Unofficial Translation

OSLO DISTRICT COURT

JUDGMENT

Entered:	14 September 2012 in Oslo District Court
Civil Action No.:	10-041388TVI-OTIR/02
Judge:	Judge Elisabeth Wittemann
Case concerns:	Prohibition on the visible display of tobacco products

Philip Morris Norway AS	Attorney Jan Magne Juuhl-Langseth Of counsel: Attorney Peter Dyrberg and Assistant Attorney Anne Hukkelaas Gaustad

Versus

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Intervener

The Norwegian Cancer Society	General Secretary Anne Lise Ryel

No restrictions on publication

- Translation from Norwegian -

JUDGMENT

The case concerns the question of whether the prohibition on the visible display of tobacco products and smoking accessories is in conflict with the EEA Agreement Article 11 cf. Article 13.

1 Presentation of the case

Statutory regulation

A total ban on advertising of tobacco products has been in force in Norway since 1975, pursuant to Act No. 14 of 9 March 1973 relating to the Prevention of the Harmful Effects of Tobacco (the Tobacco Control Act) Section 4, previously Section 2. The Tobacco Control Act Section 4 first and second paragraphs state:

> "All forms of advertising of tobacco products are prohibited. The same applies to pipes, cigarette paper, cigarette rollers and other smoking accessories.
>
> Tobacco products must not be included in the advertising for other goods or services."

In Regulation No. 989 of 15 December 1995 relating to the prohibition of advertising of tobacco products etc., as it was worded before the insertion of [the prohibition of] visible display of tobacco products (the Display Ban), Section 8 made an exemption from the prohibition against tobacco advertising inter alia for display of tobacco products. The provision had the following wording:

> "To the extent that a situation will be covered by the advertising prohibition of the Tobacco Control Act Section 2 first, second and fifth paragraphs, including the provisions of these regulations, the following exceptions are hereby made:
>
> 5. Display of tobacco products inside the sales premises to the extent such placement is expedient for rational sales. The exception does not apply to accessories for placement of goods that due to its size or design will have an advertising effect."

By Act No. 18 of 3 April 2009, the Tobacco Control Act was amended in such a way that the display of tobacco products and smoking accessories, which was allowed according to the

exception in Section 8 No. 5 of the Regulations, was prohibited with effect from 1 January 2010. The Tobacco Control Act Section 5 first to third paragraphs reads:

> "The visual display of tobacco products and smoking accessories at points of sale is prohibited. The same applies to imitations of such products and cards for use in vending machines that allow customers to obtain tobacco products or smoking accessories from vending machines.
>
> The prohibition in the first paragraph does not apply to tobacconist shops.
>
> At points of sale neutral information may be given regarding prices and the tobacco products sold there. The same also applies to smoking accessories."

As will be seen from the definitions given in Section 2 [of the Act], tobacco products encompass products that can be smoked, snuffed, sucked or chewed provided that they wholly or partly consist of tobacco.

Objective

The purpose of the introduction of the Display Ban is found in the preparatory works to the amending act, Proposition No. 18 to the Odelsting (2008-2009). In Section 1.1 of the Proposition (page 5) on the main content, it states:

> "The aim of the prohibition is to restrict the advertising effect of display of such goods, in order to contribute to reduced tobacco use and reduced health damages."

The objective is further discusses in Section 1.3 (page 7):

> "The purpose of the ministry's proposal to introduce a prohibition on the visible display of tobacco products and smoking accessories at retail outlets is to reduce the proportion of smokers and snus users in the population in general, and amongst children and youngsters in particular. The ban shall contribute to protecting children and youngsters against the harmful health effects of tobacco use. A reduction in the number of children and youngsters who begin to smoke and/or use snus will in the future lead to a reduction in the proportion of adult smokers and snus users. In addition, a prohibition on the visible display [of tobacco products] could contribute to making it easier for individuals who are trying to quit, or have quit tobacco."

