties. Such barriers can be justified if there are mandatory requirements.

64. Counsel for *Wilhelmsen* gives an exposition and analyse of the *Keck* ruling²⁴ and states in substance that the ruling does not entail a new practice as

¹⁸ Articles 30 and 36 of the EC Treaty

¹⁹ Case C-8/74 *Dassonville* [1974] ECR 83

²⁰ Cases C-249/81 *Commission v. Ireland* [1982] ECR 4005; C-42/82 *Commission v. France* [1983] ECR 1013; C-177 and 178/82 *Van de Haar* [1984] ECR 1797

²¹ Case C-120/78 *Cassis de Dijon* [1979] ECR 649

²² OJ 1980 No. C 256, 3

²³ Cases C-75/81 *Blesgen* [1982] ECR 1211; C-148/85 *Forest* [1986] ECR 3449; C-69/88 *Krantz* [1990] ECR I-583; C-23/89 *Quitlynn* [1990] ECR I-3059; C-286/81 *Oosthoek* [1982] ECR 4575; C-60 and 61/84 *Cinéthèque* [1985] ECR 2605; C-362/88 *GB-INNO* [1990] I-667; C-126/91 *Yves Rocher* [1993] ECR I-236; C-145/88 *Torfaen* [1989] ECR 3851; C-169/91 *Stoke-on-Trent* [1992] ECR I-6636

²⁴ Joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097

regards national provisions laying down requirements concerning the product as such.

65. In so far as provisions on forms of sale are concerned, a modification of the *Dassonville* principle is introduced. It is important not to lose sight of the conditions that the ECJ lays down for this presumption, *i.e.* that the provisions in question should apply to all traders (trading with products) and the condition that the provision should have an equal effect on the trade with imported and domestic products, *i.e.* that it should not discriminate with respect to the nationality of traders or the origin of the goods. In Wilhemsen's view, this interpretation is supported by ECJ's *Eurim-Pharm* ruling²⁵. Another characteristic feature of the *Keck* ruling is that focus is put on access to the market.

66. Showing the practice of the ECJ after the *Keck* judgment, counsel for Wilhemsen lists ECJ rulings concerning national provisions on the goods themselves²⁶ and rulings concerning national provisions on forms of sale²⁷. In Wilhemsen's opinion these rulings show that the *Keck* ruling establishes a new rule of presumption, but it does not exclude the possibility that national provisions on the forms of sale of goods may be measure with an equivalent effect in the sense of Article 30 EC, even if they are not discriminating. In the specific assessments, the effects on access to the market and the question of whether the national provision has special effect on foreign goods, has been decisive.

67. The following criteria established by the ECJ's *Peijper*²⁸ ruling still apply.

68. Wilhemsen contends that Vinmonopolet's exclusive right to retail sales of beer in class 3 is a national provision concerning the product itself, because specific legal consequences are connected to characteristics of the product.

69. The relation between beers with an alcohol content of up to 4,75 % and beers with an alcohol content above this level is clearly one of competition. The area of application of the products is the same, irrespective of whether the alcohol content is above or below the said limit. Most types of beer have the same area of application, being taken as a refreshing beverage or as a beverage used with food. The chosen limit is therefore arbitrary. It affects beers produced abroad to a special extent. The reason for this is that the dividing line established in Norway is unknown in other countries. Foreign breweries would have to adapt their

²⁵ Case C-320/93 *Eurim-Pharm* [1994] ECR I-5234

²⁶ Cases C-315/92 *Clinique* [1994] ECR I-317 ; C-293/93 *Houtwipper* [1994] ECR I-4249

²⁷ Cases C-292/92 *Hünermund* [1993] ECR I-6787 ; C-401 and 402/92 *Heukske* [1994] ECR I-2199; C-69/93 and 258/93 *Punto Casa* [1994] ECR I-2355; C-412/93 *Leclerc-Siplec* [1995] ECR I-179

²⁸ Case C-104/75 *De Peijper* [1976] ECR 613

production to this dividing line by brewing beer with a lower alcohol content than 4.76 % in order to be able to sell their beer with an alcohol content of say 4.8 %. These types of beer is clearly substitutable and competing with beers with an alcohol content lower than 4,76 %. As Norway must be considered by most foreign breweries as a relatively unimportant market, it would be uneconomical to adapt production in order to fall below the said limit.

