



OSLO COUNTY COURT

RULING

Date of ruling: 6 November 2017, Oslo

Case No.: 17-110415TVI-OBYF

Judge: Judge Henning Kristiansen

The case concerns: Petition for temporary injunction against the mandate regarding standard packaging of snuff

Swedish Match Ltd.

Attorney Morten Goller

Legal Assistant: Attorney Siri Falch-Olsen

against

The State, under the auspices
of the Ministry of Health and
Care Services

Attorney Pål Erik Wennerås

Legal Assistant: Attorney Magnus
Schei

Third-party intervenor:
Norwegian Cancer Society

RULING

1 INTRODUCTION

The Oslo County Court received a petition for a temporary injunction from Swedish Match Ltd. on 6 July 2017, directed at the State under the auspices of the Ministry of Health and Care Services with a request for an injunction on the implementation of new regulations that entail that snuff sold in Norway must meet certain requirements for standard or neutral packaging, in English called “plain packaging”.

The Court received a statement on 31 August 2017 regarding third-party intervention from the Norwegian Cancer Society for the benefit of the State. No objections to the third-party intervention were made by any of the parties, and the terms third-party intervention were then fulfilled.

The Court summoned the parties to an informal hearing, which took place over five days during the period 25-29 September 2017.

2 BACKGROUND OF THE CASE

Swedish Match Ltd. is a Swedish company that develops, manufactures and sells snuff, other tobacco products (cigars and chewing tobacco), matches and lighters, in addition to having some distribution activities. The company is Scandinavia's largest snuff manufacturer, and it has approx. 5,000 employees and operations in 9 countries. The major owners in the company are larger funds, including several Swedish pension funds.

Swedish Match produces so-called Swedish snuff (Scandinavian snuff), a smokeless tobacco product containing nicotine.

Snuff is included in the definition of tobacco products in the Act on the Prevention of the Harmful Effects of Tobacco (Tobacco Harm Act), section 2, first paragraph. This implies, among other things, that snuff cannot be sold to people under the age of 18, that there is a ban on self-service for the sale of snuff, that all forms of advertising for snuff are prohibited, and that there is a ban on the visual appearance of snuff as a tobacco product at sales outlets. The law further asserts that snuff packages must be labelled with health warnings. The requirements for health warnings are elaborated on in Regulation No. 41 of 6 February 2003 regarding the content, labelling and design of tobacco products, etc., where section 11 provides the following regulation of the requirements for labelling smokeless tobacco products:

“Smokeless tobacco must be labelled with the following warning:

“This tobacco product damages your health and is addictive.”

The warning must be printed on the package's most prominent side and cover at least 30 percent of this side.

In case of retail sales, the warning must also be printed on any outer packaging, except if that outer packaging is transparent.

In the case of packages where the most prominent side is larger than 75 cm², the area for the warning text must be at least 22.5 cm².”

It is stated in regulation’s statutory objective clause, section 1:

“The purpose of this regulation is to limit the health damages caused by tobacco use. The further purpose of the regulation is to prevent the use of tobacco products by regulating them, so that they do not appeal to children and adolescents, by ensuring that the health warnings get the most possible attention and have the best possible effect, as well as minimise the risk that the design will have the effect of being misleading.”

Norway is bound by two EU tobacco directives; Directive 2001/37/EC on the manufacture, presentation and sale of tobacco products, and Directive 2003/33/EC on tobacco advertising and sponsorship. Furthermore, a new Directive has been passed, Directive 2014/40/EU of 3 April 2014, regarding the manufacture, presentation and sale of tobacco and related products that replaces Directive 2001/37/EC. The process of incorporating this Directive into the EEA Agreement is ongoing.

In addition, Norway has signed and ratified the World Health Organization's Tobacco Control Convention (WHO Framework Convention on Tobacco Control), which entered into force in 2005. The guidelines of the Convention, Articles 11 and 13, contain recommendations to the states regarding the introduction of requirements for standard packaging of tobacco products.

The former tobacco Directive (Directive 92/41/EEC) contained in Article 1, subsection 3(c), a provision stating that packages of smokeless tobacco should also contain a cancer warning (“Causes cancer”). This warning was removed in the following tobacco Directive of 5 June 2001 (Directive 2001/37/EC), Article 5 no. 4. Directive 2014/40 states the requirement for labelling of Article 12 which provides that packages of smokeless tobacco must contain the following warning:

“This tobacco product damages your health and is addictive.”

The provision has been implemented in Norwegian by the provision in the regulation regarding content, labelling and design of tobacco products, section 11.

In Article 17, the Tobacco Directive also contains a provision prohibiting the sale of smokeless tobacco, including snuff:

“Member States shall prohibit the placing of tobacco for oral use on the market, without prejudice to Article 151 of the Act of Accession of Austria, Finland and Sweden.”

The exemption from the prohibition of snuff is also applicable to Norway by the decision of the EEA Joint Committee on 31 January 2002, Article 1.

There is essentially no requirement regarding the content of the snuff products sold on the Norwegian market, for example, as regards requirements for the highest quantities of harmful substances, cf. Recommendation 101 L (2016-2017), Recommendation of the Health and Care Committee on amendments to the Tobacco Harm Act (implementation of Directive 2014/40/EU and standardised tobacco packages), subsection 1.1.6. In comparison, the regulation regarding content, labelling and design of tobacco products, etc. contains such a provision on permitted contents of cigarettes in section 4. It is stated that Sweden introduced regulations that impose requirements on the content of smokeless tobacco, with effect from April 2016.

The new Tobacco Directive does not directly prescribe requirements for standardised tobacco packaging, but Article 24(2) states that the Directive does not prevent Member States from introducing such legislation, provided certain conditions are met. By “standardised tobacco packaging”, it is meant that the design of all tobacco packages within each category should be similar, so that it is not permitted to use the manufacturer's logos, trademarks, symbols, images, colours or other forms of advertising.

Article 24(2) of the Directive reads as follows:

“This Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them.”

The right to introduce legislation in addition to the explicit provisions of the Directive is further discussed in the Directive’s preamble, section 53:

“Tobacco and related products which comply with this Directive should benefit from the free movement of goods. However, in light of the different degrees of harmonisation achieved by this Directive, the Member States should, under certain conditions, retain the power to impose further requirements in certain respects in order to protect public health.

This is the case in relation to the presentation and the packaging, including colours, of tobacco products other than health warnings, for which this Directive provides a first set of basic common rules. Accordingly, Member States could, for example, introduce provisions providing for further standardisation of the packaging of tobacco products, provided that those provisions are compatible with the TFEU, with WTO obligations and do not affect the full application of this Directive.”

On 17 March 2015, the Ministry of Health and Care Services submitted a proposal for amendments to the Tobacco Harm Act with a view to introducing requirements for standardised tobacco packages. The requirement for standard packaging comes in addition to the requirements in the regulation on labelling of tobacco products, including the health warning in section 11.

A report from 2014 prepared by the Norwegian Institute of Public Health, “Health Risk in Using Snuff” was published in the consultation paper, and the following summary of the findings in the report was provided (page 5, subsection 1.1):

“Due to the increase in snuff use among youths, measures to limit the use of snuff have obtained higher priority in the tobacco prevention work. In 2014, the Norwegian Institute of Public Health prepared a summary of the health risks involved in using snuff. The report concludes that snuff is carcinogenic, leads to worse prognoses for cancer patients, increased mortality after myocardial infarction and stroke, increased risk of diabetes 2, and that the use of snuff during pregnancy is very harmful to the foetus. The Norwegian Institute of Public Health shows in the report that the increase in snuff use in Norway has tripled over the last five years and that the increase is greatest among youths. The institute further states that the sharp increase in snuff use among youths can be characterised as an epidemic and that there is no indication that the increase will cease. The Institute believes that there are concerns regarding the number of cancer cases resulting from snuff use, taking into account today's many young snuff users and the number of pregnant women who use snuff during pregnancy, a sector that can be expected to increase over the next few years. “

On 10 June 2016, the Ministry of Health and Care Services presented in Proposal 142 L (2015-2016), Amendments to the Tobacco Harm Act (implementation of Directive 2014/40/EU and standardised tobacco packages), proposals for amendments to the Tobacco Harm Act. In proposition paragraph 1.4.2, a corresponding summary of the report of the Norwegian Institute of Public Health has been provided, such as the one referred to above, which states, among other things, that there are “good indications that snuff increases the risk of pancreatic cancer, oesophagus and oral cavity” (page 12).

In addition to promoting legislative proposals for statutory amendments in order to implement the new Tobacco Directive, the proposition also contained proposals to introduce standardised tobacco packaging and a legal basis to impose further requirements for standardisation of all tobacco products.

It was evident from the proposition that the proposed legal basis to enforce standard packaging should include tobacco packets, tobacco products and associated equipment, as well as tobacco surrogates (such as herbal cigarettes, herbal snuff and e-cigarettes), but that the Ministry did not plan to enforce standard packaging of tobacco surrogates now.

Regarding the grounds for enforcing standard snuff packaging, this was mentioned in proposition 3.7.2.:

“However, in the case of snuff, it is not appropriate to make exceptions from the requirement for standardised packages. A number of snuff products with untraditional designs have been on the market in recent years, which has contributed to the product's increased appeal to youths. The Ministry therefore considers that it is particularly important to standardise these products. Although smokeless tobacco, and especially snuff, is not as harmful as smoking tobacco, the Ministry wishes to emphasise that the use of smokeless tobacco also poses a risk of serious health damage, see section 4.2 above for further discussion of this. If the health authorities were to accept that solely smoking tobacco was to be considered, this could be perceived by youths as a signal that there is no health risk related to the use of smokeless tobacco. Such a signal will be particularly unfortunate in view of the sharp increase in the use of snuff among youths in the last decade.

In 2016, the Norwegian Directorate of Health obtained information about the tobacco market in Norway from the tobacco importers. The overview covers the tobacco brands that are sold in Norway, and includes design, weight, size and a description of sales volumes for the individual product types. The survey shows that there were 183 snuff variants on the Norwegian market in 2015. In comparison, 53 different cigarette variants have been reported. In the Ministry's opinion, many of the snuff boxes have designs and colours that make the product attractive. The Norwegian Design Council selected a snuff box aimed at younger users as the best design in the “packaging” category for 2013. In its impact assessment of 19 December 2012 of proposals for a new tobacco product directive, the EU Commission has shown that there has been significant product development in the snuff segment. Swedish Match had 22 types of snuff in 2002, while the figure was increased to 180 in 2008.

One of the purposes of the proposal for standardised tobacco packages is to contribute to the denormalisation of tobacco products and tobacco use in society. SIRUS Report 2/2014 reviewed the coverage of snuff by Norwegian newspapers during the period 2002-2011. The report calls attention to, among other things, the following:

“The content of the publicity indicates that the newspapers depict a development towards the normalisation of snuff in Norwegian society. Even though several of the notices have neutral or negative value, they may still be considered to play a role in the marketing of snuff in a country like Norway,

The Ministry believes that this substantiates the need for the proposed regulation to also include snuff.

Furthermore, the increase in the use of snuff among young women has led to an increasing problem of using snuff during pregnancy. Serious health consequences for the foetus are among the findings presented by the Norwegian Institute of Public Health in its health risk assessment from 2014, see section 4.2 above for further discussion of this.

Although snuff is less dangerous to health than smoking tobacco, the Ministry believes that the health risk associated with the use of snuff in the case of youths should not be compared primarily to the health risk of smoking, but by not using any kind of tobacco.

The dissemination of information about tobacco products and the different risk of health damage to smokers should occur through channels other than the introduction of differentiated regulation of snuff and smoking tobacco when it comes to standardised tobacco packages.”

In Recommendation 101 L (2016-2017), Recommendation of the Health and Care Committee on amendments to the Tobacco Harm Act (implementation of Directive 2014/40/EU and standardised tobacco packages), section 1.2.3, it was described as such for the purpose of introducing requirements for standard packaging:

“The overall purpose of the proposal for standardised tobacco packages is to reduce the proportion of children and youths who start using tobacco with a view to protecting them from the harmful effects of tobacco use. More specifically, the purpose of the measure to make tobacco products less attractive by limiting the packaging's advertising effect, increasing the effect of the mandatory health warnings, and minimising the risk that the packaging design gives a misleading impression of the health risk associated with tobacco use. It is also assumed that the measure will contribute to a moderate reduction in tobacco consumption among adults, as well as denormalise tobacco products and tobacco use in society.”