On the significance for children's and young people's exposure to advertising, tobacco products and tobacco use, Section 1.2 of the Proposition notes the following (page 7):

> "In Report No. 11–2004, *Smoking Prevention Measures Among Children And Youngsters*, the Norwegian Knowledge Centre for the Health Services concludes that there is a correlation between early exposure to the tobacco industry's marketing in the form of advertising and future smoking among youngsters in the age group 8 to 17. Surveys have also shown that young people are influenced by how common smoking is, and that young people who overestimate how many people are smokers have a greater risk of beginning themselves. The accessibility of points of sale for tobacco products, the prominent placement of tobacco products at the checkouts and tills and the sale of tobacco products together with other ordinary groceries may contribute to the perception on the part of children and youngsters that tobacco use is more widespread and less dangerous than is actually the case."

Background

The background for the enactment of a display ban was the *National Strategy for Tobacco Control 2006-2010* in which the government, via the Ministry of Health and Care Services [hereafter the Ministry of Health], presented its strategy for tobacco control. In Section 6.2 of the strategy, as one of several sales restriction measures, it was suggested that "A proposal should be drawn up for the ban on visible display of tobacco products and pictures of tobacco products at retail outlets, for example by placing tobacco products under the counter." In the strategy's overview of eight strategic priority areas in tobacco control, sales restrictions is one of three points under the priority area "Prevention of smoking initiation."

The Directorate of Health and Social Affairs (now the Directorate of Health) at the request of the Ministry of Health, presented its professional recommendation in a report of 1 November 2006. The Directorate noted that the public was exposed to a considerable amount of tobacco advertising through the manner in which tobacco products were displayed and sold, and that it would therefore be an important tobacco control measure to ban the visible display of tobacco products. The Directorate concluded that the measure appeared to have the potential of reducing young people's use of tobacco, even if there was no clear documentation of the effect of a display ban. It was argued that the absence of visible tobacco products could also reduce impulse buying and thereby prevent relapse among former smokers. All things considered, a display ban was also regarded as a tool to de-normalise the use of tobacco.

The draft legislation on a display ban was sent on a public consultation in March 2007 with a time limit for comments 20 June 2007.

In connection with the preparation of the draft legislation, the Ministry of Health requested a report from the Norwegian Institute for Alcohol and Drug Research (SIRUS). SIRUS prepared the report *The knowledge base for a prohibition on the display of tobacco products* (SIRUS Papers No. 1/2008). The Ministry of Health wanted an overview of research regarding effects of advertising and advertising prohibitions, and an identification of any effect evaluations of tobacco display bans, before the draft legislation was brought before the Norwegian parliament, the Storting. In Proposition No. 18 to the Odelsting (2008-2009) Section 1.2, the Ministry of Health has reproduced the SIRUS Report as follows:

> "The Norwegian Institute for Alcohol and Drug Research (SIRUS), in the report "The knowledge base for a prohibition on the display of tobacco products" (SIRUS Papers No. 1/2008), notes that the tobacco industry has invested considerable resources in developing packet designs with a view to communicating a message to existing consumers and potential customers, and that the packaging has acquired greater significance as an advertising medium following the introduction of the prohibition of tobacco advertising. The SIRUS Report concludes that there is reason to assume that tobacco-product displays function as purchase influencing factor along the same lines as ordinary advertising. It is, however, difficult to estimate whether the strength of the purchase influence is greater or less than for ordinary advertising, and to what extent the health warnings on the packets are significant for the advertising effect."

The Ministry of Health's evaluation of the effect of a Display Ban

Section 2.3 (pages 12 et seq.) of the Proposition gives the Ministry of Health's evaluation of the effect of a display ban as a tobacco control measure:

> "Many factors influence and affect tobacco use and tobacco sales. In jurisdictions in which display bans have been introduced, the ban is only one of several measures with the same purpose. The various measures operate together and may have a certain synergy effect. It is therefore difficult to determine which effects are due to the individual measure. (…)
>
> Some of the bodies entitled to comment on the public consultation point out that the proposed ban will have no preventive effect in Norway because there is already a considerable impact on attitudes in the form of an advertising ban and rules for labelling of tobacco products. The ministry emphasises that the proposed ban is an important element in a larger package of measures aiming to reduce and prevent the harmful effects of tobacco. The ban must not be regarded as an alternative to other measures in tobacco control, but as a supplement to these.

