

Case No: 79549
Document No: 1061610
Decision No: 035/20/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's breach of Article 16 EEA by failing to adjust Frihöfnin's operation of the retail sale of alcoholic beverages at Keflavík airport to ensure that there is no discrimination regarding the conditions under which the alcoholic beverages are procured and marketed

1 Introduction

On 22 August 2016, the EFTA Surveillance Authority (“the Authority”) received a complaint concerning Iceland’s alleged failure to comply with Article 16 of the Agreement on the European Economic Area (“EEA Agreement” or “EEA”), in relation to the conditions upon which Fríhöfnin ehf. (“Fríhöfnin”) procures and markets alcoholic beverages at Leifur Eiríksson Air Terminal (“LEAT”) at Keflavík Airport.¹ According to the complainant, who is an economic operator importing alcoholic beverages into Iceland, no objective, transparent and neutral rules on product selection have been adopted by Fríhöfnin and the conduct of any such selection by Fríhöfnin seems to be arbitrary, which results in the complainant not being able to sell his imported alcoholic beverages to Fríhöfnin.²

Having assessed the case, the Authority has reached the conclusion that Fríhöfnin’s operation of the retail sale of alcoholic beverages at LEAT constitutes a State monopoly within the meaning of Article 16 EEA. As Fríhöfnin’s system of product selection and marketing does not fulfil the requirements of EEA law, Iceland is in breach of Article 16 EEA.³

2 Correspondence

By letter dated 9 September 2016,⁴ the Authority informed the Icelandic Government of the receipt of the complaint and, on the same date, the Authority sent a letter of acknowledgement to the complainant.⁵

By letter dated 24 January 2017,⁶ the Authority asked the Icelandic Government for information on the matter and by letter dated 6 March 2017,⁷ Iceland provided the requested information. In that letter, the Icelandic Government stated that it considered the retail sale of alcoholic beverages by Fríhöfnin at LEAT not to be a monopoly falling within the scope of Article 16 EEA.

The case was discussed at the package meeting in Iceland on 8 June 2017. At that meeting, to the Authority’s understanding, the representatives of the Icelandic Government informed the Authority that Iceland had reconsidered its view on the scope of application of Article 16 EEA and could accept that Article 16 EEA was applicable. Further, the representatives of the Icelandic Government gave a commitment to consider what changes would be required to bring Fríhöfnin’s product selection system into conformity with Article 16 EEA. Iceland undertook to submit a proposal to the Authority on the product selection system by the end of September 2017.

¹ Doc. No 815374.

² The complainant imports alcoholic beverages and sells them to ÁTVR (the State Alcohol and Tobacco Company of Iceland). According to information from the complainant, he currently supplies 2 out of 11 of the most sold beers (in cans) in ÁTVR.

³ It should be noted that the products which are subject to the Authority’s assessment in this case are alcoholic beverages covered by Article 16 EEA, cf. Article 8 EEA and Protocol 8 to the EEA Agreement.

⁴ Doc. No 817547.

⁵ Doc. No 817538.

⁶ Doc. No 836029.

⁷ Doc. No 845923.

On 2 October 2017, the Authority sent a letter to the Icelandic Government, reminding it that the time limit for submitting a proposal on a revised product selection system had expired, and fixing a second time limit for 9 October 2017.⁸ By letter dated 9 October 2017,⁹ Iceland requested an extension of the deadline to submit a draft revised product selection system. In that letter it was noted that the Icelandic Government and Fríhöfnin's parent company, Isavia ohf. ("Isavia"), had been working on the changes required to bring Fríhöfnin's product selection system into compliance with Article 16 EEA, and that they intended to continue working on the product selection system. On 19 October 2017, the Authority granted the Icelandic Government an extraordinary extension of the time limit to submit a revised product selection system for Fríhöfnin, until 24 November 2017.¹⁰ The Authority added that the possibility for informal discussions remained open, although they should take place well in advance of 24 November 2017.

By letter dated 24 November 2017,¹¹ the Icelandic Government informed the Authority that the work by the Ministry of Finance and Economic Affairs and Isavia on Fríhöfnin's product selection system was not yet finalised. The Government also stated that Fríhöfnin had hired an independent EEA law specialist, who had prepared a legal opinion, concluding that Article 16 EEA was not applicable to Fríhöfnin,¹² and that it would therefore be necessary to initiate informal discussions to address the issues raised in the legal opinion.

By letter of 21 December 2017,¹³ the Authority urged the Icelandic Government to honour the commitment given in June 2017 and to provide the necessary information. By letter dated 3 January 2018,¹⁴ the Icelandic Government informed the Authority that it had been considering the changes required to bring Fríhöfnin's product selection system into compliance with the requirements laid down by Article 16 EEA. The Government also stated that the premises for the Authority's conclusion, namely that Fríhöfnin should be considered a State monopoly within the meaning of Article 16 EEA, should be revisited. The Government considered that the explicit grounds for the obligation to set up a product selection system for Fríhöfnin were unclear and that it was therefore not feasible at that point to continue the formulation of a product selection system.

On 27 March 2018, the Internal Market Affairs Directorate of the Authority ("the Directorate") sent a pre-Article 31 letter to the Icelandic Government, concluding that Iceland appeared to be in breach of Article 16 EEA.¹⁵ More specifically, the Directorate considered that Fríhöfnin's operation of the retail sale of alcoholic beverages at LEAT constituted a State monopoly within the meaning of Article 16 EEA and, as no product selection system had been adopted by Fríhöfnin in order to ensure that the conditions under which alcoholic beverages were procured and marketed by the company were non-discriminatory, Iceland appeared to be in breach of Article 16 EEA.

By letter dated 9 May 2018,¹⁶ the Icelandic Government replied to the pre-Article 31 letter. In the letter, the Icelandic Government disagreed with the Directorate's

⁸ Doc. No 875999.

⁹ Doc. No 877186.

¹⁰ Doc. No 878531.

¹¹ Doc. No 884345.

¹² Doc. No 884351.

¹³ Doc. No 889164.

¹⁴ Doc. No 891140.