A new provision in Section 30 of the Tobacco Harm Act, which sets requirements for standardised tobacco packaging, entered into force with effect from 1 July 2017. The provision reads:

“It is prohibited to bring into Norway or sell tobacco packages and tobacco products that do not have a standardised design according to detailed provisions laid down by the Ministry in regulations. For example, the standardisation may apply to colour, shape, appearance, material and labelling, including the use of trademarks, logos and other brand-related elements.

The Ministry may stipulate requirements in regulations regarding equivalent standardisation for tobacco paraphernalia and tobacco substitutes, and make exceptions for certain product categories. The Ministry may place restrictions in regulations regarding the types of sales outlets that can sell goods that are exempted from the standardisation requirement.”

The provision entered into force on 1 July 2017, but it follows from the regulation on transitional rules of 10 February 2017, No. 5 on amendments to the law of 9 March 1973 No. 14 regarding the protection against tobacco injuries that tobacco products that were on sale at the date the provision went into effect may be sold without standardised packaging during the period up to 1 July 2018.

In the regulation regarding amendment of the regulation on content and labelling of tobacco products, 22 June 2017, No. 942, detailed requirements for the packaging design, etc. Are included in Chapters IV to VIII. The mandate concerns the product categories of cigarettes, rolling tobacco and snuff. The regulation includes, among other things, requirements for the colour and degree of lustre of packaging, packaging material, design and placement of brand names, etc. The new rules involve a ban on the use of colours, and it is forbidden to use the manufacturer's figurative trademarks and designs.

3 ARGUMENTS OF THE PARTIES

3.1 Swedish Match Ltd. has asserted

There is agreement between the parties that the mandate for standardised packaging is a restriction and that this restriction is justified for legitimate reasons - consideration for public health. However, Swedish Match asserts that the mandate does not meet the requirement of proportionality because it is not appropriate and necessary, nor is it formulated in a consistent and systematic manner.

The state has the burden of proof and must show that the mandate is appropriate and necessary, and formulated in a consistent and systematic manner. It is stated that in this case, the state has gone far beyond its margin of appreciation in the formulation of the mandate.

Swedish Match asserts that the mandate has been adopted on a faulty factual basis and is based on obvious misjudgements. If the actual reasoning fails, the mandate is also inappropriate.

The State's perception of health risks associated with snuff use is based solely on the report of the Norwegian Institute of Public Health in 2014. Both the consultation paper and the proposition refer to this report. When assessing whether requirements for standard packaging of snuff should be introduced, decisive emphasis was placed on the cancer risk associated with using snuff. All the other alleged health risks relate to the use of nicotine.

If the summary that the Norwegian Institute of Public Health has given on the health risks associated with using snuff on page 117 in its report is inaccurate, then the mandate has been made on false grounds and therefore is not appropriate either.

The Norwegian Institute of Public Health has based its report on IARC (International Agency for Research on Cancer) assessments. IARC's objective is to identify if there is a danger associated with the use of tobacco, but says nothing about public health risks.

The WHO has assumed that it is "scientifically inappropriate" to evaluate the risk of smokeless tobacco products as a single product when assessing risks or formulating measures. This is what the State has done in this case. No separate risk assessment related to the use of snuff has been completed. Instead, the State has chosen to mix epidemiological studies of the risk of snuff use with epidemiological studies of other tobacco products.

The State has not been able to refer to research that proves that cancer arises as a result of the use of snus. The extensive amount of epidemiological studies from Sweden that show the health risk associated with using snuff is not assessed. This research shows that no correlation between using snuff and cancer has been established. This applies to pancreatic, oral and oesophageal cancer. The State's approach has been to emphasise individual studies that indicate a connection, at the expense of studies that do not show a connection. The result of this is that the Norwegian Institute of Public Health's report is completely inaccurate in terms of cancer risk.

In addition to this, the Norwegian Institute of Public Health, according to instructions from the ministry, has deliberately failed to assess the importance of snuff as a harm-limiting alternative to cigarettes. This despite the fact that there is extensive Norwegian research on this matter. Particularly striking is the fact that at the same time, the State chooses to include in the assessment on whether the use of snuff can lead to an increase of people who smoke (the "gateway theory"), even though this hypothesis has long since been rejected. Thus, the harm limitation perspective is completely cast aside with regard to the assessment of snuff, while it is drawn on as an argument for allowing e-cigarettes, even though the risk profile of these products is approximately the same.

The above conditions show that the introduction of a mandate for standardised packaging of snuff is made on a faulty factual basis and therefore not suitable for reaching the objective.

Furthermore, it is stated that the State has also not demonstrated that the mandate on standardised packaging will have a positive effect on public health and that the measure is therefore not suitable for achieving the stated purpose. If a measure does not have a positive effect on public health, it is also inappropriate, see Advocate General Szpunar in Case C-148/15, section 48.

Snuff does not have an adverse effect on public health as the state claims. There is no evidence of any increased risk of cancer while using snuff, which was a very central reason for the mandate. On the contrary, the mandate could have a negative effect on public health because snuff is a harm-limiting alternative to cigarettes. New Zealand decided to legalise snuff in 2017 precisely on the grounds that snuff can act as a harm-limiting alternative to cigarettes. The Ministry of Health and Care Services has furthermore emphasised the principle of harm reduction in the regulation of e-cigarettes, cf. Proposition 142 L 2015-2016 p. 22. Snuff is clearly an alternative product for cigarettes in Norway and Sweden. It is impossible to explain the low mortality rate in Sweden in connection with tobacco use in any other way.

If the snuff boxes are standardised, this will affect the attractiveness of the product. Lower attractiveness will have an effect in all groups. Due to the extreme difference in the degree of harm between cigarettes and snuff, the measure regarding standardisation seen as a whole is likely to be negative. The mandate therefore cannot serve to fulfil the purpose and for this reason, is therefore not appropriate either.

Furthermore, it is stated that lack of consistency and systematics in the regulations also makes the mandate on standard packaging for snuff inappropriate. Appropriateness assumes that the State seeks to achieve the objective in a consistent and systematic manner, cf. EU Court of Justice Case C-1969/07, Hartlauer, section 55, EU Court of Justice Case C-500/06, Cororación Dermoestética, section 39, and the EFTA Court Case E-03/06, section 51. The State has imposed standard packaging on snuff and lifted the ban on the sale of e-cigarettes at the same time, but without imposing standardised packaging on e-cigarettes. The products are therefore regulated differently, despite having a comparable risk profile. Both products contain nicotine and are harm-limiting alternatives to cigarettes. Unlike snuff, however, there is little research on the health effects of using e-cigarettes, and the use of e-cigarettes also affects third parties. To distinguish between these products on the basis that one is a “tobacco product” and the other one a “tobacco surrogate” is therefore false. The reality is that the legislators have chosen a different perspective in the risk assessment of e-cigarettes than for the regulation of snuff, see consultation paper of 9 June 2015 on standardised tobacco packaging, etc., p. 25 in comparison with Norwegian Parliament Report 19 (2014-2015), p. 72. The fact that legislators have a legal basis to also intervene with respect to e-cigarettes is, in this connection, of no significance. The legality assessment must be based on the conditions today.

Nor are there any indications that snuff has a greater appeal to children and youths than e-cigarettes, rather the contrary. E-cigarettes are already used by youths where they exist, cf. consultation paper of 18 January 2016 on implementation of the Tobacco Harm Directive, p. 13, et seq. It follows from this that there is a lack of consistency and systematics in the regulations.

It follows from the above that the mandate on standard packaging of snuff is not the result of a consistent and systematic approach and is therefore not an appropriate measure.

Swedish Match further asserts that the mandate is also not necessary, cf. the EFTA Court decision in case E-16/10, Phillip Morris, Section 85.

In assessing whether the measure is necessary, it must be taken into account that a mandate that eliminates competition between market participants is an extreme interventive measure.

The condition of necessity must be assessed against the chosen level of protection. The State claims that this level of protection is high. However, the real level of protection is the level chosen for e-cigarettes, which is a comparable product to snuff in terms of competition, user groups and risk profile. It is irrelevant if the State considers that the mandate on standard packaging will provide an even higher level of protection when other, less interventive measures exist, cf. EFTA Court Case E-03/06, section 58.

The State is obliged to assess whether there are other, less interventive, and equally effective, alternatives for taking action. However, other alternative measures are only briefly treated in the preparatory work, and not individually in relation to snuff.

There are several less interventive alternatives that could at least equally effectively achieve the objective of protecting public health. Such measures could be more effective enforcement of age limits, municipal licensing schemes and determination of the limits for unwanted substances in snuff. The scheme, which enters into effect on 26 October 2017, is not the same licensing scheme as the Norwegian Parliament originally adopted.

Violation of the principle of equal treatment also indicates that the mandate is not necessary, cf. C-265/06, section 43 and EFTA Court Case E-09/00, Alcopop, section 56-57. Snuff and e-cigarettes are treated differently in spite of the fact that the products are comparable, while snuff and cigarettes are treated equally, even though the products have a completely different risk profile.

It is further argued that there are conditions for securing a temporary injunction, cf. the Dispute Act, section 34-4 (1) (b). Implementation of the mandate - denormalisation of snuff – creates irreparable consequences. The mandate creates a deliberately false impression that snuff is as dangerous as cigarettes and can reduce (the value of) snuff as a harm-limiting alternative to cigarettes. Significant misconceptions regarding health risks with respect to snuff are reinforced through the mandate. The reputation consequences will be irreparable, and Swedish Match will not be able to rectify these. Another obvious consequence of the mandate will be that low-cost products of poorer quality will gain access to the market. All products will look the same, and consumers will choose a product based on price to a greater degree.

Furthermore, the mandate will cause Swedish Match to suffer significant economic damage and disadvantages as a result of the fact that production has to be restructured for the Norwegian market. These manufacturing adjustments must be made long before 1 July 2018. In addition, Swedish Match will not be able to use the company's design and trademark.

There is no basis for refusing an injunction due to lack of proportionality. It is a question of implementing new rules which have not previously been deemed necessary, and there is no dire need for immediate implementation. At the same time, implementation of the mandate will have major production and sales implications for Swedish Match, leading to irreparable reputation damage, but without having a major effect on total consumption.

The injunction must last until the question of legality is subject to a full examination and a legally binding judgment.

Swedish Match Ltd. has submitted the following requests:

1. The State, under the auspices of the Ministry of Health and Care, is prohibited from implementing or applying the mandate on standardised snuff packages as specified in the Tobacco Harm Act, section 30, and the regulation regarding amendment of the regulation on the content and labelling of tobacco products of 22 June 2017, No. 942, Chapter IV and VIII against Swedish Match Ltd. until a legally binding judgment on the legality of the mandate exists.
2. Swedish Match Ltd. is awarded litigation expenses.

3.2 The State, under the auspices of the Ministry of Health and Care Services has asserted

The states can determine the level of protection and how to achieve this, cf. EFTA Court judgment in case E-16/10, Phillip Morris, section 77 et seq. However, the measure must be suitable for meeting the current objective. If it is a measure that is appropriate for limiting the consumption of tobacco, this is presumed to be suitable for promoting public health. In such cases, it rests with the plaintiff to prove that the opposite is true by providing clear proof of this, cf. Mathisen/Fredriksen, EEA law, 2nd edition, page 106/107. The State alleges that the plaintiff has not submitted such “clear evidence” in this case.

The legislators’ assumptions and objectives for the regulation appear in Proposition 142 L (2015-2016). The proposition states that the legislators were familiar with Swedish Match's view of the documentation regarding health risks associated with the use of snuff. The preparatory work also shows that the legislators were familiar with the “harm reduction” discussion, cf. Recommendation 101 (2016-2017), p. 12.

The Tobacco Directives (Directive 2001/37 and 2014/40) are based on the argument that tobacco products are dangerous to health, and prescribe measures against this (health warnings, misleading packaging and snuff bans). If snuff was not harmful, the provisions that entail measures to limit the use of the snuff could not have been adopted.

As regards the health risk, the State will show that smokeless tobacco contains nicotine and is addictive. Furthermore, smokeless tobacco in all its forms can cause cancer. Research also confirms the health risks associated with snuff. Although there are relative differences in the health risks, snuff cannot be considered a safe or harmless product.

Products with low nitrosamine content, such as snuff, have not been on the market for long enough to conclude anything with any certainty. Health risks associated with smokeless tobacco are pancreatic cancer, oral and oesophageal cancer, as well as there being an increased risk of fatal heart attacks and complications during pregnancy. Although there is scientific uncertainty regarding certain findings, conflicting results should be interpreted with caution.

The fact that tobacco products are harmful to health, and that this also applies to snuff, is stated in Directive 2014/40, preface sections 8, 32, 34, Article 12 (1) and 17.