> Experiences from previous statutory regulations on tobacco show that regulations can to a large extent contribute to a change in attitudes. An example of a statutory regulation that has had such an effect is the introduction of smoke-free bars and restaurants. (…)
>
> The ministry, relying on the information summary from SIRUS, presumes that available information relating to advertising and the effects of advertising has transferable value to the visible display of tobacco products. The ministry is of the opinion that the visible display does not constitute an insignificant purchase influencing factor and a prohibition against the visible display will be a suitable tool to prevent such effects. In the ministry's view there is reason to assume that a removal of the purchase influencing factor will contribute to a reduction in the use of tobacco among children and young people as well as the general population. Furthermore, there is reason to believe that it may take time before we can see the effect of a ban against the visible display of tobacco products and that dramatic changes will therefore not take place in the short term."

The report of the Health and Care Services Committee

The parliamentary Health and Care Services Committee concurred with the Ministry of Health's evaluation in its Recommendation No. 49 to the Odelsting (2008-2009). The majority of the Committee noted:

> "The majority notes that the intention behind the prohibition is to contribute to protect children and young people against the harmful health effects of tobacco use. Section 2 of the Tobacco Control Act provides for a total prohibition against the advertising of tobacco products and the visible display of tobacco products entails an advertising effect for these products. The majority agrees that a reduction in the number of children and young people who begin to smoke and/or use snus will, in the long term, lead to a reduction in the number of adult smokers and snus users. In addition, a tobacco display ban may contribute to making it easier for persons trying to quit or who have quit smoking."

What information may be given to the consumer according to the preparatory works

As regards what information may be given to consumers regarding the product selection at points of sale, the ministry has considered this in Section 4.3 of the Proposition, which reads:

> "Lists of information on product selection and prices may only be posted in the immediate vicinity of the places where the goods are stored. The lists must have a neutral typography and layout. Brands, logos, pictures etc. with an advertising effect may not be used. Nor may such

> lists be designed so as to emphasise any brand names over others. The use of lists should be permitted only inasmuch as it is expedient for rational sales. This means that it is not permitted to post big lists or an exaggerated quantity of lists in such a way that these have an advertising effect in themselves."

The Ministry of Health's evaluation of the relationship with the EEA Agreement

Section 6.2 of the Proposition, on pages 29-30, evaluates the Display Ban vis-à-vis other tobacco-restricting measures:

> "Some consultation bodies have advocated that a limited display of tobacco products should be allowed. This may for example be done by permitting the display of one or two examples of each brand. The ministry considers that such an arrangement would imply that the incentive to purchase and use tobacco which the visible display constitutes, is maintained, which is not compatible with the objective of the proposed prohibition.
>
> Another objection against the proposed ban is that the objective, of preventing children and youngsters from buying tobacco products, can be achieved equally well by a stricter control with the age limit for the sale of such products. Even with a more stringent enforcement of the age limits for tobacco sales, the visible display of tobacco products will provide an incentive to the purchase and use of such products. Therefore, in the ministry's view, stricter enforcement of the age limit is a supplementary measure, which does not in itself negate the legitimacy or the proportionality of limiting indirect marketing. In this connection it is noted that the aim of the proposed prohibition is not merely to affect tobacco use among children and youngsters, but also to limit the consumption of tobacco in general. The ministry cannot see that there exist less restrictive measures that will yield the same effect."