70. A relatively significant part of foreign beer has a strength in alcohol which is above the Norwegian limit for strong beer.

71. The consequence of this is that a significantly larger proportion of the product range of foreign breweries has to be sold through Vinmonopolet instead of in groceries, as the case is with most Norwegian breweries' products. The established dividing line between beers in class 3 and others is therefore fully covered by the definition of measures having an equivalent effect given by ECJ's *Dassonville* ruling. The Norwegian rule restricts indirectly and actually the trade between the parties to the EEA Agreement.

72. Vinmonopolet may buy the product it sells - including strong beers - from Norwegian breweries and from companies or individuals that have a wholesale licence, but not from a foreign producer. This practice is discriminating. Foreign breweries have to sell those products which, on account of the retail monopoly, have to be retailed by Vinmonopolet, through an intermediary. Contrary to this, Norwegian breweries may sell directly to Vinmonopolet. Thus, foreign breweries are having forced upon them a cost increasing intermediary level in their distribution. In addition to the price increase entailed by this intermediary level, there is also the licence tax levied by the state on each litre sold at this level.

73. In Wilhelmsen's opinion, the discriminating practice which entails that foreign beers in class 3 having to go through an additional level of distribution, is connected to the product itself. Therefore, Wilhelmsen contends that this practice is an actual barrier to trade contrary to Article 11EEA.

74. Should the EFTA Court consider the said practice to be a question of a "provision on form of sale" in the sense that the practice refers to the way in which the products are distributed, Wilhelmsen contends that the actual requirement that imported beer in class 3 has to be sold through an extra intermediary level, is entirely parallel to the situation in ECJ's *Eurim-Pharm*²⁹ ruling being a discriminating system which is not covered by the rule of presumption expressed in the *Keck* judgement.

²⁹ See Footnote 25

75. Thus, it is sufficient in order to establish that it should be considered as a measure having equivalent effect in the sense of Article 11EEA, that the system can potentially limit imports. In the case of the retail monopoly, Wilhelmsen contends that the restriction on imports are actual and not just potential.

76. Should the EFTA Court find the system non-discriminatory, it is contended that it is restrictive of trade in any case. In this alternative it would fall under the presumption established in *Keck*. Reference is made to ECJ's *Commission v. Belgium*³⁰ ruling concerning a Belgian requirement of a government authorisation for the marketing of pesticides and phyto-pharmaceutical products.

77. The system makes it necessary for foreign producers to provide themselves with an importer holding licence or, alternatively, establish their own import business in Norway. Both alternatives entail extra costs, and especially the alternative of an establishment is out of the question for smaller foreign producers because of the investments required.

78. Furthermore, the Norwegian prohibition against advertising for alcohol strengthens the plaintiff's view that the distribution system itself is a measure with an effect equivalent to a restriction on imports.

79. The Norwegian prohibition of advertising differs from the facts in ECJ's *Leclerc-Siplec* ruling³¹. The prohibition on advertising in Norway is total.

80. Wilhelmsen contends that this has a special effect on the sales of foreign products because existing brands, specially those of domestic producers, are established and well known. The introduction of new types of beers or variants will therefore benefit from the brand name's position in the market.

81. The prohibition against advertising does not prevent Vinmonopolet from giving neutral product information in different publications targeted to the publicity. This very limited possibility of marketing is reserved for the products which Vinmonopolet has in its range.

82. Wilhelmsen holds the view that the national provisions on the alcohol content limit for strong beer, the retail monopoly, Vinmonopolet's purchasing practice and the prohibition against advertising for alcohol should be considered together as a "package of measures" against equal access to the market and against equal conditions of distribution for a considerable proportion of foreign beers.