¹⁵ Doc. No 901236.

¹⁶ Doc. No 913046.

view that Fríhöfnin's operation of the retail sale of alcoholic beverages at LEAT constituted a State monopoly within the meaning of Article 16 EEA. The Icelandic Government maintained that Fríhöfnin's legal right to operate duty free stores within LEAT only covered a relatively small part of the market for alcoholic beverages in Iceland and neither entailed any exclusive effect nor did it determine or appreciably influence imports or exports between EEA States within the meaning of Article 16 EEA.

The case was discussed at the package meeting in Iceland on 6 June 2018, where the representatives of the Icelandic Government reiterated its view that Article 16 EEA did not apply to Fríhöfnin. In the follow-up letter from the Authority dated 4 July 2018,¹⁷ the Icelandic Government was invited to submit further arguments in relation to its position and to submit a copy of the operating licence agreement between Isavia and Fríhöfnin, by 19 August 2018.

By e-mail dated 9 August 2018,¹⁸ the Icelandic Government sent the Authority a copy of the operating licence agreement between Isavia and Fríhöfnin. By letter of 14 August 2018,¹⁹ Iceland requested an extension of the deadline to reply to the follow-up letter until 20 September 2018. On 17 August 2018, the Authority granted the requested extension.²⁰ By letter dated 17 September 2018,²¹ the Icelandic Government requested a further 10 days extension of the deadline. On 18 September 2018, the Authority granted a final extension of the deadline until 1 October 2018.²² By letter of 1 October 2018,²³ the Icelandic Government submitted additional arguments in relation to its position in the case.

On 28 November 2018²⁴ the Authority issued a letter of formal notice to Iceland where it concluded that, by failing to adjust the State monopoly of Fríhöfnin to ensure that there is no discrimination regarding the conditions under which alcoholic beverages are procured and marketed, Iceland had failed to fulfil its obligation arising from Article 16 EEA.

After an extension to the deadline, Iceland replied to the letter of formal notice by a letter of 28 February 2019.²⁵ In the letter, the Icelandic government reiterated its position that Fríhöfnin's operation at LEAT did not constitute State monopoly within the meaning of Article 16 EEA.

By letter dated 16 April 2019,²⁶ the Icelandic Government informed the Authority that it had reconsidered its position in the case and that it accepted the reasoning set out in the letter of formal notice. It was also stated that the Icelandic Government, in cooperation with Fríhöfnin, was preparing a product selection scheme for alcoholic beverages sold at LEAT.

The case was discussed at the package meeting in Iceland on 4 June 2019, where the Icelandic Government presented a proposal for legislative amendments to the Icelandic Customs Act No 88/2005 ("the Customs Act")²⁷ as well as the

¹⁷ Doc. No 918168.

¹⁸ Doc. No 926702.

¹⁹ Doc. No 927082.

²⁰ Doc. No 927205.

²¹ Doc. No 930174.

²² Doc. No 930287.

²³ Doc. No 932408.

²⁴ Doc. No 958130.

²⁵ Doc. No 1056604.

²⁶ Doc. No 1065166.

²⁷ Tollalög nr. 88/2005.

outlines for a product selection system. The Icelandic Government's reply to the Authority's follow-up letter dated 2 September 2019,²⁸ informed the Authority that the proposed legislative amendments were on the Government's draft list of parliamentary cases for autumn 2019. According to that list, the proposal would be submitted to the Parliament in November 2019.

By e-mail dated 24 October 2019,²⁹ the Icelandic Government informed the Authority that a draft bill proposing amendments to the Customs Act had been submitted to the Government's public consultation portal and that the aim was to submit it to the Parliament in November 2019.

By e-mail dated 11 December 2019,³⁰ the Icelandic Government informed the Authority that the draft bill had unfortunately not been submitted to the Parliament within the time planned, but that it was foreseen that it would be submitted after Christmas.

On 2 March 2020 a draft bill proposing amendments to the Customs Act was submitted to the Parliament.

3 Relevant national law

Act No 76/2008 on the Establishment of a State-owned Limited Liability Company for the Operation of Keflavík Airport ("the LEAT Act")³¹ provides the legal basis for the establishment of Isavia.

Article 2 of the LEAT Act stipulates that the Minister of Finance and Economic Affairs handles the State's stock in the company (Isavia). According to Article 3 of the Act, the company has a five-member board of directors, elected at the company's annual general meeting.

Article 4 of the LEAT Act reads:

"The purpose of the company is to engage in the operation, maintenance and development of Keflavík Airport, as a civilian international airport, as well as the exploitation of the airport area for security and defence related operations and international obligations of the State. Furthermore, the company shall engage in the operation, maintenance and development of the Leifur Eiríksson Air Terminal, including the operation of duty free stores at the airport premises, [...].

The company shall be authorised to establish other companies or undertakings and become a shareholder in other companies or undertakings, including the participation in a company which is intended to engage in the development of employment in the local area of the airport. The company shall be authorised to make any contracts with other parties in order to reach its purpose in the most efficient manner. The purpose of the company shall be further described in its articles of association."³²

Article 101 of the Customs Act reads:

²⁸ Doc. No 1085742.

²⁹ Doc. No 1111728.

³⁰ Doc. No 1111845.

³¹ Lög nr. 76/2008 um stofnun opinbers hlutafélags um rekstur Keflavíkurflugvallar o.fl.

³² Authority's translation.

“Subject to compliance with the conditions of Article 91, paragraph 1, points 1-3 and 6-9 and having received a written application, the Director of Customs can grant to legal persons a licence for the operation of duty free shops in airports and seaports. A licence according to paragraph 1 also covers the operation of duty free stockrooms for merchandise sold in the licensee’s shop.

The Director of Customs shall keep a register of licensees according to this Article. Companies other than those having been registered are not permitted to operate a duty free shop. If a licensee has not started operations within twelve months of notification that an operating licence has been granted, the licence shall be cancelled. The licence shall also be cancelled if the licensee has not for twelve consecutive months provided services it is authorised to provide in accordance with this Law.”³³

Article 104 of the Customs Act deals with the sale of duty free goods and paragraph 3 of the provision stipulates that the Minister shall decide by regulation which goods are authorised for sale in duty free shops, including alcohol and tobacco. In line with this, Article 1 of Regulation No 641/2006 on Goods Authorised for Sale in Duty Free Shops, lists alcohol as one of such authorised goods.