Display bans in other countries

Iceland introduced a display ban in August 2001. Ireland adopted a display ban in 2002 and implemented it in 2009. In the United Kingdom a display ban was passed in 2009, and the ban is to be implemented gradually from 1 April 2012. Finland implemented a display ban 1 January 2012. It is not necessary to discuss the content of the various countries' display bans in greater detail. However, there are differences in the detailed regulation; inter alia in the UK and Finland it is permitted, on request, to show price lists with pictures of products.

Display bans have also been introduced in the 13 Canadian provinces during the period from March 2002 to January 2010, and in five of the Australian states from 2010. Thailand introduced a display ban in 2005, Panama in 2010 and New Zeeland in July 2012.

Overview of the tobacco market in Norway

The Display Ban covers all tobacco products. The main categories of tobacco products are factory-manufactured cigarettes (hereinafter FMC or just cigarettes), Roll Your Own (hereinafter RYO), and snus.

There is currently no tobacco production in Norway, but tobacco products were manufactured in Norway until 2008.

Tidemanns Tobakksfabrikk AS produced the cigarette brand Prince from 1967 to 2008, on licence from House of Prince in Denmark. In addition the cigarette brands Petterøes, Tidemanns Rød, Teddy, and Blue Master were produced in Norway, including other brands that gradually went out of production in the period between 1965 and 2008. Tidemanns Tobakksfabrikk AS also produced the RYO brands Tiedemanns Gul, Tiedemanns Rød, Mentolet and Blå Rose.

The RYO brands Tiedemanns Gul, Tiedemanns Rød, Mentolet and Petterøes, are still on the Norwegian market, of which the first three are owned by the Scandinavian Tobacco Group, while Philip Morris owns Petterøes.

The cigarette brands Prince, Tiedemanns Rød and Petterøes and Blue Master are still on the Norwegian market. Teddy and South State were on the market until 2010/2011. Prince is currently owned by British American Tobacco. Philip Morris owns Petterøes, South State and Blue Master, while Teddy and Tiedemanns Rød are owned by the Scandinavian Tobacco Group.

In addition, Asbjørnsens Tobakksfabrikk produced Eventyrblanding, a RYO, up until 2004. The product is still on the Norwegian market and is currently owned by Imperial.

Since the 1980s snus for the Norwegian market has been produced by Swedish Match.

The plaintiff, Philip Morris Norway AS (hereinafter Philip Morris), has submitted an overview showing the distribution between the three main categories of tobacco products on the Norwegian tobacco market. The overview is based on figures from AC Nielsen for the

supermarket segment (Norwegian acronym DVH), and the figures have been collated and calculated by Philip Morris in connection with the case. As of 31 December 2011 the breakdown was 45% FMC, 26% RYO and 29% snus.

The defendant, the Norwegian Government represented by the Ministry of Health and Care Services (hereinafter the government), has in its presentation of the case provided an overview of the sales of FMC and RYO for the period 2000 to 2011 based on sales figures from AC Nielsen. The overview shows that the sale of cigarettes as of 2000 was around 1.5 billion, that the figure for the period 2007 to 2009 increased to around 1.7 billion in 2009, and thereafter fell back to 1.6 billion in 2010 and 1.55 billion as of December 2011.

The corresponding figures for RYO were, converted to cigarettes, 1.4 billion in 2000, which up to 2006 fell to 780 million, and thereafter increased somewhat and once again fell further during the period from 2008 to 2011 to around 672 million cigarettes (672 tonnes RYO).

According to the government's presentation the ratio between FMC and RYO in 2002 was 52% FMC and 48% RYO. In 2011 the ratio was 68% FMC and 32% RYO.