³⁰ Case C-155/82 *Commission v. Belgium* [1983] ECR 531

³¹ Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179

83. Referring to ECJ's *Commission v. Greece*³² and *Banchero*³³ rulings Wilhelmsen states that these rulings can not be invoked to support an acceptance of the retail monopoly for beers in class 3, or for any other product under the exclusive right.

84. In Wilhelmsen's opinion the requirements that are in practice imposed in order for a foreign producer of beers in class 3 to get his product to the Norwegian consumers, hinders and discriminates specially small and medium - sized suppliers rather than the bigger companies. To establish an import company or to find a representative is especially prohibitive for smaller producers. The requirements that have to be fulfilled as regards turnover in order that the product is not cut out, will in practice exclude a large number of producers. Even if a producer has obtained the costs and made the necessary efforts required to a Norwegian importer, it is by no way certain that he will, through Vinmonopolet, reach the consumer market. The fact is that Vinmonopolet chooses itself among the products offered by importers and representatives. There exists no possibility of parallel imports of beers in class 3, so that the goods could in this way reach the consumers. As Vinmonopolet does not purchase directly from abroad, and as the Norwegian importer, if there is one, of the brand in question would not import in this way, and because other established Norwegian importers would never involve themselves in parallel imports of goods competing with the brands they are representing, there is no possibility of parallel imports penetrating the consumer market.

85. Under no circumstances would Vinmonopolet be capable of treating imported goods in an equal way.

86. As opposed to the facts in the *Banchero*³⁴ case, the outlets of Vinmonopolet are not easily accessible to consumers in the whole country. Due to the number of outlets in many areas of the country, there is often a long distance to the nearest retail monopoly shop.

87. After reiterating the arguments put forward by the Norwegian Government in order to justify the retail monopoly for health and social policies reasons, counsel for Wilhelmsen, regarding the discriminating practice requiring that all imported strong beers have to be sold through an intermediary, which is not the case concerning domestically produced beers, tests the invoked arguments against Article 13 EEA.

³² Case C-391/92 *Commission v. Hellenic Republic* [1995] ECR I-1621

³³ Case C-387/93 *Banchero* [1995] ECR I-4663

³⁴ See Footnote 33

88. For this reason, reference is made to ECJ's *Eurim-Pharm*³⁵, *Melkunie*³⁶, *Eyssen*³⁷ and *Peijper*³⁸ rulings.

89. In respect of the retail monopoly for beers in class 3 the question is whether the need for control can be attained by other measures. In this context it must be relevant to take into account that other countries are attaining this objective by exerting control on private operators in the chain of distribution, by means of licence or authorisation systems.

90. Wilhelmsen contends that it cannot be right that the need of control which is connected to the health argument has to be attained by having beers with an alcohol content of, say, 4.8 % sold through Vinmonopolet, whereas other types of control measures which may be combined with sales in groceries are sufficient if the beer has an alcohol content of 4.75 %. Thus, Wilhelmsen contends that the public health argument can not be invoked to justify the provisions establishing the retail monopoly.

91. In relation to the requirement that beer should have an alcohol content not exceeding 4.75 %, in order to be sold in groceries, Wilhelmsen's conclusion is that this provision is based on requirements concerning the goods themselves, and that, indirectly and actually, it restricts trade between Contracting Parties. The question as to whether the measure may nevertheless be justified and upheld, should therefore be answered on the basis of criteria that it must be necessary to satisfy mandatory requirements.

92. Concerning the question of mandatory requirements, counsel for Wilhelmsen tests, whether the measure in question or the actual provisions are proportionate. The Norwegian Government has chosen the measure of having beer with an alcohol content higher than an arbitrarily chosen limit sold through Vinmonopolet. This measure restricts trade between the parties to the EEA Agreement to an unnecessary degree. If the retail monopoly was found to be the only possible measure on account of its nature, then at least it ought to be used in such a way as to include all types of beer which are in reasonably strong and clear competition with one another.