The State claims that standardised packaging is a suitable measure to reduce the consumption of snuff. Measures that restrict the marketing of tobacco products are, by their very nature, appropriate for reducing the consumption of snuff, especially among children and adolescents, cf. Directive 2003/33 (Marketing Directive), preface sections 3, 27 and 28, and Articles 3-5, 7, 13 and 14. The State refers further to E-16/10 Phillip Morris, sections 143-144 and the decision of the EU Court of Justice in case C-491/01 BAT, sections 133-139.

With regard to standardised packaging, Directive 2014/40, preface section 53 and Article 24(2) recalls that States are given the right to impose requirements for this. It is also stated in E-16/10 Phillip Morris, section 76, that there is nothing in the directive that prevents the introduction of standard packaging requirements. On the contrary, the decision indicates that reduction of tobacco use, including snuff, is suitable for promoting public health, cf. Judgement paragraphs 77 and 84. The fact that neutral packaging is suitable for reducing consumption of tobacco products, including snuff, is further supported by a number of other sources. The State here refers to, among other things, the EU Commission's impact assessment, Sweden's impact assessment in SOU 2016:14, and the WHO Convention and its guidelines.

The harm reduction hypothesis cannot be used as a starting point. Existing studies do not provide the basis for reliable conclusions. A number of institutions reject or criticise the harm limitation theory and the "Swedish Experience". The Advocate General's statement in the Swedish Match case, C-210/03, paragraphs 50-54, shows that the gateway and harm reduction theories go in opposite directions and that scientific uncertainty prevails in both respects. The consideration of deterrence indicates that the legislators do not have to wait until the gateway theory is proven, cf. the Advocate General's statement, paragraphs 108-109.

Under any circumstances, the tobacco directives prohibit the marketing of snuff, which in itself eliminates the harm limitation hypothesis. The theory is further incompatible with the WHO Convention and its guidelines. For states not subject to the ban on snuff, i.e. Norway and Sweden, the Directive requires that snuff be treated like other tobacco products with regard to misleading packaging, cf. Article 13 of the Directive, cf. 2(4). Likewise, the Directive permits standardised packaging to be introduced for tobacco products in general, including snuff, cf. Article 24 (2) cf. 2 (4).

The measure that imposes standardised packaging promotes the objective/objectives in a consistent and systematic manner.

The consistency assessment is limited to the same product and is not extended to similar products, see EU Court of Justice Case C-333/14 Scotch Whiskey, sections 37-39. The condition is fulfilled if the measure conforms to a series of other similar measures directed against the product. The Norwegian tobacco regulation is such a regulation type.

Snuff is a different product than e-cigarettes because the latter is not a tobacco product, cf. section 2 of the Tobacco Harm Act and Directive 2014/40, Article 2(4), 2(16) and Article 20, which provide for a less stringent regulation than for tobacco products, cf. case C-477/14 Pillbox 38, section 43. The WHO Convention also associates the marketing restrictions with tobacco products, cf. Articles 11 and 13 of the Convention. It is evident from the Pillbox decision that the differentiation in the Tobacco Directive is considered to be consistent.

E-cigarettes and tobacco products are different products and therefore need not be regulated in the same manner. The products have different content, different consumption. In addition, e-cigarettes are new products and the health risk has not yet been clarified. Furthermore, e-cigarettes do not specifically appeal to youths, and the use of the product is currently not widespread. If the market conditions for e-cigarettes change, standard packaging may also be introduced for these.

It follows from this that it is also not inconsistent to distinguish between e-cigarettes and snuff with respect to the formulation of the regulations.

Therefore, Swedish Match cannot validly claim that the state has chosen a low level of protection because standard packaging of e-cigarettes is not compulsory. Requirements for standard packaging are based on a high level of protection, cf. Directive 2014/40, Article 13 and E-16/10 Phillip Morris, sections 143-144, among others.

The measure regarding standardised packaging is necessary. The states have a margin of appreciation in the selection of measures, and this margin of appreciation indicates that a limited judicial review intensity be taken into account by the courts. The states do not need to positively establish that no other measure would have achieved the consideration equally effectively, cf. EU Court of Justice Case C-333/14 Scotch Whiskey, section 37.

Regulation of requirements for product content, including limit values, are not an alternative measure. Product regulation is by nature not an equally effective preventive measure, nor does it ensure all of the objectives of the measure. The main purpose here is to prevent the use of tobacco, especially among children and adolescents (prevention), while the purpose of product regulation is to reduce health damage related to tobacco use (harm reduction). Product regulation therefore does not ensure the preventive objectives of the measure (to avoid new recruitment).

Product regulation and other harm reduction measures are complementary - not alternative - to preventive measures. The State further refers to the fact that the ban on misleading tobacco packaging has been deemed necessary despite the fact that the states are also required to regulate the product's content.

The State will further argue that the regulation of a product's content is by nature not a more intrusive measure than regulation of packaging. Packaging regulation limits marketing, while product content requirements constitute a prohibition on non-compliant products, cf. EU Court of Justice judgment in case C-41/02, section 49. Product requirements that could theoretically provide equivalent protection levels as preventive measures will be comparable to a ban on snuff.

A higher age limit for snuff will at least be an equally effective measure in relation to the primary purpose of avoiding new recruitment of children and adolescents, but it will not reduce the attractiveness of the product and prevent new users over the age limit. The assessment of the impact of the measure must be linked to all target groups. Age limits are by nature not as effective as preventive measures. Such limits can easily be circumvented and are therefore not an effective measure to protect people under the age limit. Age limits are complementary - not alternative – to preventative measures. We refer to the Tobacco Directive's system, which urges states to introduce age limits (preface, section 21), while they are simultaneously obligated to ban misleading packaging (Article 13) and provide a legal basis for the introduction of neutral packages (Article 24 (2)). The introduction of age limits has also not prevented the courts from considering that the ban on misleading packaging is necessary or that the directive authorises the introduction of standardised packaging. Age limits are also not a minor intervention measure; they prohibit the sale of the product within a section of the market (those below the age limit).

Strict enforcement of the age limits is also not an alternative measure. Chapter 7 of the Tobacco Harm Act has introduced measures to ensure better enforcement. In any case, this is not an equally effective measure.

The measure could not be limited so that the neutral packages would only be sold to children and adolescents. The objective is not confined to youths.

The snuff ban in the EU is considered necessary. It follows from C-210/03 Swedish Match that the ban is considered proportionate and therefore also justified according to Article 13 of the EEA Agreement. Although this is not decisive for our case, it is clearly normative of what the outcome must be in terms of legality of the packaging requirements. The same can be inferred by, among other things, the Commission's decision of 26 July 2016 regarding smokeless tobacco products in Finland, section 32, and by the UK's notification to the Commission of similar measures concerning neutral packaging, and where the Commission had no objections, cf. the High Court of Justice, Queen's Bench Division, Administrative Court's decision of 19 May 2016 regarding British American Tobacco et al., sections 666-679 (hereinafter referred to as the "BAT judgment").

The measure has been adequately elucidated. There is no need to consider measures which by their nature are less effective. This is especially true in cases where the EU impact assessment has clarified that the measure is effective, and the WHO especially recommends it.

The State further argues that there is no reason to demand security. It is not documented that Swedish Match will be subject to any specific disadvantage as a result of the measure. The effects that Swedish Match asserts will result from the measure will only take effect after the measure comes into effect. Consequently, there is good time to get the case considered in the form of an ordinary lawsuit and after the usual main proceedings. Regardless, any loss that Swedish Match will incur can be compensated for - the counterparty (the State) is obviously not indigent. Furthermore, Swedish Match has not established as probable that it will suffer any irreversible loss of reputation due to the measure.

In all circumstances, the proportionality requirement is not met. The plaintiff's interest is essentially of an economic nature and is largely protected by the compensation option. The State's interests are, in turn, to avoid irreversible consequences in terms of exposure to health risks.

If Swedish Match's claim for injunction is upheld, this can nevertheless not be given any longer duration than to the date on which there is a judgement in the first instance. In this case, the State requests that the Plaintiff be imposed a deadline to immediately file a lawsuit.

The State has submitted the following requests:

1. The petition for a temporary injunction is not allowed.
2. The State, under the auspices of the Ministry of Health and Care Services, is awarded litigation expenses.

3.3 The Norwegian Cancer Society has asserted

The Norwegian Cancer society agrees with the State's arguments and claims in the case.

4 ASSESSMENT OF THE COURT

4.1 The principle questions of the case

The EEA Agreement sets out in Article 11 a prohibition against measures that prevent or restrict the free movement of goods. The mandate on standardised tobacco packages and goods forms a part of product requirements, and it is clear – and not contested either- that the mandate must be regarded as a restriction pursuant to Article 11, as well as SOU 2016: 14, chapter 10.7.4.

The question is therefore whether the measure is still legal under Article 13 of the EEA Agreement, which under certain conditions authorises the introduction of restrictions if they are justified due to specified considerations. One of the considerations protected by the decision is the consideration of public health (“life and health of humans and animals”). It is not disputed in this case that the relevant mandate is justified for public health reasons and that this is a legitimate interest that is protected by the current decision.

Although the measure in question is justified for reasons covered by Article 13, it must in fact also be appropriate for safeguarding the considerations cited. Furthermore, the scheme must not have a greater trade-barrier effect than is necessary in order to favour the consideration(s) that justify the scheme as well as the national authorities wish.

As explained by way of introduction, it follows from Article 24(2) of Directive 2014/40 that the states have the opportunity to maintain or introduce further requirements as regards as the aspects concerning the packaging of tobacco products that have not been harmonised by the Directive, for example, by setting requirements for which colours the packaging will have. Lawsuits raised to find the decision invalid have not been filed, cf. EU Court of Justice decision in case C-547/14 Phillip Morris.

The Ministry of Health and Care Services has in Proposition 142 L (2015-2015), page 77 (subsection 3.10.2) assumed that the proportionality assessment under Article 13 of the EEA Agreement will be in the long run consistent with the assessment of whether the conditions under the Tobacco Directive Article 24(2) are fulfilled. It has been shown in that connection that the relevant decision in the Tobacco Directive must also be understood in light of the principle of freedom of movement and which restrictions on the flow of goods that are appropriate and necessary for public health reasons under Article 13 of the EEA Agreement. The Court agrees with this and refers to C-547/14 Phillip Morris et al., section 70. The parties in this case have used the general provisions of Articles 11 and 13 as a starting point in the assessment of the questions raised by the case, and the Court's assessment in the following will be linked to those provisions and the case law which further determines the content in the provisions.

There is reason to note that, in the consultation round, Swedish Match also argued that the requirement for standard packaging of snuff would go too far in relation to the relevant EU/EEA legal principles, and in particular, the proportionality principle. In this connection, it was especially emphasised that there is insufficient evidence of health damage associated with snuff use to justify such a radical intervention in the free movement of legal goods that the measure entails, and that the investigation of alternative measures that would have a similar effect was very inadequate, cf. the proposition, page 75 et. seq. (subsection 3.10.1).

Swedish Match's arguments related to lack of proportionality were assessed by the ministry in the proposition, page 77 et seq. (see subsection 3.10.2). To some extent, these are the same arguments made by Swedish Match in this case, and it is also stated by Swedish Match that in reality, the company asks for a review in a Court of law of the questions raised by the company during the consultation round and which the company considers were answered inadequately or incorrectly.

The Court wishes to note further that several of the arguments and statements put forward by Swedish Match in this case are similar to what the company asserted in the EU Court of Justice Case C-210/03 Swedish Match, regarding the snuff ban in the EU, see for example, the Advocate General's proposal for a decision in the case, section 44 et seq.

In his proceedings, the Attorney General has argued that the statements made by Swedish Match in this case are also to a large extent a copy of the statements made by the company in EU Court of Justice Case C-151/17 Swedish Match, which is a case that has not yet been processed or decided by the EU Court of Justice. The questions that the EU Court of Justice's case concretely raises are to a limited extent explained to the Court here. However, the Attorney General has encouraged this Court to obtain the contributions from the Commission, the European Parliament and the Council, which are submitted in the current case. The Court announced at the end of the verbal negotiations that it would not procure these contributions and indicated that it would then be necessary to accommodate for contradiction regarding the evidence under consideration. The contributions from the relevant EU institutions are therefore not included in the case documents.