As regards the market share of the various cigarette brands, measured in sales in the DVH for the six biggest brands in 2005 – 2011, Prince and Marlboro are the biggest with a share of 37.9 percent and 25 percent respectively as of 31 December 2011. For Prince this constitutes a gradual decline from 44.2 percent in 2005. Marlboro has been around the same level, but increased its market share from 23.8 percent in 2009 to 25 percent as of 2011. Next, Barclay/Kent had a 10 percent market share during the period 2005 – 2011. During this period Petterøes was running at around 7 percent, while Lucky Strike went from 3.2 to 4.7 percent. Lucky Strike has increased its market share from 4.1 percent in 2009 to 4.7 percent as of 2011. Paramount, which was introduced in 2007 with a market share of 4.7 percent, has gradually increased its share to 6.9 percent in 2009 and then to 8.7 percent as of 2011. The collocation has been performed by the government and is graphically presented in Ancillary Document 6.

According to a schedule submitted by Philip Morris, the market share as of 31 December 2011 for brands previously produced in Norway by Norwegian-owned companies or on licence (Prince), in addition to Prince and Petterøes, is: Blue Master with 0.4 percent, and Tiedemann with 1.5 percent. South State and Teddy had no market share. In total this came, as of 31 December 2011, to 46.9 percent of the market for cigarettes, of which 37.9 percent is

Prince while the remaining 9 percent are brands from previously Norwegian-owned companies.

RYO is dominated by brands that were previously produced in Norway and as of 31 December 2011 these products had 97.3 percent of the market for RYO.

The parties agree that no entirely new brands have been launched following the implementation of the Display Ban. However, subgroups or variants of existing brands have been introduced.

Philip Morris International owns Marlboro. The company owns a number of other big international cigarette brands, but, as far as the District Court understands, these are not sold on the Norwegian market.

The tobacco markets in Norway, Sweden and Denmark are different as regards the various cigarette brands' market shares. Philip Morris has submitted a graphic comparison between the three countries and the six biggest cigarette brands in each country. While Marlboro has a relatively large share in Norway and Sweden, Marlboro is not among the six biggest in Denmark. Prince has a large share in Norway and Denmark, but a rather smaller one in Sweden. The second-biggest brand in Denmark, L.A., is not found in Norway and Sweden.

Norway distinguishes itself from Sweden and Denmark in that RYO has a larger share of the tobacco market, 22.5 percent as against 6.9 percent in Denmark and 2.3 percent in Sweden, according to figures submitted by Philip Morris. Moreover, snus constitutes a considerable part of the total tobacco market in Norway and Sweden, according to Philip Morris respectively 33 percent and 54.1 percent. In Denmark sale of snus is subject to stricter EU restrictions.

The District Court notes that the information that snus constitutes 33 percent of the tobacco market and RYO 22.5 percent is not in accordance with the figures of 29 and 26 percent respectively as claimed by Philip Morris' overview and to which the court has referred above. The District Court will not discuss this further as in any case it has no significance for the result.

Smoking habits

Statistics Norway (SSB)'s smoking habits survey for the period 1995 – 2010 shows a steady decline in the number of daily smokers from 1998.

In 1998, 33 % of the age group 16-74 smoked daily, as against 19 % in 2010. The decline in daily smoking has been greatest for young people in the age group 16-24. In 1998, 30 % of young people in the age group 16-24 smoked, as against 12 % in 2010. From 2009 to 2010 there was a decline from 21 % to 19 % in daily smoking in the age group 16-74. For the youngsters, the proportion of daily smokers fell from 17 % in 2009 to 12 % in 2010. The decline has been greater among young men than among young women.

The surveys show an increase in the use of snus. The proportion of young men who use snus daily has doubled in the period 2003 to 2010 from 11 to 25 %. Since 2007 there has been an increase in daily snus use among young women, from under 1 % in 2007 to 8 % in 2010.

The progress of the case

On 9 March 2010 Philip Morris brought suit against the government claiming that the Display Ban constitutes an unlawful restriction under the EEA Agreement Article 11. The government claimed acquittal by notice of intention to defend of 15 April 2010.