Article 10 of Act No 75/1998 on Alcoholic Beverages provides that the State Alcohol and Tobacco Company of Iceland (“ÁTVR”) shall have a monopoly over the retail sale of alcohol. The same follows from Article 7 of the Alcoholic Beverages and Tobacco Trading Act No 86/2011.

4 Relevant EEA law

Article 16 of the EEA Agreement, on State monopolies, provides:

“1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States.

2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others.”

5 The Authority’s Assessment

5.1 Fríhöfnin’s operation and legal basis

Fríhöfnin as a State-owned company

Isavia is an official public limited liability company owned by the Icelandic State. It was established under the LEAT Act, in order to operate Keflavík Airport and LEAT. According to Article 3 of the LEAT Act, the company (Isavia) has a five-member board of directors, elected at the company’s annual general meeting. The candidates for the board election are nominated by the Minister of Finance and

³³ Authority’s translation.

Economic Affairs, who handles the State's stock in the company, cf. Article 2 of the LEAT Act. It follows from the preparatory works to the LEAT Act that the company shall be fully owned by the Icelandic State and its sale is prohibited.

Article 4(1) of the LEAT Act provides that the company (Isavia) shall engage in the operation, maintenance and development of LEAT, including the operation of duty free stores at the airport premises. Article 4(2) of the LEAT Act provides that the company (Isavia) is authorised to establish companies, including for the purpose of developing employment in the airport area, and is authorised to conclude contracts with other parties to reach its purpose in the most efficient manner.

Article 4 of the LEAT Act thus grants Isavia the authority to both contract out to private parties the right to operate duty free stores at LEAT, as well as to run duty free stores itself, or through a subsidiary. This was confirmed by the Icelandic Supreme Court in Case No 465/2003,³⁴ where the Court stated that the predecessor to Isavia (Flugstöð Leifs Eiríkssonar hf.)³⁵ was entitled to decide whether, and to what extent, it would contract out to other parties the provision of services to passengers at LEAT or whether it would operate duty free stores itself and, if so, which products it would sell and in which area of the airport.

On the basis of Article 4(2) of the LEAT Act, Isavia established Fríhöfnin, a private limited liability company, as its wholly-owned subsidiary, with the purpose of handling the sale of certain duty free goods at LEAT.³⁶ The board of directors of Fríhöfnin is elected at the company's annual general meeting and Isavia selects the board via the election as the sole owner of stock in Fríhöfnin.

How licences to operate duty free stores at LEAT are granted

Articles 101 to 104 of the Customs Act provide a general legal framework for the operation of duty free stores in Iceland. According to Article 101 of the Customs Act, the Directorate of Customs can, having received a written application, grant a licence for the operation of duty free stores in airports and seaports. Any legal person can apply for a licence, subject to compliance with the conditions of Article 91(1), points 1-3 and 6-9 of the Act.

In light of both Article 4 of the LEAT Act and this general system of licensing provided for in the Customs Act, the Authority understands there to be a twofold system in place for the licensing of the operation of duty free stores at LEAT.

On the one hand, there is an open tender procedure, based on the Customs Act and the LEAT Act, where in practice the Directorate of Customs and Isavia cooperate in the granting of licences to operate duty free stores at LEAT.³⁷ This is an open and competitive procedure, and takes place through the process of public procurement (for ease of reference, the Authority refers to this as "the Tender Procedure"). On this basis, thirteen private operators were granted a licence for the operation of *inter alia* restaurants and stores at LEAT in 2014.³⁸

³⁴ Supreme Court of Iceland Case dated 29 April 2004 No 465/2003, *Íslenskur markaður hf. v Flugstöð Leifs Eiríkssonar hf. & Samkeppnisráð*.

³⁵ Flugstöð Leifs Eiríkssonar hf. was established by Act No 76/2000, which is materially identical to the LEAT Act under which Isavia was established.

³⁶ See also Article 3 of Fríhöfnin's articles of association.

³⁷ This follows from a letter sent by the Icelandic Government on 9 June 2016 in a separate state aid case (Case No 78978, Doc. No 807917).

³⁸ Those private operators are: 66° North, Airport Fashion, Blue Lagoon, Elko, Joe and the Juice, Loksins Bar, Mathús, Nord, Optical Studio, Penninn Eymundsson, Pure Food Hall, Rammagerðin and Segafredo. It should be mentioned that, as a result of this process, the Pure Food Hall was

On the other hand, on the basis of Article 4 of the LEAT Act, Isavia can decide to run duty free stores at LEAT itself or through a subsidiary. This is in line with the preparatory works to the LEAT Act, which provide that Article 4 confers a special statutory authorisation (licence) for Isavia (or its subsidiary) to operate duty free stores within the meaning of Article 101 of the Customs Act. It should be recalled that Isavia is entitled to decide which duty free products it will sell (itself or through a subsidiary) or licence at LEAT. During the latest big Tender Procedure, which took place in 2014, Isavia made it clear that the Tender Procedure would not apply to the product categories sold by Fríhöfnin, which would continue to engage in the sale of traditional duty free goods, including alcoholic beverages.³⁹

Fríhöfnin's activities

According to its articles of association, the purpose of Fríhöfnin is to operate duty free stores as a subsidiary of Isavia.⁴⁰ Fríhöfnin operates six duty free shops at LEAT: four for departing passengers, one intended for transfer passengers from countries outside the Schengen Area, and the sixth on the 1st floor for arriving passengers. The main product categories offered by Fríhöfnin are alcohol, tobacco, sweets, cosmetics, toys and related products.⁴¹

According to Article 3(3) of the ownership policy of Fríhöfnin, it is to operate duty free stores based on an operating licence agreement with Isavia. The product range of Fríhöfnin's duty free stores is limited by that operating licence agreement.⁴² It follows from Article 2 of the ownership policy that the operation of Fríhöfnin shall be in line with the Icelandic State's general ownership policy. Article 2 also emphasises that the decision-making of public companies operating in a competitive market shall be based on equality and objectivity. Furthermore, Article 1 of Fríhöfnin's purchasing policy stipulates that the company shall evaluate its suppliers based on their ability to provide products that meet the demands of the customers of the duty free stores. Products shall be purchased bearing in mind long-term prospects, the company's ability to compete with other duty free stores and the expectations of its customers.