4.2 Burden of proof and evidentiary requirements

The starting point and basic principle are that the authorities that implement the measure must prove that the measures pursue legitimate objectives and that they are appropriate and necessary as means for achieving these objectives. Basically, it is the one responsible for the restrictions that has the risk of doubt and the obligation to provide evidence, cf., for example, the EFTA Court's decision in E-16/10 Phillip Morris, section 85, and the decision of the EU Court of Justice in case C-333/14 Scotch Whiskey, section 53.

As regards the evidentiary requirements that are applicable, Haukeland Fredriksen and Mathisen, EEA law, 2nd edition, p. 105, refers to the fact that the EU Court of Justice's practice is based on the fact that a sharpened evidentiary requirement to prove that a measure is justified is applicable, but that at the same time, the Court accommodates the evidentiary requirement in some cases. It appears that this is the case in situations where the legal interests that the restriction shall protect concern life and health, and where it is a question of averting a serious and imminent danger to these interests. It also follows from Bull, Legal Data, comments on the EEA Agreement, Article 11, Note 34 that in practice, there are variations in which evidentiary requirements are made.

In the decision of the EFTA Court in case E-16/10 Phillip Morris, the Court ruled that the measure, a ban on the placement of tobacco products, was a measure which by nature appeared to limit in the long term the consumption of tobacco in the relevant EEA state. In the absence of clear evidence to the contrary, a measure of this kind could therefore be regarded as appropriate for protecting public health.

In the EU Court of Justice decision in case C-10/05, section 66, which involved a ban on moped trailers, the Court ruled that requirements cannot be imposed that the state in question must prove that no other conceivable measures can make it possible to attain the relevant objective on the same terms. The same is true of C-333/14 Scotch Whiskey, section 55.

In the extension of this, it is apparent from the latter decision, section 56:

“In that context, it is for the national Court called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the principle of proportionality. On the basis of that evidence, that Court must, in particular, examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less intrusive of the free movement of goods.”

The same evidentiary requirement was made in EU Court of Justice Case C-148/15, section 36, which applied to German legislation that established a fixed price scheme for the sale of prescription medicines.

In summary, according to existing practice, there is no basis for setting any sharpened evidentiary requirements in assessing whether the relevant mandate is appropriate and necessary. The Court assumes that the State will have fulfilled the evidentiary requirement if there are reasonable grounds to believe that the measure is appropriate and necessary to achieve the objective.

4.3 Judicial review intensity and margin of appreciation

The courts initially fully examine the EEA Court's proportionality principle, that is, both the interpretation and the subsumption, cf. Haukeland Fredriksen, the Court's examination of the EEA Agreement's proportionality principle - A comment on the Supreme Court's judgment in the gambling machine case, Jussens Venner 05/2007, pages 295- 305. and Haukeland Fredriksen and Mathisen op.cit., page 99. On the part of Swedish Match, it is also shown that the courts must prove whether the measure has been taken on the basis of a clearly false assessment, in English “manifest error of assessment”, and that it is in this case that the courts must also examine whether the order has been made on a false factual basis, see, for example, C-293/93 Houtwipper, section 22.

In other words, the courts initially undertake a full examination as to whether the measure meets the proportionality principle, and this assessment must be done in a specific way, where the use of tobacco in society, international and updated research results, market conditions and any effects of different measures are taken into account. The Court assumes that this assessment of factual circumstances must be undertaken, even if one arrives at the conclusion that the State has a margin of appreciation in the area concerned, see BAT judgment, sections 408 and 442, and Sejersted et al., EEA law, 3. edition, 2011, page 341.

At the same time, the EU and the EFTA Courts accommodate the judicial review intensity in some cases, partly due to the character of the legal interest to be safeguarded by the restriction. The complexity of the assessments to be made and uncertainty related to the impact of the measures can also justify restraint in the judicial review of whether the measure is proportionate, cf. Advocate General's decision proposal in case C-333/14 Scotch Whiskey, section 84. It will also be relevant whether the measure in question is directly based on EU legislation, whether the measure is based on national regulations in which the State invokes general exemption provisions (such as the EOS Agreement, Article 13) as the basis for the measure, or for measures that implement EU legislation in national courts, cf. The Supreme Court's decision of June 24, 2015, Lumsdon, section 35. The accommodation of the judicial review intensity stands in close relationship to the accommodation that the courts make of the evidentiary requirement, cf. Haukeland Fredriksen and Mathisen op.cit., pages 107-108. The relationship between the questions regarding evidence and the judicial review intensity is also shown in the Advocate General's decision proposal in case C-333/14 Scotch Whiskey, sections 82-86.

A consequence of this is that in certain areas, separate principles or guidelines for the judicial review that the courts will undertake in certain areas may develop, cf. the Supreme Court's decision of 24 June 2015, Lumsdon, section 34. An example of this is the EU and EFTA Courts decisions regarding gambling, as Haukeland Fredriksen has shown in the above-mentioned article in Jussens Venner 05/2007.

As regards measures adopted by EU institutions, it has in practice been assumed that these can only be considered illegal if the measures are “manifestly inappropriate” or “manifestly disproportionate” cf., for example, EU Court of Justice judgements in cases C-44 /14 Pillbox 38, section 49 and C-491/01 American Tobacco, section 123. In legal theory, it is further assumed that the EU Court uses a “stricter” proportionality assessment vis-à-vis the Member States than the EU institutions, cf. Fenger, Proportionality principle in the EU and EEA courts in the book, “Proportionality Principle Assessments in Administrative Law”, 2015, Note 2. However, the above-mentioned basis for the evidentiary assessment/judicial review does not apply in cases where the restriction in question is not based on EU legislation, cf. the Advocate General's decision proposal in case C-333/14 Scotch Whiskey, section 86 and BAT judgement, section 449.

At the same time, as mentioned above with respect to practice, the states have a wide margin of appreciation in the area of health. The fact that there is scientific uncertainty related to the potential for damage and the risk of the products to which the restrictions apply, may further lead to a larger margin of discretion than would otherwise have been the case, cf. section 445 of the BAT judgment. The same applies if the objective to be safeguarded is particularly important politically, cf. Fenger, op.cit. 3.2.1. At times, this margin of appreciation is expressed in the same way as in the judicial precedents that are associated with measures adopted by the EU legislature. One example is the EU Court of Justice judgment in case C-293/93 Houtwipper, which concerned a Dutch law that established an approval/guarantee scheme for precious metal work, in which the Court (section 22) assumed that the Member States had a wide margin of discretion, and that it is only where a clearly false assessment has been shown, (“manifest error of assessment”, “åbenbart fejlskjøn”, “eines offensichtlichen Ermessenfehlers”), that the measure can be set aside. In this connection, the Court mentions as a matter of form that one of Swedish Match's main arguments is based precisely on the fact that the State has made "obvious misjudgements" when adopting the new provisions on standard packaging. It is therefore possible to ask questions based on this regarding how great the difference in practice is between those cases where the measure in question is based on EU legislation and where the basis is national law.

On the basis of the above-mentioned practice, the Court considers that the states have a wide margin of appreciation in the “tobacco harm area” and that this margin of appreciation applies to both the appropriateness test and the necessity test, cf. section 676 of the BAT judgment. The correlation between the questions regarding evidence and the judicial review intensity further indicates that the starting point for the assessment of condition for appropriateness and necessity is the same. In this connection, the Court refers to the EFTA Court's decision in E-16/10 Phillip Morris, section 83, which states:

“It follows that, where the EEA State concerned legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health.”

On the basis of the existing evidence, the Court shall make an objective assessment regarding whether there are reasonable grounds to assume that the measure is appropriate and necessary, cf. decision in C-333 Scotch Whiskey, section 56. The assessment shall be based on an in-depth analysis of all relevant facts and legal issues in the case, cf. Scotch Whiskey, section 50 and the Supreme Court's decision of 24 June 2015, Lumsdon, section 74. The Court assumes with this that a full review of proportionality must be undertaken, but that the State must therefore be granted a margin of appreciation, see also regarding this, Haukeland Fredriksen and Mathisen, op.cit., page 99. As the Court will return to in greater detail below, this cannot be understood to mean that the actual threshold to “Pass” the appropriateness and necessity test is necessarily high.

4.4 The question as to whether the mandate on standardised snuff packages is an appropriate measure

4.4.1 General information regarding the appropriateness test

The appropriateness test means that the measure must be examined against its objective - the measure must be a suitable means of achieving the objective, cf. Haukeland Fredriksen and Mathisen, op.cit., page 92 et seq. The subject of the assessment is not how well suited the measure is, only if it is truly appropriate. Haukeland Fredriksen and Mathisen formulate this as a question of whether the measure should be presumed to lead to the attainment of the objective.

In legal theory, it is on the basis of the practice of the EU Court of Justice and the EFTA Court assumed that the appropriateness test is not particularly strict and that it is curtailed to checking whether the measure is as a whole or is clearly unsuitable for promoting the relevant public interest, cf. Haukeland Fredriksen and Mathisen, op.cit., page 93, Bull, Legal data, comments on the EEA Agreement, Article 11, Note 34, and Fenger, op.cit., section 3.2.1.

In the decision of the EU Court of Justice in C-333/14 Scotch Whiskey, the assessment was limited to the finding that it was not unreasonable to assume that a measure that set a minimum price for alcoholic beverages that were cheap was suitable for reducing alcohol consumption in general and dangerous or harmful alcohol consumption in particular. The EU Court of Justice also issued a brief statement in the judgment in C-110/05, section 63, that the current ban on the use of motorcycle trailers was appropriate for safeguarding the objective - road safety - because there were no approval regulations that ensured that the use of motorcycle trailers was not dangerous. The same can be said of the EFTA Court Case E-16/10, Phillip Morris, sections 83 and 84. The discussions leave the impression that the assessments were also not encumbered by any particular doubt.

As part of the assessment of the appropriateness requirement, a judicial review must also be made to assess whether the state acts consistently in its policy in the area concerned (in the theory, referred to as the “consistency test”), cf. C-333/14 Scotch Whiskey, section 37. As part of this, it must be taken into account whether the state adopts, promotes or tolerates other measures that go against the objectives sought by the legislation in question, cf. EFTA Court ruling in case E-3/06 Ladbrokes, section 51.

The Court cannot see that this elaboration or the specification of the appropriateness criterion implies that the actual judicial review of the measure will necessarily be different. In this connection, we can refer to the Scotch Whiskey decision, section 38, where it was briefly stated that the relevant measure – a minimum price for alcohol - was only one of a number of measures that were implemented in Scotland and that were aimed at reducing alcohol consumption in the population, and that it was therefore also consistent, cf. Gjermund Mathisen, Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement, Common Market Law Review 2010, pages 1021-1048.

4.4.2 The question as to whether the mandate has been adopted on a faulty factual basis and is based upon obvious misjudgements

Swedish Match has argued that the mandate for standardised snuff packages will only be an appropriate measure if it is based on a thorough assessment of the risk that the State invokes as a basis for implementing the measure, and that the measure will not be appropriate if it is based on an obviously false assessment (“manifest error of assessment”). The cited legal basis for the arguments are, among others, cases C-41/02, section 48, C-293/93 Houtwipper, section 22, and EFTA Court ruling in E-03/00 Kellogg's, section 26. In connection with this, it is argued that the factual basis that the legislative body bases its assessment on regarding whether the relevant measure is to be put into effect must be correct, and in this connection, it is referred, among other things, to the Court of first instance decision, T-13/99 Pfizer.

Swedish Match's arguments regarding factual errors raise questions about what is necessary for such errors to lead to an inappropriate measure. The question has not been sought to be elucidated to any great degree by the parties in the present case.

Assuming that it is only in cases where the exercise of discretion is clearly false that a measure will not be appropriate, in the court's view, this draws attention to the fact that the actual error in the factual basis must be so clear and substantial that it - at least theoretically - may have impacted the decision on whether the measure should be adopted and implemented. This will provide a poor correlation between the regulations if almost every error in the factual basis of measure leads to the proportionality criterion not being fulfilled, while the corresponding threshold for error in the exercise of discretion should be that the decision is based on an obviously incorrect exercise of discretion. The relevant questions are also closely connected to each other, as it is precisely a factual error that is cited as the basis for the inaccuracy of the exercise of discretion. The Court finds support for such an interpretation in the Supreme Court's decision of 24 June 2015, Lumsdon, section 42, where the more detailed content of the similar term “manifestly inappropriate” is discussed, cf. section 4.3 above.

The assessment of whether the measure is based on the correct facts shall be undertaken based on evidence at the time when the Court makes its decision, cf. C-333/14 Scotch Whiskey, sections 63 and 65. It follows from the practice of the EU Court of Justice that measures that are based upon public health reasons can be adopted, even though the research is not unambiguous, as long as the measure is based on recent, credible studies, cf. Advocate General's statement in case C-210/03 Swedish Match, section 93. There being clear indications (“serious indications”) that there is a health risk associated with the use of the relevant product is sufficient.