93. Counsel for Wilhelmsen presents an alternative system of distribution to the state-owned outlets of Vinmonopolet which could also safeguard the same

³⁵ See Footnote 25

³⁶ Case C-97/83 *Melkunie* [1984] ECR 2367

³⁷ Case C-53/80 *Eyssen* [1981] ECR 409

³⁸ See footnote 28

consideration of health and control. The alternative should be a licensing system, whereby private shops are granted a permission by the authorities for the sale of beers in class 3. A corresponding system is in force today for beers in class 2.

94. In Wilhelmsen's opinion, Vinmonopolet operates like any other business. It is not more difficult to buy beer in an outlet of Vinmonopolet than in other privately owned shops in Norway. The employees of Vinmonopolet act in the same way as employees of private commercial undertakings. They do not act as controllers, health or social workers, or anything similar.

95. Counsel for Wilhelmsen suggests the following answer to the second question posed by the national court:

"Article 11 of the EEA Agreement should be understood to prevent national provisions referring beers with an alcohol content exceeding 4.75 per cent to being retailed to consumers in a limited number of outlets owned and operated by Vinmonopolet, whereas beers with a lower alcohol content can be retailed in groceries, when the offers of beers from producers in other Contracting Parties has a larger proportion of the total offer of beers with an alcohol content in excess of 4.75 per cent, than of beers with lower alcohol content. Such a provision is a measure with an effect equivalent to a quantitative restriction on imports.

No such mandatory requirements exist which could form the basis for an exception from the prohibition of such a provision under Article 11. Considerations relating to public health cannot be held to require that beers with an alcohol content exceeding 4.75 per cent must be retailed to consumers by others than those who are retailing beers with a lower alcohol content.

Article 11 of the EEA Agreement must also be understood to prevent a national provision whereby the holder of an exclusive right to retail sales cannot purchase goods produced in other Contracting Parties from the producer or from others, except if they are established in the import country and have an import and wholesale licence. Such a provision is a measure with an effect equivalent to a quantitative restriction on imports. It is also discriminating and thus contrary to Article 4 of the EEA Agreement. The provision is an arbitrary discrimination and thus it cannot be exempted under the rule in Article 13 from the prohibition in Article 11 of the EEA Agreement.

The system of retail distribution of beers in class 3 through Vinmonopolet is contrary to Article 11 of the EEA Agreement. The EFTA Court need not take a standpoint on the question of whether the refusal of the application in question was justified".

The Government of the the Kingdom of Norway

96. The *Norwegian Government* contends that Article 11 EEA is not applicable to a state retail monopoly for the sale of beer containing more than 4.75 % alcohol by volume.

97. Reference is made to ECJ's *Dassonville*³⁹, *Keck*⁴⁰, *Hünermund*⁴¹, *Leclerc-Siplec*⁴² and *Commission v. Hellenic Republic*⁴³ judgments.

98. Following the "*Keck jurisprudence*", national provisions restricting the sale of certain products, fall outside the scope of Article 30 EC, provided that they affect domestic products and those from other Member States in the same manner and provided that they apply to all traders operating within the national territory. Furthermore, in order to qualify as a selling arrangement, the national legislation must not relate to the characteristics of the products.

99. In the opinion of the Norwegian Government the exclusive right to the retail sale of strong beer should be considered a "selling arrangement".

100. The purpose of the retail monopoly for strong beer is to reduce the sale of stronger beer in favour of products containing less alcohol. This goal is in line with The European alcohol action plan of the regional Committee of World Health Organisation.

101. The Norwegian Government notes that the monopoly does not affect the sale of imported goods any more than domestic products. This fulfils the requirement set by the ECJ in *Banchemo*⁴⁴ case. As of 1 November 1996 Vinmonopolet's price list included 10 Norwegian labels of beer and seven foreign labels.

102. The limit of 4.75 % alcohol was initially set for tax purposes. Nevertheless, from an alcoholic policy point of view, beer stronger than 4.75 % is more likely be used for the purpose of intoxication than beer containing less alcohol. A study of

³⁹ See footnote 19

⁴⁰ See footnote 24

⁴¹ See footnote 27

⁴² See footnote 31

⁴³ See footnote 32

⁴⁴ See footnote 33

Brewers Association of Canada shows that in only one of 23 surveyed countries the average alcohol content was more than 5.1 % alcohol.