With regard to marketing, it can be inferred from the operating licence agreement with Isavia that Fríhöfnin engages in joint marketing activities with licence holders at LEAT.⁴³ It can also be seen from Fríhöfnin's website that it advertises and promotes certain alcoholic beverages.⁴⁴

Fríhöfnin's exclusivity

As can be seen from the above, Fríhöfnin does not operate under the general licensing framework provided for in the Customs Act. Instead, Fríhöfnin derives its right to operate its duty free stores from the LEAT Act and the operating licence agreement with Isavia, read in conjunction with the Customs Act. Thus, Fríhöfnin

granted a licence to sell Icelandic alcohol, based on it being a company specialising in the sale of Icelandic products. This is considered further below. No other private operator at LEAT engages in the retail sale of alcoholic beverages.

³⁹ This was announced in a press release by Isavia on 13 March 2014, which can be accessed here: <https://www.isavia.is/fyrirtaekid/fjolmidlatorg/frettir/kynningarfundur-19-mars-vegna-forvals-a-verslunar--og-veitingarekstri-i-flugstod-leifs-eirikssonar->.

⁴⁰ See Article 3 of Fríhöfnin's articles of association.

⁴¹ See Article 1.1 of Appendix 1 to the operating licence agreement between Isavia and Fríhöfnin.

⁴² See Article 3.4.1 of the operating licence agreement and Article 1.1 of Appendix 1 to the agreement.

⁴³ See Article 3.5.1 of the operating licence agreement.

⁴⁴ <http://www.dutyfree.is/en/special-offers>

has been granted a special statutory right to operate its duty free stores and sell there, *inter alia*, alcoholic beverages.⁴⁵

Based on Article 4 of the LEAT Act, Isavia has full discretion to decide whether products are offered for sale by Fríhöfnin at LEAT, and if so, which products. Isavia exercised this discretion by establishing Fríhöfnin as its subsidiary, exempting it from the Tender Procedure and granting it a right to sell certain traditional duty free product categories, including alcoholic beverages, at LEAT. Fríhöfnin is therefore in a position different from all other companies at LEAT and thus has exclusive rights.

Fríhöfnin's operations constitute an exception to the general alcohol monopoly in Iceland

The authorisation of Fríhöfnin to sell alcoholic beverages at LEAT constitutes an exception to the general alcohol monopoly in Iceland. As mentioned above, Article 10 of Act No 75/1998 on Alcoholic Beverages and Article 7 of the Alcoholic Beverages and Tobacco Trading Act No 86/2011 both state that ÁTVR has a monopoly over the retail sale of alcohol in Iceland. However, according to Article 104(3) of the Customs Act and Article 1 of Regulation No 641/2006 on Goods Authorised for Sale in Duty Free Shops, alcohol can be sold in duty free shops at LEAT. It follows that the general alcohol monopoly in Iceland, governed by ÁTVR, does not apply to duty free shops at LEAT.

5.2 Article 16 EEA and case law of the European Courts

Article 16(1) EEA provides that EEA States 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 EEA nationals. Article 16(2) makes clear that the obligations flowing from the first paragraph apply to any body through which the competent authorities of an EEA State, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between EEA States. In other words, the requirements of EEA law apply irrespective of how national authorities decide to organise a State monopoly of a commercial character. Furthermore, the second sentence of Article 16(2) EEA makes it clear that Article 16 also applies to monopolies conferred by the State on others.

According to the case law of the Court of Justice of the European Union (“CJEU”) and the EFTA Court, where a monopoly falls within Article 16 EEA, the general principles of EEA law require the existence of a product selection system, in order to ensure the absence of discrimination.⁴⁶ Such a product selection system must be based on criteria that are independent from the origin of the products and must fulfil the necessary requirements of transparency. It must be transparent by providing both for an obligation to state reasons for decisions and for an independent monitoring procedure, to ensure compliance with the system. Furthermore, a State monopoly’s marketing and advertising measures must be impartial and independent of the origin of the products and must endeavour to make known new products to consumers.

The criteria for what constitutes a State monopoly of a commercial character

⁴⁵ See Article 1.1 in Appendix 1 to the operating licence agreement.

⁴⁶ Case C-189/95 *Franzén*, EU:C:1997:504, paras. 44, 51 and 62; Case C-438/02 *Hanner*, EU:C:2005:332, paras. 39 and 41; Case E-19/11 *Vin Trío*, [2012] EFTA Ct. Rep. 974, para. 53.

It is settled case law of the CJEU that Article 37 TFEU (which corresponds to Article 16 EEA) applies to the exercise by a domestic commercial monopoly of its exclusive rights.⁴⁷ In for example the *Hansen* case, the CJEU held that in all cases where the arrangements for marketing a product such as spirits entail the intervention of a public monopoly acting pursuant to its exclusive right, the specific provisions of Article 37 TFEU are applicable.⁴⁸ In relation to the activities which will constitute a State monopoly of a commercial character, in the *Cinzano* case, the CJEU stated that Article 37(1) TFEU “is worded in deliberately general terms so as to include activities by which the State concerned acts only ‘de facto’ or ‘indirectly’ in trade between Member States as well as activities by which, far from ‘supervising’ or ‘determining’ such trade, it is satisfied merely by ‘influencing’ it.”⁴⁹

The scope of Article 37 TFEU was considered in the *Hanner* case.⁵⁰ Advocate General Léger observed that the definition of State monopoly in Article 37 TFEU presupposes the existence of two distinct elements: an organic element and a functional element.⁵¹