The factual basis that the legislators used as a basis in adopting the new provisions on standard packaging of snuff is set forth in Proposition 142 L (2015-2016), pages 13 and 91 (subsections 1.4.2 and 3.10.2). The proposition states that the Ministry assessed Swedish Match's arguments that were made during the consultation round, including the argument that there is insufficient documentation of health damage caused by using snuff to justify such an in-depth intervention in the free flow of goods. The Ministry's point of departure here was that "using snuff is far less harmful to health than smoking", but that this does not mean that the health damage is irrelevant, and that this applies especially to vulnerable groups, such as children and adolescents, those suffering from heart disease and pregnant women.

Regarding the general risk associated with the use of snuff, there is reason to note that Swedish Match does not dispute that there are certain risks associated with the use, in other words, that the product is not risk-free. In this connection, Swedish Match has claimed, among other things, that snuff has the same risk profile as e-cigarettes.

The fact that snuff is a product that is addictive and that has negative health effects is also the basis of EU legislation, cf. Directive 2014/40, preface, Section 32:

"Council Directive 89/622/EEC prohibited the sale in the Member States of certain types of tobacco for oral use. Directive 2001/37/EC reaffirmed that prohibition. Article 151 of the Act of Accession of Austria, Finland and Sweden grants Sweden a derogation from the prohibition. The prohibition of the sale of tobacco for oral use should be maintained in order to prevent the introduction in the Union (apart from Sweden) of a product that is addictive and has adverse health effects. For other smokeless tobacco products that are not produced for the mass market, strict provisions on labelling and certain provisions relating to their ingredients are considered sufficient to contain their expansion in the market beyond their traditional use."

In this connection, we refer to the fact that the ban on the sale and marketing of smokeless tobacco has also so far been maintained in the case law, cf. C-210/03 Swedish Match.

The Court concludes that for the reasons mentioned above, it already follows that there is a health risk associated with the use of snuff. The disagreement relates mainly to the extent of this risk, and in particular, the question of whether the use of snuff can lead to cancer.

In order to further assess what the disagreement associated with the risk profile and possible errors regarding facts and the exercise of discretion are, it is necessary to take a closer look at the justification given by the State in order to introduce the new rules on standard packaging. The Court - as the parties - assumes that the existence of the snuff ban does not automatically imply that a less intrusive measure (here, the requirement for standard packaging) is proportionate, cf. the Advocate General's statement in case C-148/15, sections

Regarding the risk of *heart attack* and *stroke*, the Ministry concluded that there are convincing indications that using snuff may lead to increased risk of death *after* a heart attack or stroke, and that there are some indications that using snuff may be associated with increased risk for heart failure, cf. the proposition, page 13 (subsection 1.4.2). In addition, the parties seem to agree that there is no increased risk of cardiovascular disease as a result of using snuff.

In this connection, Swedish Match has referred to the fact that there are challenges related to research that shows the risk of increased mortality after suffering an infarction or stroke because possible causes of such outcomes can be complex/ varied. In the material presented by Swedish Match, which provides an overview of available research, there is at least one study that concludes that the prognoses for stroke patients who use snuff are poorer than they are for others. Certain other studies also show increased risk, including increased blood pressure. The existing research material has been reviewed in the Norwegian Institute of Public Health's report, section 6.4, and in subsection 6.4.4 (page 93), it is concluded that there are few or no indications that the use of snuff increases the risk of getting cardiovascular disease, a heart attack or a stroke, but that there is an increased risk of death after a heart attack or stroke. The same thing is indicated in the Swedish Institute of Public Health's Report A 2005: 15 "Health Risks with Swedish snuff", page 94. The Court accordingly deems that there is no indication that the Ministry's assessment is based on an incorrect fact on this point.

The Ministry further stated that there are "indications that high consumption of snuff is associated with an increased risk of *type 2 diabetes*, as well as some indications that snuff use may be associated with a risk of weight gain and obesity", cf. the Proposition, p. 13. Swedish Match has presented an overview of available research on the relationship between snuff use and diabetes 2, which shows that in three studies, a connection has been demonstrated such as that which the Ministry has assumed. Nor can the Court see that there is reason to conclude that the Ministry has assumed an incorrect fact.

Regarding the health risk of *snuff use for pregnant women*, this is not contested in this case and must in addition be considered to be well documented. The Court refers here to the explanation from Anna Gunnerbeck, which shows that using snuff during pregnancy may lead to foetal death and premature birth.

Regarding *the goal of reducing tobacco use among children and youths*, it is not contested that this is a legitimate concern and that the State can and should take measures to limit this use to the greatest extent possible. The Court refers here to the fact that Swedish Match, as one of several other, less intrusive alternatives to standard packaging, has indicated that the State can instead adopt rules regarding higher age limits for the purchase of snuff and more effective enforcement of age limits. Furthermore, during the oral hearing, Swedish Match has in addition clearly communicated during the verbal negotiation agreement that children and youths should not use snuff. The fact that the consideration that children and youths should not start smoking or using snuff was a fundamental consideration behind the measure is also clear, cf. Recommendation 101 L (2016-2017), page 17 et seq.

The Ministry has further stated that using snuff causes *changes in the oral cavity and mucous membranes, as well as retraction of the gums*, which in turn can lead to the softening of the teeth and tooth sensitivity. Swedish Match has not contested nor attempted to oppose the conclusions, and they are based on the conclusions of the Norwegian Institute of Public Health's report. There is no basis to consider that the conclusions are incorrect.

In the proposition, the Ministry has highlighted as "an important question" *to what degree use of snuff increases the risk of later smoking*. In this regard, the Ministry refers to the Norwegian Institute of Public Health's report, which shows that there is an excess of indications that using snuff increases the risk of later smoking (report page 111). At the same time, it shows (proposition page 13) that there are "more studies, but [that] these show contradictory results". In its summary of available research, Swedish Match has referred to the fact that two studies have concluded that there may be a connection between using snuff and smoking, but that there are also several studies that substantiate that there is no basis for such a "gateway" hypothesis. Similar uncertainty is expressed in SCENIHR's (Scientific Committee on Emerging and Newly Identified Health Risks) report, "Health Effects of Smokeless Tobacco Products", 6 February 2008, Chapter 3.7.1.1. The fact that there is uncertainty about this, including professional disagreement as to what would be sufficient proof of a "gateway", is also stated in the National Institute of Drug Research's report of 15 December 2014, page 53. On the basis of this, the Court cannot see that the Ministry incorrectly assumed that research results in this area differ substantially.

When it then comes to the *risk of cancer* as a result of using snuff, the Ministry refers to the Norwegian Institute of Public Health's report, which concludes that snuff is carcinogenic and that there are good indications that snuff increases the risk of cancer of the pancreas, oesophagus and oral cavity, and that there are some indications that use of snuff increases the risk of cancer of the stomach, lung, colon and rectum (proposition, pages 12-13). This is also formulated in the report of the Norwegian Institute of Public Health (page 13), so that the three forms of cancer - pancreatic cancer, oesophageal cancer and cancer in the oral cavity - are "certainly related to the use of snuff". At the same time, it is apparent from the proposition that it is not possible to determine how great the risk increase for using snuff will be for getting cancer, and that the degree of risk is likely to depend on how early one starts using snuff, how frequently it is used, how much snuff is used, how many years one uses snuff and the content of harmful substances in the snuff product.

The fact that there are challenges to quantify the risk associated with snus use is also found in the Norwegian Institute of Public Health's report, page 112, which states:

“The TSNA content [carcinogenic tobacco-specific nitrosamines] will be important with respect to the risk of cancer, and for health effects where nicotine plays an important role, the nicotine content will be of importance. However, it is not possible from the epidemiological studies to quantify the magnitude of the risk of health effects with respect to snuff use.”

The same is stated in the same report, pages 80 and 117.

In response to this summary, Swedish Match has protested that the Norwegian Institute of Public Health has based its conclusions on research on smokeless tobacco other than snuff, although it is agreed that the amount of tobacco-specific nitrosamines is important with respect to cancer risk (the Norwegian Institute of Public Health's report, page 117). The Court will note with respect to this that it is clear from both the Norwegian Institute of Public Health's report and the Ministry's summary that, when compiling and evaluating available research, one has been conscious that the tobacco-specific nitrosamine content in different types of snuff varies (the report, page 46) and that the content of harmful substances in the snuff product are important with regards to cancer risk (the report, pages 65, 77). In light of this, according to the view of the court, the Norwegian Institute of Public Health and the Ministry have been conscious of and taken into account that the research must be assessed in light of these individual differences.

Swedish Match has also argued that in the assessment of the research available in this area, it is unacceptable not to assess the risk, and in this connection, has referred to WHO report, "The Scientific Basis of Tobacco Product Regulation", page 9, which states that the risk of using smokeless tobacco varies between the products, and that these differences in risk make it “scientifically inappropriate” to consider smokeless tobacco as a single product when the risk of the products are assessed, and the measures are determined. To this end, the Court will show that the Norwegian Institute of Public Health and the Ministry - as shown above - have taken these conditions into account in the assessment made of the existing research related to smokeless tobacco. In this context, it must also be taken into account that the challenges associated with estimating the risk also relate to the knowledge of usage patterns, cf. the above-mentioned WHO report, page 9, in conjunction with the Norwegian Institute of Public Health and the Ministry report, page 12. In the view of the court, there is no basis to conclude that the challenges presented by the Norwegian Institute of Public Health regarding the calculation of the risk are not real, and that for this reason, that the working group's assessments and conclusions must therefore be deemed to be based on a clearly inadequate judgment.

There is further reason to assume that the research material assessed has become broader due to the fact that research findings relating to different types of smokeless tobacco are included in the assessments, cf. the Norwegian Institute of Public Health's report, pages 78 and 79. The Court mentions further that there have also been questions raised regarding whether products with lower levels of carcinogenic nitrosamines - such as Scandinavian snuff - have been sufficiently long in the market to make it possible to decide conclusively the extent to which these products can be carcinogenic, cf. the Commission Staff Working Document, Impact Assessment, 19 December 2012, page 64. It is therefore noted that there also appears to be disagreement as to whether there is a basis for distinguishing between the so-called Scandinavian snuff sold on the market today and other types of snuff sold in western countries, cf. the Swedish Institute of Public Health's November 2005 report, "Health Risks with Swedish Snuff", page 57.

The Norwegian Institute of Public Health has largely based on its assessments and conclusions on the synthesis of knowledge regarding health risks with the use of snuff and smokeless tobacco from the EU's Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) and the World Health Organization's Cancer Institute - the International Agency for Cancer Research (IARC).

SCENIHR concludes in the 2008 report, "Health Effects of Smokeless Tobacco Products" (page 93) that there is a causal link between the use of smokeless tobacco and *pancreatic cancer*, but that it is difficult to estimate the risk due to the fact that the products have varying amounts of toxic substances, and that the studies have been conducted in different populations with different usage patterns. The IARC has concluded in the 2012 report, "Personal Habits and Indoor Combustions" (pages 295 and 309) that there are sufficient indications that there is causal link between the use of smokeless tobacco and pancreatic cancer.

SCENIHR further concludes (page 93) that there is a causal link between the use of smokeless tobacco and *oesophageal cancer* and that some studies have shown an increased risk of *oral cavity cancer*. The same is stated in the IARC report (pages 295 and 309), which concludes that there are strong indications that the use of smokeless tobacco can cause cancer in the oral cavity and that there are sufficient indications that the use of smokeless tobacco can lead to cancer of the oesophagus.

According to what the Court can see, there is no significant deviation between the conclusions drawn by the Norwegian Institute of Public Health in its report and the conclusions drawn in the Swedish Public Health Institute's report from 2005. In the latter report (page 51) it is concluded that pancreatic cancer, together with cancer in the oral cavity, is the cancer form for which the epidemiological indications for a connection with smokeless tobacco are the strongest. At the same time, it is stated in the same report, p. 52:

“All in all, the majority of studies give indications that snuff can be a risk factor for pancreatic cancer, but the basis for the Scandinavian snuff is limited and based on repeated analyses from a single cohort. There is no evidence that the carcinogenic effects of the snuff are modified by country of origin. “

Furthermore, the Swedish Public Health Institute's report (page 51) states that - despite variations in the results of the studies - there are several studies showing that there is a causal link between cancer in the oral cavity and snuff use than studies that show that there is no such connection. However, the proportion of studies showing a relationship seems to be lower when it comes to Scandinavian snuff, but without there being any good basis for concluding that Scandinavian snuff has other carcinogenic properties than other smokeless tobacco products that are sold in western countries.