103. Furthermore, the Norwegian Government states that the restriction is justified under Article 13 EEA, if the EFTA Court were to consider the retail monopoly for strong beer as a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 11 EEA.

104. The Norwegian Government evaluates the effect of monopolisation based on experiences in Finland and Sweden.

105. Furthermore, the Norwegian Government refers to the study in "Alcohol Policy and the Public Good" published by Oxford University Press in association with WHO in Europe in 1994 from which follows that alcohol, including beer, is responsible for considerable problems, such as violence, crime and road accidents, and carries high social and health costs.

106. The ECJ has confirmed that combatting alcohol abuse constitutes a public health concern⁴⁵. Moreover it is generally accepted that there is a direct link between availability and the harmful effects caused by the consumption of alcohol beverages. This recognition has been acknowledged by the WHO in its strategic document "Health for All by the Year 2000". The aim of the WHO plan to reduce the consumption of alcohol is in conformity with the objectives introduced by Article 129 (1) EC. Although there is no similar provision in the EEA Agreement, the same general objective must also be considered to be part of the objective of the EEA Agreement.

107. Neither in the EU nor in the EEA is there a harmonisation of alcohol policy as such. In the absence of harmonisation, it is up to each EEA State to pursue an alcohol policy which takes sufficient account of health protection.

108. Under the EEA Agreement, states may restrict the free movement of goods when necessary and proportionate. This follows from Article 13 EEA with respect to public health, as well as from the jurisprudence of the ECJ as regards other public interest objectives.

109. The Norwegian Government contends that a state retail monopoly for strong beer such as that of Vinmonopolet will at any rate be justified under Article 13 EEA.

⁴⁵ Cases C-1/90 and C-176/90 *Aragonesa and Publivia* [1991] ECR I-4151

110. Concerning the second question posed by the national court, the Norwegian Government proposes the following answer:

"An exclusive right of a state monopoly to sell strong beer falls outside the scope of Article 11 of the EEA Agreement, provided that its practices are non-discriminatory and apply to all traders within the national territory".

The Government of the Kingdom of Sweden

111. Referring to ECJ's *Dassonville*⁴⁶, *Keck and Mithouard*⁴⁷, *Hünermund*⁴⁸, *Leclerc-Siplec*⁴⁹, *Commission v. Greece*⁵⁰ and *Banchero*⁵¹ judgments the *Swedish Government* states that a retail monopoly which applies in the same way to all suppliers and affects, both in legal and real terms, the marketing of domestic products and products from Member States in the same way must be judged to be a sales method which falls outside the scope of Article 30 EC.

112. From the facts given to the Swedish Government, it seems that the Norwegian retail monopoly is motivated by considerations of life and health. The purpose of the retail monopoly is not to regulate trade between Member States and the intention of the legislation is not to prevent or obstruct imported products from reaching the market to a greater extent than domestic products.

113. The Swedish Government emphasizes that there is no difference between a system where the exclusive right is given to a single monopolist and a system of several holders of an exclusive right.

114. If the EFTA Court were to find that Article 11 EEA is applicable and that the system could not be approved owing to such mandatory which results from the ECJ's case law, the Government of Sweden considers that legislation concerning retail trading monopolies regarding alcohol beverages is nevertheless permitted under the special provisions contained in Article 13 EEA concerning the protection of human health and life.

⁴⁶ See footnote 19

⁴⁷ See footnote 24

⁴⁸ See footnote 27

⁴⁹ See footnote 31

⁵⁰ See footnote 32

⁵¹ See footnote 33

115. The Swedish Government proposes to answer the second question referred by the national court in the affirmative.

The EFTA Surveillance Authority

116. ESA makes references to EFTA-Court's *Restamark*⁵² ruling and ECJ's *Dassonville*⁵³, *Cassis de Dijon*⁵⁴, *Keck and Mithouard*⁵⁵, *Commission v. Greece*⁵⁶ and *Banchero*⁵⁷ rulings and submits that the case at hand calls for similar considerations to be made.