On 25 June 2010 the District Court decided to refer the questions regarding the interpretation to the EFTA Court pursuant to the Court of Justice Act Section 51 a). There was an understanding [between the parties] that in answering the questions, the EFTA Court should base itself on that the Norwegian regulations are not directly discriminatory, and that the question was whether the regulations indirectly involve discrimination. After receiving the parties' views, on 12 October 2010 the District Court made the following request for an Advisory Opinion:

> "In connection with the decision on whether the EEA Agreement Article 11 and 13 prevent a prohibition of visible display of tobacco products at retail outlets as laid down in the Tobacco Control Act Section 5, the Oslo District Court hereby requests answers to the following questions:
>
> 1. Shall the EEA Agreement Article 11 be understood in such a way that a general prohibition of visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods?

2. Assuming there is a restriction, which criteria would be decisive to determine whether a display prohibition, based on the objective of reduced tobacco use by the public in general and especially amongst young people, would be suitable and necessary to public health?"

The EFTA Court submitted its judgment on 12 September 2011. In reply to the questions the EFTA Court issued the following Advisory Opinion:

"1. A visual display ban on tobacco products, imposed by national legislation of an EEA State, such as the one at issue in the case at hand, constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products imported from other EEA States to a greater degree than that of imported products which were, until recently, produced in Norway.

2. It is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products."

In its pleading of 29 March 2012 the Norwegian Cancer Society declared itself as an intervener under the Dispute Act Section 15-7 first paragraph b).

The main hearing in the case was held over eight court days in the period 4 – 13 June 2012. Nine expert witnesses were heard, in addition to party testimony from Michael Saxon, the General Manager of Philip Morris Norway AS.

2 Phillip Morris Norway AS' claims and legal grounds

Philip Morris entered the following claims:

1. The prohibition in the Act relating to the Prevention of the Harmful Effects of Tobacco (the Tobacco Control Act) Section 5 first paragraph cannot be applied to Philip Morris' tobacco products that have an EEA origin and that are imported from another EEA state to Norway

2. The Defendant shall be ordered to pay the plaintiff's costs, including interest on delayed payment from due date until final payment is made.

As basis for its claims, Philip Morris has adduced the following main arguments:

The Display Ban is a restriction within the meaning of the EEA Agreement Article 11 and is neither a suitable nor a necessary measure to protect public health.

The Display Ban is groundless. The measure's effect on public health is undocumented. At the same time, the Display Ban excludes new products from the market, freezes the market and prevents competition between brands. It is in conflict with a fundamental value in the EU, namely market integration. The measure's effect on trade is entirely clear, whereas the health effects of the Display Ban are uncertain and undocumented.

There is no dispute that tobacco is harmful. It is, however, legitimate for Philip Morris to want competition in the market to increase its market shares, and for that reason attack the Display Ban through the courts.

Restriction

The Display Ban is a restriction that falls under the EEA Agreement Article 11. It is restrictive and *de facto* discriminatory against the free movement of goods and is therefore in conflict with the EEA Agreement.

As regards the restrictiveness of the measure, reference is made to the EFTA Court's advisory opinion paragraph (42), that the prohibition by its nature can have a restrictive effect on the marketing of tobacco products, particularly for the launch of new products on the market. This is supported by the rest of the evidence presented. The restrictive effect is great because of the general tobacco advertising ban.

The Display Ban prevents every remaining possibility of competition between brands on the tobacco market. Brands and product availability cannot be communicated at points of sale and adult consumers who have decided to purchase tobacco products have no opportunity to see brands or the selection of available products. It is thereby impossible for a new brand to succeed in entering the market. The consumers' brand loyalty means that it is even harder to compete on the market, given that the consumers have no opportunity to see the products and

any new brands/brand variations. In any case, sometimes smokers are not as loyal and are more mobile between brands, and this means that competition between brands is relevant.

The EFTA Court defines the restriction evaluation in such a way that the District Court must take special account of the obstacles the Display Ban creates for the right to introduce new products on the Norwegian market, compared with established national brands. Reference is made to the EFTA Court's statement, paragraphs (48-50). Since there is no national tobacco production, the EFTA Court identifies a new group of products that can be discriminated in favour of, namely products previously produced in Norway (national products).