In the case of oesophageal cancer, the Swedish Public Health Institute (page 54) concludes that the majority of studies suggest a slight risk increase for this form of cancer for snuff users.

The Ministry further assumed that there are some indications that the use of snuff increases the risk of cancer in the stomach, lung, colon and rectum. The same is stated in the Norwegian Institute of Public Health report, page 80.

Swedish Match has presented an overview of available research on the connection between different forms of cancer and the use of Scandinavian snuff. Some of the studies are also included in the summaries of knowledge developed by SCENIHR and the IARC, which form the basis of the Norwegian Institute of Public Health report. No objections have been made as regards the contents of the summaries provided in the overview, and the Court assumes that the overview provides a complete and comprehensive overall view of the conclusions in the existing research related to the cancer risk associated with the use of Scandinavian snus.

The overview presented by Swedish Match shows that most of the studies published on the connection between cancer in the oral cavity and snuff use show that there is no risk associated with using snuff, and that there is only one study where increased risk has been identified. In the case of pancreatic cancer, there are three studies that, with some different assumptions, conclude that there is an increased risk for snuff users, while the majority of studies conclude that there is no such relationship. For oesophageal cancer, one study has shown that there is an increased risk for snuff users, while the other three studies have not shown such an increase in risk. In the case of lung cancer and stomach cancer, there are no indications in the research of any increased risk due to using snuff, except one study that showed an increased risk of stomach cancer as a result of using snuff.

If the conclusions drawn by the Norwegian Institute of Public Health in its report are compared with the summary presented by Swedish Match regarding available research on Scandinavian snuff, the question of the Ministry's general conclusions that “snuff is carcinogenic” and that there are “good indications suggesting that using snuff increases the risk of cancer of the pancreas, oesophagus and oral cavity”, as well as “some indications that the use of snuff increases the risk of cancer in the stomach, lung, colon and rectum”, is accurate for the actual research in the area.

If one takes as a starting point the existing research related to Scandinavian or Swedish snuff, in the court's view, there is much to suggest that the report of the Norwegian Institute of Public Health and the summary of conclusions in this, as they are recounted in the proposition, give an incomplete or somewhat skewed picture of the current research in the field. In this connection, the Court refers to the fact that the majority of the studies that are carried out linked to the risk of cancer due to snuff use show that there is no increased risk of cancer associated with the use of Scandinavian snuff. Based on the submission of evidence in this case, it is the view of the Court that the existing research does not provide the basis for a conclusion that there is a “certain” connection between the use of Scandinavian snuff and some types of cancer, but that the picture is more complex. Jan Alexander, who was the head of the working group that prepared the report, explained in this context that the phrase “convincing indications” is meant to express that there is a strong balance of probabilities (in the order of 80-90% probability) for the connection between snuff use and the relevant forms of cancer. A more correct approach would, according to the court's view, be to reveal that there is a greater scientific uncertainty, also in relation to the causal link between snuff use and cancer of the pancreas, oral cavity and oesophagus, than was stated in the report, and later referred to in the proposition. As an example of a more balanced summary of the international research in the field, the Court refers to the Commission's Working Document, Impact Assessment, 19 December 2012, page 64, et seq.

In assessing whether there is a fault in the factual basis relating to the assessments of whether the use of snus can lead to cancer and the significance that this may have, in the view of the court, it must be taken into account that the Ministry expressly assumed that - based on the present research - it was not possible to determine how large the risk increase for using snuff will be in order to get cancer. Furthermore, it must be taken into account that the Ministry, in its assessment, took into account that the risk would depend on the usage pattern and type of product. The latter must also be seen in relation to the fact that the studies carried out have had information regarding exposure to a limited degree, cf. the explanation by Jan Alexander regarding this and the Norwegian Institute of Public Health report, page 12. These clarifications contribute, in the view of the court, to creating a more complete and correct picture of the risk that using snuff can lead to cancer. Furthermore, the Court can also not see that there are any errors in the factual basis underlying the measure as a result of the fact that when assessing the available research, the Norwegian Public Health Institute included research, not only regarding snuff, but also on other smokeless tobacco, and we refer here to the fact that there were objective reasons for including studies on other types of smokeless tobacco.

If the factual basis that the Ministry based the preparation of the law on is considered collectively, the Court will say that this essentially provides a comprehensive description of the research available, as presented by the parties in this case. In the view of the court, the conditions relating to the summary of the research on the connection between using snuff and cancer are not of a character that indicates that the discretionary assessment of whether the measure is to be implemented is based on obvious misjudgements. In this assessment, it must also be taken into account that the purpose of the relevant measure is beyond the limitation of the spread of cancer, and faults with or deficiencies in the factual basis on which the measure is based with respect to this one point, can therefore not lead to the assessment of the appropriateness of the measure being considered to be based on obvious misjudgements.

4.4.3 The question as to whether the measure is not appropriate because it has no positive effect on public health

Swedish Match has also argued that the measure is not appropriate because it has no positive effect on public health. With respect to this, we refer in particular to the Advocate General's decision proposal in case C-148/15, section 48, which states that an action would only be appropriate if the measure truly seeks (“genuinely reflects”) to achieve the objective in a coherent and systematic manner. The same criterion are used as a basis in previous practice of the EU Court of Justice, cf. note 44 of the Advocate General's decision proposal.

Swedish Match's argument is based on the fact that the Court here will carry out an examination of whether the measure in question is actually appropriate for – capable of - achieving the effect that the authorities aim for. It is not here a question of putting an action aside as a consequence of the measure being contradictory or that the objective of the measure is different from what the State claims.

The assessment of whether the measure should be considered appropriate must be based on the specific objective(s) that the measure shall safeguard, see, for example, C-333/14 Scotch Whiskey, section 34 et seq., and EFTA Court Case E-3/06 Ladbrokes, section 50 et seq. The Court finds no basis in the existing practice for the approach on which Swedish Match's argument is based, and which implies that the assessment of the effect of the measure is based on a form of discretionary overall assessment - or “health problem” - of whether the measure results in a net public health benefit.

The Court finds support for this understanding in the Advocate General’s decision proposal in case C-262/02 Loi Evin, section 80, which states:

“Accordingly, what must be ascertained is not which measures would be feasible and more effective in abstract terms, but whether the actual measures adopted by France in the exercise of its discretionary power to impede the televising of binational sporting events at which advertising for alcoholic beverages is displayed are appropriate for achieving the degree of protection of public health pursued by that State.”

The EFTA Court's decision in case E-16/10 Phillip Morris, section 83-84, moves further in the direction of that the courts in this field do not make strict demands for a measure to be considered appropriate. As long as the measure cannot clearly be considered inappropriate, the suitability test must also be considered to be passed.

The purpose of the standard packaging requirement is stated in Proposition 142 L (2015-2016), page 59, and Recommendation 101 L (2016-2017), page 7, and is cited initially in this ruling. In summary, the purpose of the standard packaging requirement is to:

- Reduce the proportion of children and youths who start using tobacco, so that youths are protected from the harmful effects of tobacco use.
- Make tobacco products less attractive by limiting the packaging's advertising effect, increasing the effect of health warnings, and minimising the risk that packet designs give misleading impressions of the health risk associated with tobacco use.
- Contribute to a moderate reduction in tobacco use among adults.
- Denormalise tobacco products and tobacco use in society.

In the view of the court, there is no indication that these objectives could be better achieved by not implementing the current measure regarding standard packaging. This primarily concerns the objective of reducing the proportion of children and youths who start using tobacco, but the other objectives will also not be better safeguarded by reversing the current measure.

As regards Swedish Match's argument that snuff is a harm-limiting alternative (alternative product) to cigarettes, the Court will refer to the Advocate General's statement in case C-210/03 Swedish Match, sections 50-54 and 89, which states that there is uncertainty linked to both the harm limitation theory (that snuff is a harm-limiting alternative to cigarettes) and the “gateway” theory (that using snuff may lead to more people - who otherwise would not have started using tobacco – beginning to smoke). Furthermore, the Court cannot see that more recent research contributes significantly to the greater clarity of these issues, see for example, Commission Staff Working Document, Impact Assessment, 19 December 2012, pages 66-69, with a review of available research, and Ingeborg Lund and Karl Erik Lund, How has the Availability of Snuff Influenced Cigarette Smoking in Norway? International Journal of Environmental Research and Public Health 2014, page 11713. The Court further refers to the explanation of Karl Erik Lund, where it was found that his assessment was that the net health benefit of the measure would be negative, but that this is an assessment question. With respect to this question, David Hammond explained that the introduction of standard packaging requirements is likely to have little or no effect for people who want to switch from cigarettes to snuff.

It follows from this that the problem presented here before the Court must be regarded as quite complex and as having an uncertain conclusion. As shown above, this also requires that the courts show restraint when testing whether the relevant measure is appropriate. In addition, this is a question of the introduction of a recognised measure, which is recommended internationally and being introduced in a number of countries, and which is considered effective by research, especially where the states have already introduced extensive restrictions on marketing tobacco products. The Court refers in particular here to the statement by David Hammond regarding the effect of introducing requirements for standard packaging. Under these circumstances, the measure must also be considered to be appropriate.

4.4.4 The question as to whether the measure is inappropriate due to a lack of consistency and systematics in the regulations

Swedish Match further argues that the measure is not appropriate because the State has adopted different regulations for snuff and e-cigarettes, even though the products have a similar risk profile, and that there is no basis for any different regulation of the products. In this regard, it is referred to EU Court of Justice case C-169/07 Hartlauer, C-500/05 Corporación Dermoestética and EFTA Court case E-03/06 Ladbrokes.

The question as to whether the State seeks to achieve the objective sought by the relevant measure in a consistent and systematic manner is included in the appropriateness test, cf. the Advocate General's decision proposal in case C-148/15, section 48.

As regards the more detailed content of the criterion that the measure should only be considered appropriate if it truly fulfils the interest of attaining the objective in a coherent and systematic manner, it will be relevant to look at whether the State adopts, promotes or tolerates other measures that work against the objectives sought by the legislation concerned, cf. Ladbrokes decision, section 51.1 There is a requirement for consistency in this, including the fact that the State truly pursues the purpose that justifies the measure, and that the measure is not contradictory, cf. Haukeland Fredriksen and Mathisen op.cit., page 93 and Fenger op.cit., page 53 et seq.

The decisions that Swedish Match has referred to can also be seen as a consequence of this. One example is the EU Court of Justice's decision in E-169/07 Hartlauer. Briefly, the case concerned the issue of whether provisions in Austrian legislation that placed requirements upon permission to establish and operate private treatment institutions was an illegal restriction of freedom of establishment. In the actual case, a private individual had been refused a license for such a permit because what the clinic would provide was already covered by doctors who had health insurance agreements, which meant that one of the conditions for obtaining such a permit was not fulfilled. The EU Court of Justice concluded that the measure did not contribute to the realisation of the objectives, the need to maintain good and stable healthcare and cost management in a coherent and systematic way, because the relevant legislation simultaneously allowed for so-called joint or group practices, but without any fair reason to distinguish between them, cf. the judgment, section 57 et seq.

In legal theory, the above-mentioned practice is formulated (Fenger op. cit., pages 55-57), so that it sets requirements to ensure that the State really pursues the unbiased objective that is invoked in support of the measure's legality, that is, that the measure is not justified for external purposes. Furthermore, it is assumed that the requirement for coherence and consistency can infer a requirement that the overall legislation or the collective measures taken will have the ability to reach the stated objective. The EU Court of Justice's decision in the Hartlauer case may, in the view of the Court, be seen as the expression of the latter.

However, the question is about Swedish Match's argument of biased differential treatment of snuff and e-cigarettes, given that these products have similar characteristics and risk profiles, will be to take one step further than that which follows from the above-mentioned practice. Fenger op.cit., page 56, discusses how far the above principles can be stretched in the following way:

“Applied strictly for only the most obvious cases, such a further test will not differ significantly from the test of the law’s objective ability to achieve its goal just mentioned. But what if the requirement that the goal be pursued systematically is broadly interpreted? Can one, for example, in the interests of public health, prohibit smoking on public transport if one does not simultaneously prohibit smoking in public offices? And can one ban a given food additive if one allows the same food to contain other presumptively hazardous additives?”