117. The principles laid down in *Keck and Mithouard*, and the subsequent case law on the matter, should in ESA's view also be relevant in the EEA context.

118. The present case is different from the cases referred to in so far as all retail outlets are owned by one single entity, Vinmonopolet. In ESA's view this fact alone should not distinguish this case from cases such as *Commission v. Greece* and *Banchero* in a decisive manner. The criteria established by the ECJ in these cases do not relate to the formal structure of the sales arrangements concerned, but to their effects with regard to market access and equal treatment of foreign and domestic producers and products. The ownership structure at the retail level is but one element to be taken into account.

119. While recognizing that it will be for the national court ultimately to establish the relevant facts, ESA notes that the exclusive right concerned is not designed to regulate trade between EEA states. Moreover, the exercise of this right does not imply any requirements to be met by the products concerned, whether related to designation, form, presentation, labelling or packaging. In view of this, the retail monopoly would in the Authority's view fall outside the scope of Article 11 EEA., if applicable to all affected traders on the Norwegian market and if affecting in the same manner, in law and in fact, the marketing of domestic products and those from other EEA States.

120. The restriction on sale imposed by retail monopoly applies equally to domestic traders and traders from other EEA States operating in the market, since all traders have to sell their products through Vinmonopolet.

⁵² Case E-1/94 *Restamark* [1994] EFTA Court Report 15

⁵³ See footnote 19

⁵⁴ See footnote 21

⁵⁵ See footnote 24

⁵⁶ See footnote 32

⁵⁷ See footnote 33

121. On the basis of the information received by the Authority in this case, there is nothing to suggest that the relevant Norwegian legislation would not apply without any formal distinction as to the origin of the products concerned. As a matter of law, products of other EEA States would appear to be affected in the same manner as domestic products.

122. As regards possible discriminatory effects in fact there is neither further information in the reference of the national court nor is there any other information in the case to suggest that the practical application of the legislation concerned would jeopardise a satisfactory supply to consumers or affect products originating in another EEA States any differently from Norwegian products.

123. For the national court, the key issues to be considered will be the way in which traders may have their products to be put on sale in its retail outlets, as well as rules and practices with regard to the pricing of products and information to the public on products available on the market.

124. In ESA's opinion there is no need to consider the exclusive right of Vinmonopolet to sell strong beer with regard to Article 13 EEA.

125. An exclusive right of the kind concerned could fall within the scope of Article 11 EEA. This would be the case, if the right were to be designed or applied in such a manner as to imply discrimination of products or producers of other EEA States. With regard to Article 13, ESA cannot see any reason why an exclusive right to sell strong beer through a retail monopoly could not be neutral as regards the origin of the products. No discrimination would be justified in the Authority's opinion.

126. ESA proposes the following answer to the second question:

"Article 11 of the EEA Agreement is to be interpreted as not applying to national legislation which grants to an entity such as Vinmonopolet the exclusive right to sell beer containing more than 4.75 per cent alcohol by volume to consumers, provided that the legislation applies to all affected traders and that it is not designed or applied so as to hinder the marketing of products originating in other EEA States any more than it hinders the marketing of domestic products".

The Commission of the European Communities

127. The *Commission* also referres to ECJ's *Dassonville*⁵⁸, *Keck and Mithouard*⁵⁹, *Banchero*⁶⁰ and *Commission v. Greece*⁶¹ rulings.

128. In the opinion of the Commission it is immaterial whether, on the one hand, the exclusive right is reserved to a single monopoly operator or, on the other, to a plurality of operators collectively holding such exclusivity as a professional category regulated by law.

129. It follows from ECJ's *Banchero* ruling that the fact that the monopoly applies to specific products, namely strong beer, does not mean that it relates to the characteristics of the product, as opposed to constituting a selling arrangement.

130. For the Commission the main point is whether there can be said to be discrimination as to the procurement and marketing of strong beer.