With regard to the organic element, the Advocate General referred to the fact that Article 37 TFEU requires that the State monopoly be of a ‘commercial’ character, which means that the body in question must engage in an economic activity, *i.e.* an activity which consists in offering goods on a given market. He then went on to state:

*“However, the ‘State’ character of the monopoly requires that the entity in question have a special link with the State. It may be part of the administration, a public undertaking or a private undertaking endowed with exclusive or special rights. The main criterion is that the State be able to exert a decisive influence over the conduct of that entity. In addition, the ‘State’ character of the monopoly requires that it have its origin in an act of the public authority and that its exclusivity be guaranteed in law. [...]”*⁵²

With regard to the functional element, the Advocate General observed that:

*“[Article 37 TFEU] applies to a situation in which the public authorities are in a position to influence trade between Member States appreciably through the aforementioned body or entity. In that regard, it is not necessary for the State to supervise or determine imports and exports. It is sufficient that it be in a position to influence such trade, even indirectly. In addition, in order for the State’s influence to be deemed appreciable, it is not necessary for it to supervise all imports or exports. A State which has the exclusive right to import and market products for 65% of the requirements of the national market has the power to exert an appreciable influence on imports of those products from other Member States.”*⁵³

Advocate General Léger then applied these criteria to the sales regime at issue, *i.e.* the Swedish rules reserving the retail sale of medicinal preparations to Apoteket AB. He concluded that Apoteket constituted a State monopoly of a

⁴⁷ Case C-91/78 *Hansen*, EU:C:1979:65, paras. 9 and 10; Case C-189/95 *Franzén*, cited *supra*, footnote 46, para. 35.

⁴⁸ Case C-91/78 *Hansen*, cited *supra*, footnote 47, para. 9.

⁴⁹ Case C-13/70 *Cinzano*, EU:C:1970:110, para. 5.

⁵⁰ Case C-438/02 *Hanner*, cited *supra*, footnote 46.

⁵¹ Opinion of Advocate General Léger in Case C-438/02 *Hanner*, EU:C:2004:317, paras. 32-33

⁵² *Ibid*, para. 34.

⁵³ *Ibid*, para. 35.

commercial character within the meaning of Article 37 TFEU.⁵⁴ He noted that Apoteket engaged in an economic activity and was subject to State control, since its capital was held by the Swedish authorities and its board of directors was composed of politicians and civil servants. He also referred to the fact that Apoteket had an exclusive retailing right, which was a statutory monopoly established by law and which enabled the Member State concerned to exert an appreciable influence over imports of the products in question from other Member States.

The CJEU confirmed the above conclusion of Advocate General Léger that the sales regime at issue constituted a State monopoly of a commercial character within the meaning of Article 37 TFEU, and can be seen as endorsing the approach articulated by the Advocate General.⁵⁵ The Court found that Apoteket carried on a commercial activity, namely the retail sale of medicinal preparations, which was reserved exclusively to it by law. The Court noted that it was undisputed that Apoteket was subject to State control, owing both to the State's majority holding in the capital of that company and to its management structure.⁵⁶

It can be seen from the above-mentioned case law that Article 16(2) EEA, and the requirement for the competent authorities of an EEA State to supervise, determine or appreciably influence trade between EEA States, has a wide scope.⁵⁷ In that context, it is clear that it is not necessary for an EEA State to supervise, determine or influence *all* imports or exports. While the CJEU has held that “65% of the requirements of the national market” is sufficient for an EEA State to be able to exert an appreciable influence on imports of products from other EEA States, this was in relation to the facts of a particular case and nothing suggests that this is a minimum requirement under Article 16 EEA.⁵⁸

It also follows from the case law that an exclusive retailing right can enable the EEA State concerned to exert an appreciable influence over the import of products from other EEA States, irrespective of whether there is an exclusive right to import the products concerned.⁵⁹

Finally, in relation to the criterion of exclusivity, the case law also provides guidance on the difference between an exclusive retailing right and a system of licences. This is relevant when comparing the position of Fríhöfnin with the position of other licence holders at LEAT. The distinction was considered by Advocate General Léger in the *Hanner* case, where he stated:

⁵⁴ *Ibid*, paras. 36-39.

⁵⁵ Case C-438/02 *Hanner*, cited *supra*, footnote 46, para. 33.

⁵⁶ *Ibid*.

⁵⁷ See e.g. Case C-91/78 *Hansen*, cited *supra*, footnote 47, para. 9 and Case C-13/70 *Cinzano*, cited *supra*, footnote 49, para.5.

⁵⁸ The Advocate General's reference, above, to “65% of the requirements of the national market” was made in relation to the facts of the case *Commission v Greece*, Case C-347/88, EU:C:1990:470, para. 41. In that case, the Greek State had the exclusive rights to import and market a quantity of petroleum products corresponding to 65% of the requirements of the domestic market. The CJEU concluded that Greece therefore had the power to exert an appreciable influence on imports of petroleum products from other Member States by virtue of such rights. Such rights thus constituted a State monopoly of a commercial character within the meaning of Article 37 TFEU.

⁵⁹ See e.g. Opinion of Advocate General Léger in Case C-438/02 *Hanner*, cited *supra*, footnote 51, para 38 and Case C-189/95 *Franzén*, cited *supra*, footnote 46, paras. 37 et seq.

“As a preliminary point, it is important to make a distinction between an exclusive retailing right and a ‘system of licences’, that is, a system which reserves the right to retail certain products for distributors holding an administrative authorisation.

As Advocate General Elmer has pointed out, a system of licences does not constitute a monopoly in the economic sense of the term. It is an ‘open’ system in which any trader fulfilling the requirements laid down by the law is allowed to market a particular product. A system of licences therefore generally presupposes the existence of a large number of distributors [...] who are free to obtain supplies from traders of their choice. [...]

An exclusive retailing right, on the other hand, is a true monopoly in the economic sense of the term. It is a ‘closed’ system in which only one trader – in this case the State or a State-controlled entity – is authorised to market the product in question.”⁶⁰

It follows that a closed system in which a State-controlled entity has been granted an exclusive retailing right falls within the scope of Article 16 EEA, while an open system of licences does not.