In the court's view, questions can be raised about whether the problem that Fenger raises in the quote above is also pertinent to our case. In short, the question we face here is whether the appropriateness test is to be extended beyond the “obvious” cases. Fenger answers this question in the negative, and among others, refers to the judgment of the EFTA Court in case E-3/00, which concerned a Norwegian ban on additives in corn flakes, and to EU Court of Justice case C-28/09. Based on this, he concludes that with respect to the requirement of consistency and coherence, the states do not have to choose "all or nothing solutions" if they can reasonably argue for why the relevant legislation or measure is limited to specific situations and does not include other factors that to the same extent, cause the harmful effects that the legislation or measure claims to counteract.

As Fenger points out (page 57), the current issue may also arise in relation to the principle of equal treatment, cf. in this regard the Advocate General's statement in EU Court of Justice case C-210/03 Swedish Match, section 122. The Advocate General's statement in the aforementioned case (section 125) indicates that the states have the same judicial margin in relation to the principle of equal treatment as they have in the assessment of the consistency requirement, and that the discretionary authority of the states will only be exceeded when they make arbitrary choices. Stated in another way, one can say that the states, if they choose to regulate products with similar risk profiles differently, must have fair or justifiable grounds for this.

The fact that the products in question have been on the market for short or long periods of time may be one reason for such differential treatment. In the Swedish Match case, the Court assumed (section 71) that there was a basis for treating oral tobacco products differently from chewing tobacco products because the oral tobacco products were new on the market in the Member States. That there may be grounds for treating products differently for the above reasons also follows from the EU Court of Justice's decision in C-477/14 Pillbox 38, section 62.

Furthermore, relevant in this assessment will be whether the products have different objective characteristics, cf. Pillbox 38 section 62 cf. 36 et seq. With objective characteristics, for example, it refers to ingredients that are included in the products and how the products are used.

It is further stated in C-333/14 Scotch Whiskey, section 38, that the court, as part of the test of whether the measure is appropriate, should take into consideration whether the measure is included as one of several measures that form part of a more comprehensive strategy.

In the Court's view, it follows from the above-mentioned practice that the assessment of whether the measure seeks to fulfil the objective in a consistent and systematic manner is based on a broader assessment, not only of whether the relevant products have a comparable risk profile and any harm-limiting potential. In light of this, no decisive emphasis can be placed on the legislative body having chosen different perspectives for regulating e-cigarettes and snuff, cf. Norwegian Parliament Report 19, Public Health Statement, page 72 (subsection 3.4.1), which emphasises the importance of harm limitation in relation to e-cigarettes, while the corresponding perspective is not included in the assessment of the health risks associated with snuff, cf. Consultation paper on proposals for standardised tobacco packaging and implementation of the Tobacco Convention, Article 5.3, page 25 (subsection 3.5).

In the concrete assessment of whether there is a basis for differentiating snuff and e-cigarettes, or whether such discrimination will imply a lack of consistency and coherence in the regulations, the Court finds that the parties agree that e-cigarettes are a new product and for the time being, there is little research on any harm related to use, cf. also in this connection Proposition 142 L (205-2016), page 21 (subsection 2.3.1). In the court's view, this condition in itself contributes to the different treatment of the products, cf. the above practice. The Court mentions with respect to this that the proposition on page 79 (subsection 3.7.2) and Recommendation 101 L (2106-2017), page 12 (subsection 1.2.4) have taken into account that the requirement for standard packaging may also be introduced for e-cigarettes, and that this may be applicable, for example, if e-cigarettes become extensively used among youths.

In this assessment, emphasis must also be placed on the fact that the objective characteristics of the products are different, both in terms of content (tobacco vs. non-tobacco), the design and characteristics of the products, and consumption/use.

With respect to the products being treated differently, the user groups differ, both in scope and in terms of who make up the user groups, cf. Proposition 142 L (2015-2016), page 8 et seq. (subsection 1.3). In the view of the court, this factor clearly points to the fact that the different treatment of snuff and e-cigarettes must be regarded as fair and justifiable. In this regard, we refer in particular to the fact that there are far fewer youths using e-cigarettes than snuff, and that the requirement for standard packaging is especially aimed at youths. In the court's view, no decisive emphasis can be placed on the fact that the proportion of users using e-cigarettes is different in other countries - the assessment of whether the measure is appropriate must be assessed in concrete terms based on the actual situation in Norway today, cf. SOU 2016:14, page 356 (subsection 10.7.4).

In addition to this, the Tobacco Directive will introduce different regulation for tobacco products and e-cigarettes, cf. EEC Court judgment in case C-477/14 Pillbox 38, section 43. It is further clear that the current mandate on standard packaging is part of a more comprehensive strategy, relating to sales regulations, advertising bans, health warnings, etc.

The Court consequently concludes that there are fair reasons for treating snuff and e-cigarettes differently in relation to the standard packaging requirement, and that there is therefore no reason to conclude that the mandate is not a consequence of a consistent and systematic approach on the part of the State.

4.5 The question as to whether the mandate on standardised packaging of snuff is necessary

4.5.1 General information regarding the necessity test

The necessity test consists of an assessment of whether the legislative body's legitimate and concrete objectives, until the level of protection is chosen, can be achieved by the adopted measure, or whether other and less intrusive measures would be at least as effective as a means to attaining the objective, cf. the EFTA Court's decision in E-3/06 Ladbroke's, section 58. The decisive factor is whether the alternative measure is effective enough to achieve the desired level of protection, not whether the measure is as effective as the chosen measure, cf. Haukeland Fredriksen and Mathisen, *op.cit.*, pages 95-96. The yardstick is the chosen measure's objectives, not its actual effects. To what degree the measure is necessary must be assessed in terms of the actual and judicial context of the measure, cf. EFTA Court decision in E-16/10 Philip Morris, section 86. However, as explained above, the states also have a wide margin of discretion with respect to the necessity test, cf. for example, the BAT judgment, section 676 et seq. with further references to case law.

4.5.2 The question regarding what level of protection the State is pursuing

SM has argued that, in this case, the State has in fact chosen a lower level of protection by allowing the sale of e-cigarettes without a requirement for standard packaging. In this regard, it is stated that e-cigarettes and snuff are comparable and competing products with a similar risk profile.

Regarding the chosen level of protection, it is stated in Proposition 142 L (2015-2016), page 78 (subsection 3.10.2):

“The Ministry is aware that standardised tobacco packages are an intrusive measure towards tobacco producers. Such measures will only be necessary in order to achieve the objectives up to the level of protection that is chosen. In the assessment, emphasis must be placed on the fact that Norway has for decades assumed a particularly high level of protection in the tobacco sector with extensive tobacco legislation and other measures, but until now, it has done little to regulate the tobacco packages or products themselves. It is stated in the preamble of the Tobacco Harm Act that the long-term objective of Norwegian tobacco policy is to achieve a tobacco-free society, cf. section 1 of the Act.”

The Court finds in this case no evidence that the State has chosen a lower level of protection than that which is described above. The fact that a different regulation for e-cigarettes has been chosen than it has for snuff has, as explained above, justified grounds, and how widely used the different products are in Norway has been looked at, among other things. As argued by the State, the requirement for standard packaging - as also stated in the quote from the proposition above - must be considered as one of many measures taken as part of the effort to ensure a high level of protection. The fact that the requirement for standard packaging is included in the group of recent measures aimed at further contributing to reaching the intended level of protection does not appear to be disputed between the parties.

In light of this, the Court concludes that the State has chosen a high level of protection in this area, and that this level of protection is pursued with the requirement for standardised packaging of snuff.

4.5.3 The question as to whether the measure is not necessary or proportionate due to lack of or inadequate assessment of other, less intrusive measures

Swedish Match has further argued that the measure is not necessary or proportionate because other measures have not been evaluated.

The Court would like to note that alternative measures were considered in the preliminary legislative work, cf. Proposition 142 L (2015-2016), page 79 (subsection 3.10.2). In the court's view, there are no indications that the assessment made was not solid when it is clearly stated in the preliminary legislative work. The assessment is included as an element in a broader assessment of the measure's proportionality, in accordance with the requirements of the EU/EEA law. In the view of the court, it is also presumed that the State would not make a *solid* assessment of action alternatives, as a failure here could lead to a breach of state obligations under the mentioned regulations.

In assessing whether any other, less intrusive measures exist, there must, in the view of the Court, be taken into account that the chosen measure in this case is of a type that the Tobacco Directive provides for, and where it is possible for the Member States to individually adopt provisions that set further requirements for the standardisation of tobacco product packaging, cf. Article 24(2) and preface section 53. Furthermore, it is a measure that is generally considered to be effective and is recommended by the WHO, cf. SOU 2016:14, page 347 et seq., (subsection 10.7.1) and EU Court of Justice case C-547/14, section 111-113. In the view of the court, it can be said that equal demands should not be placed on the assessment of alternative measures, if the contrary had been the case, cf. section 672 of the BAT judgment, with reference to section 68 of EU Court of Justice case C-110/05. The measure is also introduced in other countries and has been considered to fulfil the proportionality principle, cf. SOU 2016:14, page 356 (10.7.4). In this regard, the Court further indicates that there is no requirement for the State to demonstrate that there are no other, less intrusive measures that could at least as efficiently lead to safeguarding the objective of the measure, cf. C-333/14 Scotch Whiskey, section 55 and C 110/05, section 66. In legal theory, it is deduced from this practice that the state may be content to argue against the schemes that are actually being argued by the counterparty, or that otherwise may appear to be close alternatives, cf. Bull, Legal Data, comments on Article 11 of the EEA Agreement, Note 43. The assessments made by the Ministry during the preliminary legislative work, and as evidenced by the proposition on page 79, fulfil the requirements, in the view of the Court.

4.5.4 The question as to whether there are other, less intrusive measures that can at least as effectively achieve the objective

Swedish Match has argued that there are several measures that are equally suited to meeting the objectives behind the introduction of the standardised packaging requirement, and in this connection, have referred to more effective enforcement of age limits, higher age limits for purchasing snuff, less intrusive packaging requirements and determination of limit values for undesired substances, and any possible combinations of these measures.

To begin with, the Court wishes to note that it is not immediately clear what a more or less intrusive measure is. The Court assumes that the answer to this question may also vary depending on the relevant supplier's market position and what products are offered. For example, for a manufacturer that offers products with higher levels of carcinogens, it will be more intrusive if the measure consists of product regulation rather than packaging regulation. In this connection, we also refer to the explanation from the Communications Executive at Swedish Match, Patrik Hildingsson, in which it emerged that the new requirements for standardised packaging can lead to the fact that competition for customers will, to a greater degree, be decided according to price, and that this could lead to other competitors entering the market who offer products that do not have the same quality. It follows from this that a requirement for standardised packaging may also benefit individual suppliers.

The fact that the question of what will be the most intrusive measure will be relative is also illustrated by EU Court of Justice case C-201/03 Swedish Match, which concerned the validity of the ban on the sale of snuff in the EU. In the present case, Swedish Match argued that requirements for packaging (“labelling requirements”) could be a less intrusive measure, cf. the Advocate General's statement, sections 116-118. In this case, it is precisely those requirements for packaging that are argued to be too intrusive assessed against other measures that are claimed to be equally effective.

However, the assessment of whether the present measure is necessary must be made with the objectives pursued by the state and which are the basis for the measure in mind, and not the effects of the measure on the individual supplier.

Swedish Match has stated that the State, as one of several possible alternatives and less intrusive measures, could introduce *product requirements* that regulate limit values for unwanted substances in snuff. However, as explained above, how far a product requirement must be considered a more or less intrusive measure than a standard packaging requirement may vary between suppliers. The Court assumes that this type of requirement, like the standardised packaging requirement, could lead to snuff suppliers being forced to change the production in order to meet the requirements for product content. Otherwise, it is hard to see that such a measure could have any effect beyond what is the current situation. Considering the circumstances, the fact that a requirement for product regulation may also be an extremely intrusive measure also follows from the Advocate General's statement in case C-210/03 Swedish Match, section 118. In the view of the Court, therefore, for this reason, there is already no basis to conclude that product regulation is a less intrusive measure.

The Court further agrees with the State that a measure based on product regulation, instead of a standard packaging requirement, would not achieve the desired level of protection. The Court here refers first of all to the fact that measures relating to product regulation do not safeguard the central preventive purpose of the measure, namely to ensure that “as few youths as possible start smoking or using snuff, thus preventing them from being addicted to tobacco in the future”, cf. the proposition, p. 92 (subsection 3.10.2). The Court can also endorse the State's argument that standardised packaging requirements are complementary and not an alternative measure for product regulation and other harm-preventing measures, see SOU 2016:14, page 125 (subsection 4.3) and BAT judgment, section 670, with reference to C-333/14 Scotch Whiskey, section 38. Standardised packaging requirements are just one of many measures aimed at preventing tobacco addiction, and must be considered to work with – not independent of – requirements that are placed on the product's contents. This must be considered to be the case, even though so far, no product regulation on snuff has been adopted in Norway. The Tobacco Directive takes into account that snuff regulations can be determined, both in terms of product requirements (preface, section 20) and standardise packaging (article 24 (2) and preface, section 53).