131. Accordingly, to the extent that Vinmonopolet is not permitted to discriminate between suppliers and products on the basis of nationality and country of origin in its procurement and marketing of strong beer, and does not so in fact, then the retail monopoly for strong beer (underlying the refusal to grant the licence in question) should be seen as a selling arrangement limiting outlets for the products concerned, without preventing access to the national market for imported products, nor impeding such access any more than it does for domestic products. On this basis it would fall outside the scope of Article 11 EEA. This would be the case even though the operation of the retail monopoly for strong beer may restrict the volume of sales (including sales of products from other State party to the EEA Agreement) - indeed, this may be the very objective of the monopoly.

132. The Commission proposes the following answer to the second question:

"Article 11 and 13 of the EEA Agreement do not preclude national legislation according to which the retail sale of beer containing more than 4.75 per cent by volume is reserved to a State monopoly, provided that in law and in fact such an exclusive right does not give rise to discrimination between domestic products and products imported from other Staes party to the EEA Agreement".

⁵⁸ See footnote 19

⁵⁹ See footnote 24

⁶⁰ See footnote 33

⁶¹ See footnote 32

4. *The third and fourth questions referred to the Court*

A. *Admissibility of the third and fourth question referred to the Court*

133. ESA, referring to the wording and the purpose of Article 34 of the Surveillance and Court Agreement states that questions 3 and 4 are general and hypothetical, without relevance to the determination of the issue to be ruled on by the national court. On the contrary, the relevance of answers to questions 1 and 2 for the determination of the Issues to be ruled by Oslo byrett is clear from the information contained in the reference to the EFTA Court. Reference is made to ECJ's *Leclerc-Siplec*⁶² judgment.

134. In ESA's view questions 3 and 4 should be declared inadmissible.

B. *The questions in substance*

Tore Wilhelmsen A/S

135. Counsel of *Wilhelmsen* suggested the following answers to the third and fourth question:

*"EEA rules do not limit the states` authority to apportion competence in the area of alcohol policies between state and municipal authorities.
EEA rules do not prevent the states from implementing a system of licences for the distribution of alcohol products, if the sytem in itself is not contrary to the substantive provisions of EEA Law".*

The Government of the the Kingdom of Norway

136. The *Norwegian Government* proposes the following answer to the third and fourth question posed by the national court:

"The EEA Agreement contains no rules on whether it is state or local authorities which may grant licences to sell alcohol. Thus, national law will decide which national body may grant licences to sell alcohol, including strong beer.

⁶² See footnote 31

The EEA Agreement contains no rules which give individuals an unconditional right to sell alcohol to the general public, regardless of national legislation stipulating a licencing system for the sale of all types of alcohol to the general public".

The EFTA Surveillance Authority

137. ESA has taken the view that the third and fourth question should be declared inadmissible. In the case the EFTA Court decided to answer these questions nonetheless, ESA has the following remarks to make.

138. In ESA's opinion, there are no provisions in the EEA Agreement dealing with decisions on licences of the kind concerned. The EEA Agreement does not provide for any unconditional right for individuals to sell alcoholic beverages to the general public.

139. Furthermore, ESA notes that any restrictions on the sale of goods, including alcoholic beverages, must be in accordance with the EEA Agreement. Any such restriction, as well as its implementation in practice, will have to satisfy certain conditions in order not to run counter Article 11 and 16 EEA .

140. In view of the third question, ESA notes that the conditions thus to be complied with apply to all national authorities involved, regardless of the level at which relevant decisions are taken.

The Commission of the European Communities

141. As far as the third and fourth questions are concerned, the *Commission* is of the view that the EEA Agreement does not cover such matters.

142. Therefore the Commission proposes the following answer to these questions:

"The EEA Agreement does not stipulate whether it is the State or the municipality that is competent to decide on applications for licences to sell alcohol".

"The EEA Agreement does not stipulate whether individuals have an unconditional right to sell alcohol to the general public".

Carl Baudenbacher
Judge Rapporteur