Measures having limited territorial scope

It follows from the case law that Article 16 EEA is closely connected to the free movement of goods. In the *Franzén* case, the CJEU stated:

“It is clear not only from the wording of Article 37 but also from the position which it occupies in the general scheme of the Treaty that the article is designed to ensure compliance with the fundamental principle that goods should be able to move freely throughout the common market, in particular by requiring quantitative restrictions and measures having equivalent effect in trade between Member States to be abolished, and thereby to ensure maintenance of normal conditions of competition between the economies of Member States in the event that a given product is subject, in one or other of those States, to a national monopoly of a commercial character.”⁶¹

Moreover, in the *Vín Trío* case, the EFTA Court held that Article 16 EEA seeks to eliminate obstacles to the free movement of goods, save for restrictions on trade inherent in the existence of the monopolies in question.⁶²

In light of this, it is of relevance to look at cases on the free movement of goods (Article 11 EEA and Article 34 TFEU), where the restriction in question has been limited to a specific geographical area, and to draw an analogy with that case law.

In the *Aragonesa* case, the CJEU stated:

“It is true that, when a national measure has limited territorial scope because it applies only to a part of the national territory, it cannot escape being characterized as discriminatory or protective for the purposes of the rules on the free movement of goods on the ground that it affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States. [...].”⁶³

⁶⁰ Opinion of Advocate General Léger in Case C-438/02 *Hanner*, cited *supra* footnote 46, paras 97-99.

⁶¹ Case C-189/95 *Franzén*, cited *supra*, footnote 46, para. 37.

⁶² Case E-19/11 *Vín Trío*, cited *supra*, footnote 46, para. 51.

⁶³ Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad*, EU:C:1991:327, para. 24.

Furthermore, in the *Ligur Carni* case, the CJEU held that the conclusion that the measure at issue was a restriction under Article 34 TFEU was not affected by the fact that the measure was limited to the territory of a municipality within a Member State.⁶⁴

It follows from this case law on Article 11 EEA and Article 34 TFEU that the fact that a measure has a limited territorial scope does not prevent those provisions from applying. The Authority is of the view that the same applies with respect to Article 16 EEA on State monopolies, due to the close link between this and the other provisions on free movement of goods, and in order to ensure the effectiveness of Article 16 EEA.

This view finds further support in the Opinion of Advocate General Roemer in the *S.A.I.L.* case,⁶⁵ which states:

“Lastly, since Article 37 is drafted in very wide terms, there is no doubt that its field of application extends to activities which are limited to a part of the territory of a Member State. That must be accepted or otherwise the rules contained in Article 37 would be easily evaded by the creation of a large number of local monopolies.”

Moreover, the CJEU held, in the *Bodson* case, that Article 37 TFEU covers a situation in which the monopoly in question is operated by an undertaking or a group of undertakings, or by the *territorial units of a state* such as communes.⁶⁶

5.3 Legal arguments made by the Icelandic Government

In its first letter to the Authority in this case, dated 6 March 2017, the Icelandic Government submitted that Fríhöfnin could not be considered a monopoly falling within the scope of Article 16 EEA. The Government referred, *inter alia*, to the following argumentation in support of its position:

“In summary Fríhöfnin ehf. is a private company operated on market terms. The company is operated in double arm’s length from the Icelandic Government and treated by law and in reality as any other private company that operates a duty free store in Iceland. The provisions of the company’s articles of association, its ownership policy and its purchase policy provide that the expectation of profit governs the purchasing decisions of its management and employee’s. The legal framework of duty free stores, provided for in [the Customs Act] is general and does therefore apply to all forms of duty free stores whether they are located at LEAT or elsewhere in Iceland. Fríhöfnin ehf. cannot therefore be considered to be a monopoly falling within the scope of Article 16 of the EEA Agreement.”

In its letter of 9 May 2018, the Icelandic Government provided new arguments in support of its position that Fríhöfnin did not constitute a State monopoly within the meaning of Article 16 EEA. The Icelandic Government argued that Fríhöfnin, as a commercial undertaking, has neither in law nor in fact exclusive rights and therefore could not be considered a State monopoly within the meaning of Article 16 EEA. The Icelandic Government further considered that the relevant product

⁶⁴ Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni*, EU:C:1993:927, paras. 36-37. See also Case C-67/97 *Bluhme*, EU:C:1998:584, paras. 19-20, where the measure in question was limited to a few Danish islands.

⁶⁵ Opinion of Advocate General Roemer in Case C-82/71 *Pubblico Ministero Italiano v S.A.I.L.*, EU:C:1972:10.

⁶⁶ Case C-30/87 *Bodson v Pompes funèbres des régions libérées*, EU:C:1988:225, para. 12.

and geographical markets for the purposes of Article 16 EEA were the sales of alcoholic beverages in the whole of Iceland. According to the Icelandic Government's information, 14% of all alcoholic beverages sold on the Icelandic retail market in 2017 were sold by Fríhöfnin, which, "*is nowhere near the '...65% of the requirements of the national market...' as referred to by Advocate General Léger in his opinion [in the Hanner case (Case C-438-02)].*" The Icelandic Government thus concluded that the legal right to operate duty free stores within LEAT under Article 4(1) of the LEAT Act only covered a relatively small part of the market for alcoholic beverages in Iceland. It did not have any exclusive effect, nor did it determine or appreciably influence imports or exports between EEA States within the meaning of Article 16 EEA.

In its letter dated 1 October 2018, the Icelandic Government reiterated its position that Fríhöfnin cannot be considered a State monopoly within the meaning of Article 16 EEA and provided further arguments. First, it argued that Fríhöfnin does not enjoy special or exclusive rights, as exclusive rights cannot be derived from either Article 4 of the LEAT Act or the operating licence agreement between Isavia and Fríhöfnin. Second, Fríhöfnin has not been enabled to supervise, determine or appreciably influence imports between EEA States. In support of this, the Icelandic Government referred to the fact that neither Fríhöfnin nor Isavia in any way monitor the import of alcoholic beverages into Iceland, as the only undertaking qualified to do this is ÁTVR. Furthermore, Article 16 EEA is only intended to apply to a State monopoly which applies to the national market as a whole and Fríhöfnin's market share on the national market of alcoholic beverages is only 14%.