On the part of Swedish Match, it is further argued that *more effective enforcement of age limits*, possibly in combination with *increased age limits* for the purchase of snuff, may be other, less intrusive measures that could lead to the attainment of the desired level of protection.

Ministry has assumed in Proposition 55 L (2012-2013), page 23 (subsection 3.1.7.2) that strict enforcement of age limits is an effective measure for reducing tobacco use in youths. Whether such an action is effective enough to attain the objectives underlying the chosen measure has not been sought to be substantiated by evidence to a great degree. Another question related to this will be how measures related to age limits and enforcement can or should be formulated in order to enable them to achieve the desired level of protection, including for example, what the age limit in that case should be. The same applies to any measure that had involved less intrusive requirements for standard packaging than the new rules entail. If the age limit is high, there is an immediate possibility that this will also be attacked by the tobacco companies, and what is most or least intrusive could be a more uncertain question. Nor have these questions been sought further elucidated in the case. The argument must largely be deemed to be based on an assumption or assertion that the alternative measure(s) would be effective enough, cf. For comparison, BAT judgment, section 668. In light of this, questions can also be asked as to what extent the State must refute that the alternative measure/s would be effective enough, cf. BAT judgment, section 674.

In the view of the court, there is nevertheless no reason to believe that the alternative measures as indicated here are suitable for reaching the defined objectives up to the chosen level of protection. In this connection, the Court refers to the EU Court of Justice case C-547/14 Phillip Morris, section 178, which among other things, concluded that raising age limits is not an appropriate measure to reduce the attractiveness of products, that it does not prevent people older than the minimum age from beginning to use the product, and that the ban on sales to people below the age limit can easily be circumvented by the marketing of the products, cf. also along the same lines, C-358/14, section 93. In the view of the court, these arguments have validity here as well.

In the court's view, there are no indications that the proposed alternatives safeguard all of the objectives of the chosen measure. The court refers in this to Proposition 142 L (2015-2016), page 59 (subsection 3.6.2), which states that the purpose of the measure is more than to reduce the proportion of children and youths who start using tobacco, although this is the central purpose of the measure. In the proposition and the recommendation, it is stated, as shown above, that the measure is also expected to contribute to a moderate reduction in tobacco consumption among adults, as well as to the denormalisation of tobacco products and tobacco use in society. In addition, it is stated that the measure will also contribute to fulfilling Norway's obligations under the Tobacco Convention. The measure must also be seen in connection with the long-term vision of the Tobacco Harm Act with respect to a tobacco-free society, cf. the proposition, page 59 (subsection 3.6.2). In the view of the court, these objectives will not be achieved by raising the age limits or by introducing a municipal licensing scheme.

The Court also points out that it is an objective of the requirements for standardised tobacco packaging that these should reduce the appeal of the products, especially with respect to youths, see for example, the proposition, page 59 (subsection 3.6.2) and page 65 (subsection 3.7.2). Clearly, this objective will not be achieved by setting higher age limits or introducing a licensing scheme. As the requirement for standardised packaging aims to prevent products from having elements and features that can lead to more people, including the measure's central target group, starting to use snuff, the goal can also not be achieved by alternative measures of the kind proposed here. In this connection, the Court refers to the EU Court of Justice case C-547/14 Phillip Morris, section 160, which is based upon similar views.

In the same way as product requirements, the determination of age limits, possibly in combination with licensing schemes, must be considered complementary – not an alternative measure, cf. Proposition 142 L (2015-2016), page 78 (subsection 3.10.2). Reference is made to the Tobacco Directive's preface, section 21, which recommends the introduction of age limits, while it is simultaneously obliged to ban misleading packaging and has the legal authority to impose neutral packaging requirements in Article 24(2).

In the view of the Court, there is no basis regard the measure in question as unnecessary as a result of a breach of the principle of equal treatment. The examples that Swedish Match has referred to in case law, EU Court of Justice decisions in C-256/06, section 43 and EFTA Court decision in E-09/00 Alcopop, sections 56-57, are not parallel to the situation we are facing here. As the Court sees it, both of the relevant cases deal with clear instances of biased discrimination. In Case C-256/06, Portugal had imposed a ban on fixing coloured film on vehicle windows and justified this in consideration of being able to make a quick check of what or who was in the vehicle. At the same time, however, the state had allowed the sale of tinted-glass vehicles, which could equally prevent a visual inspection of the vehicle, and the relevant measure (the ban on putting coloured film on the windows) could then not be regarded as a necessary measure. In E-09/00, the EFTA Court ruled that the Norwegian Alcohol Act discriminated against beer with an alcohol content of between 2.5% and 4.75% and other beverages with the same alcohol content, because of the stricter rules for the sale of the latter products than for beer. The court further held that it was to some extent about competing products (section 57).

As explained above in section 4.4, there are no corresponding similarities between snuff and e-cigarettes. The differences are expressed in terms of different content, different consumption, time on the market, user groups, extensiveness and the fact that research on the products is at different stages. Furthermore, this is a measure that is part of a more comprehensive strategy or “package” of measures, and where the legislative body must be allowed some scope in order to proceed step by step, especially in a situation where research on one of the products (e-cigarettes) has come short. The fact that snuff in such a situation is subject to the same regulating as cigarettes, while e-cigarettes are not subject to standardised packaging rules, cannot be considered, according to this, as any breach of the principle of equal treatment, which indicates that the measure is not necessary.

The Court concludes accordingly that the State has shown that the introduction of the requirement for standard packaging of snuff is a necessary measure, and that the objectives that the measure is meant to be a means of achieving cannot be attained by using less comprehensive measures or restrictions, perhaps by way of mandates, bans or restrictions that affect trade in the EEA area to a lesser degree.

4.6 Summary – primary claim and basis for security

The Court concludes accordingly that the mandate on standard packaging of snuff fulfils the proportionality principle in EU/EEA law. The measure must be considered as appropriate and necessary. The measure does not involve arbitrary differential treatment or any hidden trade restriction. Accordingly, the primary claim has not been substantiated.

In accordance with this, the Court does not go into the question of whether there is a basis of security, cf. section 34-2 of the Dispute Act, which presupposes that the injunction can only be determined if the primary claim and the basis of security are substantiated.

The petition for a temporary injunction is therefore denied.

4.7 Litigation costs

The State has won the case, and according to the basic principle in the Dispute Act, section 32-2, cf. section 20-2(1) cf. (2), it has the right to have its costs covered. According to the court's assessment, there is no basis for an exemption from the cost liability pursuant to the Dispute Act, section 20-2 (3) or 20-4.

The Attorney General has filed a litigation costs statement which shows that a total of 490 hours have been accrued on the case, at an hourly rate of 1,450 crowns. Both the hourly rate and the number of hours accrued are significantly below what is used by the plaintiff. There are have been no objections to the requirement to pay litigation costs. In addition, a claim has been made to cover expenses for copying and for witnesses and experts. The total litigation cost claim is for NOK 799,895.

The Court deems that the litigation costs that are being claimed must be regarded as necessary, and bases this on the litigation costs statement, cf. the Dispute Act, section 20-5 (1).

The Norwegian Cancer Society has not submitted a claim for coverage of litigation costs.

CONCLUSION

1. The petition is denied.
2. Swedish Match Ltd. pays the State, under the auspices of the Ministry of Health and Care Service, the amount of NOK 799,895 - seven hundred and ninety-nine thousand eight hundred and ninety-five crowns – in litigation costs within 2 – two – weeks from the announcement of the ruling.

The Court is adjourned



Henning Kristiansen

Guidelines regarding the right of appeal in civil cases is attached.

Guidelines regarding the right of appeal in civil cases

The rules in the Dispute Act, chapters 29 and 30, concerning appeals to the Court of Appeals and the Supreme Court regulate the access the parties have to have decisions re-examined by higher courts. The Dispute Act has various rules for appeals against a judge, appeals against rulings and appeals against decisions.

The appeal deadline is one month from the date on which the decision was announced or communicated, unless otherwise expressly determined by the court. The appeal deadline is interrupted by the Court holidays. The Court holidays are as follows: The Court holidays last from the last Saturday before Palm Sunday to Easter Monday, from July 1st to August 15th, and from December 24th to January 3, cf. section 140 of the Courts of Justice Act.

The appellant must pay the processing fee. The Court that has handed down the decision may provide additional details regarding the amount of the fee and how it is to be paid.

Appeals to the Court of Appeals against judgements of the District Court

The Court of Appeals is the appellate body for the District Court's decisions. A judgement from the district Court may be appealed due to errors in the assessment of actual facts, the application of the law or the case processing that underlies the decision.

The Dispute Act sets certain limitations in appeal procedures. Appeals against judgments regarding capital value are not processed without the consent of the Court of Appeals if the value of the object of appeal is below NOK 125,000. When assessing whether consent is to be given, consideration shall be given to, among other things, the nature of the case, the parties' need for re-examination, and whether there appears to be weaknesses in the decision being appealed or in the treatment of the case.

In addition, the appeal - regardless of the value of the object of appeal - may be refused when the Court of Appeals finds that it is clear that the appeal will not succeed. Such refusal can be limited to certain requirements or individual grounds for appeal.

Appeals shall be submitted by written notice of appeal to the district Court that has passed the decision. Self-litigating parties may lodge a verbal appeal by appearing personally at the district court. The Court may allow legal representatives who are not attorneys to also lodge a verbal appeal.

In the notice of appeal, particular attention must be paid to what is contested in the appealed decision and what is new factual or legal grounds or new evidence, should these exist.

The notice of appeal must state:

- the Court of Appeals
- names and addresses of the parties, deputies and legal representatives
- the decision that is being appealed
- whether the entire decision, or just parts of it, are being appealed
- the claim that the appeal case applies to and statement indicating the outcome that the appellant demands
- the errors being asserted regarding the decision being appealed
- the factual and legal grounds for the existence of the errors
- the evidence that will be entered
- the grounds for which the Court can consider the appeal, if there has been any doubt about it
- the appellants view of the further processing of the appeal

Appeals against judgements are normally settled by judgment after verbal negotiations in the Court of Appeals. The appeal procedure must be concentrated on those parts of the District Court's decision that are disputed and questionable when the case comes before the Court of Appeals.

Appeals to the Court of Appeals against rulings and decisions of the District Court

As a rule, a *ruling* may be appealed due to errors in the assessment of evidence, the application of the law or case processing. However, if the ruling concerns a case processing decision that is required by law to be made after an assessment regarding appropriate and sound processing, the decision for the discretionary judgement may only be contravened on the grounds that the decision is unwarranted or clearly unreasonable.

A *decision* can only be appealed on the grounds that the Court has relied on an incorrect general legal understanding of which decisions the Court may make according to the decision applied or that the decision is manifestly unwarranted or unreasonable.

The content requirements of the notice of appeal are, as a rule, the same as those for appeals against judges.

After the district Court has passed judgement, the district court's decisions on the case processing cannot be appealed individually. In such a case, the judgement may instead be appealed on the basis of errors in the case processing.

Appeals against rulings and decisions are submitted to the district Court that has passed the decision. Appeals against rulings and decisions are normally settled by a ruling subsequent to a simple written appraisal in the Court of Appeals.

Appeals to the Supreme Court

The Supreme Court is the appellate body for the decisions of the Court of Appeals.

Appeals to the Supreme Court against a *judge* always require the consent of the Supreme Court's appeal committee. Such consent shall only be given when the appeal concerns questions which are relevant beyond the existing case, or for other reasons, it is particularly important to have the case dealt with by the Supreme Court. - An appeal against a judge is usually settled subsequent to a verbal hearing.

The Supreme Court's appeal committee may refuse to process appeals against rulings and decisions if they do not raise questions of significance beyond the existing case, nor do other considerations indicate that the appeal should be tried, or it essentially raises extensive questions regarding evidence.

When an appeal against rulings and decisions in the district Court is decided in the Court of Appeals by a Court order, the decision cannot be appealed in the Supreme Court as a general rule.

Appeals against the Court of Appeals rulings and decisions are normally settled subsequent to a simple written appraisal in the Supreme Court's appeals committee.