In its reply to the letter of formal notice, dated 28 February 2019, the Icelandic Government reiterated the position referred to above. First, it maintained that Fríhöfnin does not enjoy special or exclusive rights. In that regard, it stated that it could not be derived from Article 4 of the LEAT Act that Isavia or its subsidiaries were meant to enjoy special or exclusive rights at LEAT. Article 4 only obliged Isavia to operate LEAT and operating duty free shops at the airport fell under that obligation. The only exception from the State monopoly on retail sale of alcohol enjoyed by ÁTVR was under the Customs Act, which sets out general requirements that do not provide for any exclusivity. Furthermore, no factual situations lead to the conclusion that exclusivity was present in terms of Fríhöfnin's operations. Second, the Icelandic Government argued that Fríhöfnin does not influence imports between the EEA States. Fríhöfnin was neither enabled to supervise or determine import or export of alcoholic beverages between EEA States by Article 4 of the LEAT Act nor did Fríhöfnin appreciably influence the market as its market share on the national market was considerably lower than at issue in the *Hanner* case.

However, in its letter of 16 April 2019, the Icelandic Government informed the Authority that it had reconsidered its position in the case and that it accepted the reasoning set forth in the Authority's letter of formal notice.

5.4 The Authority's legal assessment

It appears undisputed in this case that no product selection system has been adopted for Fríhöfnin, which would meet the requirements of Article 16 EEA and the case law of the European Courts. As noted above, Fríhöfnin's purchasing policy is primarily demand based. Further, the Icelandic Government has stated in its letter dated 6 March 2017 that no independent monitoring of Fríhöfnin's

purchasing decisions is in place, nor is there any requirement for Fríhöfnin to state reasons for rejecting an application to sell alcoholic beverages.⁶⁷ Moreover, Fríhöfnin does not appear to be under any contractual obligation to ensure that its marketing and advertising measures are impartial and independent of the origin of the products and that new products are made known to consumers.

In its letter of 16 April 2019, the Icelandic Government also acknowledged that the retail sale of alcoholic beverages by Fríhöfnin at LEAT constitutes a State monopoly within the meaning of Article 16 EEA and that Fríhöfnin's system of product selection and marketing must comply with the requirements of EEA law.

However, as the information available to the Authority currently stands, the substantial developments foreseen in the letter of 16 April 2019 have still not materialised, and the legal situation therefore remains unchanged. In particular, it is noted that the draft bill proposing amendments to the Customs Act was only submitted to the Parliament on 2 March 2020. Following the parliamentary process, which outcome is still uncertain, the rules on product selection will have to be adopted.

The Authority considers that, when assessing whether Fríhöfnin constitutes a State monopoly within the meaning of Article 16 EEA, it is appropriate to look at the criteria established by the CJEU and Advocate General Léger in the *Hanner* case (together with the other cases discussed above) and apply them to the circumstances of this case.

First, Fríhöfnin engages in an economic activity, namely the offering of alcoholic beverages for sale at LEAT.

Second, Fríhöfnin is subject to State control, as its capital is held by the Icelandic State, through Isavia, and its board of directors is elected by Isavia. The Authority considers that it is not relevant that Fríhöfnin is a private limited liability company and that Isavia, as a shareholder, is therefore not responsible for Fríhöfnin's general obligations, since the Icelandic State is nevertheless, through its capital holding, able to exert a decisive influence over the conduct of Fríhöfnin.

Third, Fríhöfnin has exclusive rights for the retail sale of alcoholic beverages at LEAT. Those rights are derived from the LEAT Act, read in conjunction with the Customs Act, and have been delegated to it by Isavia, through the operating licence agreement. Those exclusive rights are not available to other private operators at LEAT. Thus, the retail rights enjoyed by Fríhöfnin at LEAT entail a closed system in which a state owned company enjoys the rights to market the product in question. Such a system falls under Article 16 EEA.⁶⁸ In that context it is of importance that Fríhöfnin does not operate under the general open licensing framework provided for in the Customs Act, but has been granted a special statutory right to operate its duty free stores and sell there, *inter alia*, alcoholic beverages. As stated above, the preparatory works to the LEAT Act provide that Article 4 of that Act confers a special statutory authorisation for Isavia to operate duty free stores within the meaning of Article 101 of the Customs Act. In accordance with that status, Isavia made it clear during the Tender Procedure in 2014 that the procedure would not apply to Fríhöfnin. Consequently, Fríhöfnin

⁶⁷ Doc. No 845923.

⁶⁸ See Opinion of Advocate General Léger in Case C-438/02 *Hanner*, cited *supra*, footnote 51, para 99.

controls the supply of alcoholic beverages offered in retail sales to several million passengers at LEAT each year.⁶⁹

It should be noted that the Authority considers that the fact that the Pure Food Hall has a licence to sell Icelandic alcohol at LEAT does not affect the above conclusion. The Pure Food Hall derives its right to sell Icelandic alcoholic beverages from the general licensing scheme under the Customs Act and the LEAT Act and it participated in the Tender Procedure in order to obtain that licence. The Pure Food Hall is thus in a different position from that of Fríhöfnin.⁷⁰

Finally, Fríhöfnin's statutory monopoly enables the Icelandic State to exert an appreciable influence over imports of alcoholic beverages from other EEA States to be sold at LEAT. It is clear from the wording of Article 16(2) EEA and the abovementioned case law that for a body to fall under the scope of the Article it is sufficient that one of the conditions set out therein is fulfilled, *i.e.* it must enable the competent authorities either in law or in fact to, directly or indirectly supervise, determine or appreciably influence imports or exports between EEA States. Although the Icelandic State does not through Fríhöfnin or Isavia directly supervise or determine imports or exports between EEA States, the Authority's view is that the influence the Icelandic State has, through Fríhöfnin, on imports of alcoholic beverages from other EEA States is sufficient to fall under the scope of Article 16 EEA. As noted above, an exclusive retailing right can in itself be sufficient to enable an EEA State to exert an appreciable influence over imports from other EEA States.

The fact that Fríhöfnin appears to engage in around 14% of the retail sale of alcoholic beverages on the national market in Iceland and that Fríhöfnin's monopoly only applies to a part of the Icelandic national territory, does not change this conclusion. It can be inferred from the above case law, by way of analogy with the free movement of goods, that the limited territorial scope of the monopoly in question does not preclude the application of Article 16 EEA.⁷¹ A different conclusion would undermine the effectiveness of Article 16 EEA. Further, there is nothing in the case law of the European Courts to suggest that a certain minimum percentage of national sales must be met for Article 16 EEA to apply to a retail monopoly. In this context, it must be emphasised that the condition under Article 16(2) for an EEA State to supervise, determine or appreciably influence imports or exports between EEA States has a wide scope.

⁶⁹ The Authority observes that LEAT serves millions of passengers each year. According to information available to the Authority, the total number of passengers at LEAT in 2015 was just under 5 million passengers and in 2016, the number was over 6.5 million passengers. Similarly, the number of passengers in 2017 appears to have been around 8.7 million passengers, in 2018 9.804 million and in 2019 7.247 million. The Authority notes that even though there is a drop in the passenger numbers in 2019, they still remain very substantial. See <https://www.isavia.is/en/corporate/about-isavia/reports-and-statistics/passenger-statistics/passenger-statistics>

⁷⁰ Moreover, since the Pure Food Hall only sells Icelandic alcohol, it does not engage in or have an influence on the import of alcoholic beverages from other EEA States.

⁷¹ See Joined Cases C-1/90 and C-176/90 *Aragonesa*, cited *supra*, footnote 63, para. 24; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni*, cited *supra*, footnote 64, paras. 36-37; Case C-67/97 *Bluhme*, cited *supra*, footnote 64, paras. 19-20; Opinion of Advocate General Roemer in Case C-82/71 *S.A.I.L.*, cited *supra* footnote 65; and Case C-30/87 *Bodson*, cited *supra*, footnote 66, para. 12.

In any event, sales of around 14% of the alcoholic beverages on the total Icelandic market cannot be considered marginal, in particular given the size of that market and the number of passengers passing through LEAT each year.⁷²

In that regard, it should be kept in mind that the authorisation of Fríhöfnin to sell alcoholic beverages at LEAT constitutes an exception to the general alcohol monopoly in Iceland and that the Icelandic State is, through Fríhöfnin, in a position to exert an appreciable influence over the import of those alcoholic beverages which are to be sold by Fríhöfnin at LEAT. As an example of the effect on trade between EEA States, the complainant claims to be barred from selling his imported alcoholic beverages to Fríhöfnin, because of Fríhöfnin's opaque and arbitrary system of product selection.

In the Authority's view, Fríhöfnin therefore fulfils all the criteria for a State monopoly within the meaning of Article 16 EEA.

This means that the same rules apply to Fríhöfnin as to ÁTVR. Both enjoy alcohol monopolies in their respective markets, albeit on different legal bases. They are both governed by the Icelandic State and together they form the State's alcohol retail monopoly. ÁTVR has adopted rules on its product selection, which appear to comply with the requirements of Article 16 EEA. The Authority is of the view that Fríhöfnin is required to do the same, and that there are no legal justifications for treating it differently from ÁTVR.

As regards the definition of the relevant geographic and product market, the Authority notes that a technical market definition, such as that used in the context of competition law, does not have a direct bearing on the application of Article 16 EEA. It is of interest to note, however, that the Icelandic Competition Authority ("ICA"), in its decision No 2/2003 of 29 January 2003,⁷³ defined the air terminal site at LEAT as the geographic market, due to provisions in the Customs Act specifying duty free store operation, and the duty free store market as a special product and service market. These findings were confirmed in a recent decision of ICA No 28/2017 of 17 July 2017,⁷⁴ where ICA concluded that Fríhöfnin at LEAT does not operate on the same market as general retail stores selling cosmetics and hygiene products outside LEAT. In the decision, ICA referred specifically to the EU Commission's decisions concluding that airports constitute specific geographic and product markets.

In any event, the Authority's view is that, even if the national market for the retail sale of alcoholic beverages in Iceland must be considered as a whole, and, even if Fríhöfnin only sells around 14% of alcoholic beverages of that market, Article 16 EEA is nonetheless applicable.

In light of the above, the Authority concludes that, as Fríhöfnin has exclusive rights to engage in the retail sale of alcoholic beverages at LEAT, the Icelandic authorities can, through Fríhöfnin, exert their power to appreciably influence the import of alcoholic beverages from other EEA States to be sold at LEAT. The Authority's opinion is therefore that Fríhöfnin's operation of the retail sale of alcoholic beverages at LEAT constitutes a State monopoly within the meaning of Article 16 EEA. Fríhöfnin has not implemented a product selection system which meets the conditions of Article 16(1) EEA, namely a system which is non-

⁷² See footnote 69 above.

⁷³ <http://www.samkeppni.is/media/samkeppnisrad/akvardanir/2003/akv0203.pdf>

⁷⁴ http://www.samkeppni.is/media/akvardanir-2017/Akvordun_28_2017_Samruni-Haga-og-Lyfju.pdf

discriminatory, transparent and which provides for an obligation to state reasons and an independent monitoring procedure. Furthermore, Fríhöfnin appears to be under no contractual obligation to ensure that the company's marketing and advertising measures are impartial and independent of the origin of the product and that new products are made known to consumers. In the view of the Authority, this constitutes a breach of Article 16 EEA.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by failing to adjust the State monopoly of Fríhöfnin to ensure that there is no discrimination regarding the conditions under which alcoholic beverages are procured and marketed, Iceland has failed to fulfil its obligation arising from Article 16 EEA.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels, 22 April 2020

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

Frank J. Büchel
College Member

Högni Kristjánsson
Responsible College Member

Carsten Zatschler
Countersigning as Director,
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*This document has been electronically authenticated by Bente Angell-Hansen,
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