The discrimination test is supposed to emphasise market access for new products, brand loyalty and whether it is too uncertain or indirect to constitute a trade barrier.

In this context, it is noted that national products are dominant in the cigarette and RYO segment. Altogether, national products account for 65 % of the market, of which national products have 97 % of the RYO market. In this context Prince is a national product. Prince has around 38 % of the cigarette market while Marlboro has around 25 % of the market. It is impossible for a new brand to enter the market in the segment in which Prince has a strong position, and impossible to enter the RYO market where national products are totally dominant. This constitutes discrimination between national and imported products. This applies irrespective of whether any established imported products come off better, whereas other established national products come off worse under the introduction of the Display Ban.

The discrimination test as interpreted by the EFTA Court is in line with case law from the European Court of Justice and the EFTA Court, cf. the Gourmet case and Pedicel. In both cases there were corresponding questions as to whether domestic products, that the consumers know better, had a more favourable position than imported products under an advertising ban, and that there was thereby *de facto* discrimination. It has no significance whether new national products have the same difficulties entering the market as new imported products.

Prince is a national product. It is of no significance that Prince was produced on licence in Norway. The relevant question is whether a product has grown strong on the market and therefore makes it more difficult for foreign brands. In any case it has not been substantiated that Norwegian consumers know that Prince is manufactured on licence from Denmark.

Proportionality

The Display Ban is not suitable for achieving the purpose of the Tobacco Control Act of protecting public health.

Tobacco as a product has become highly visible in retail outlets under the Display Ban. Visible display of tobacco products has been replaced by big grey cupboards that are more prominent. The Display Ban has led to making tobacco products as a category more eye-catching than before. Tobacco products are in other words, more visible under the ban and [the ban] does not function.

It is not likely that anyone has started to smoke because they saw tobacco products displayed by the checkout or till at points of sale. If one has failed to communicate to one's children that they ought not to smoke, visible display means nothing in this context.

It is the government that selects the level of protection of public health. Norway is also free to choose solutions to attain the level set. But the measures the government chooses must be proportional, suitable and necessary, cf. paragraph (81) of the EFTA Court's statement. The control under the EEA Agreement concerns the control of which measures are used to attain the objective, not what level of protection the government chooses.

The precautionary principle has no application to the case. There is no scientific uncertainty about the medical consequences of tobacco use, this is the core of the precautionary principle, cf. the Pedicel case E-4/04 paragraphs (59-61).

The EFTA Court does not adjudicate the suitability of the Display Ban in paragraph (84) of its statement. The EFTA Court states, in the same way as in paragraph (42), that the Display Ban by nature is suitable, but without having made any evaluation of the facts. The EFTA Court has not taken a specific position on suitability. Philip Morris disagrees with the government's reproduction of the suitability test saying that it is sufficient that there is reason to assume that the Display Ban will contribute to the protection of public health. A threshold for when the court ought not to intervene – unless the measure is clearly unreasonable or unsuitable – was presented to the EFTA Court, cf. paragraph (68), but not included in the EFTA Court's conclusion.

The EEA Agreement Article 13 is interpreted strictly. The government has the burden of proof that no less restrictive measures exist.

Reference is made, as an example of the strict proportionality test, to case C-170/04 *Rosengren,* to which the EFTA Court refers to via C-421/09 *Humanplasma*, paragraph (38). In the Rosengren case the European Court of Justice concluded that the sales arrangement for self-import of alcohol through Systembolaget [the Swedish state liquor monopoly] was not suitable, as it had limited effects on public health. The consumers would buy alcohol anyway, and the measure was not suitable. The same applies to the Display Ban. The consumers will buy tobacco regardless of the prohibition.

Suitability

Before the Display Ban was introduced, there had been a total ban on advertising for 35 years in Norway. In the course of these years, visible display of tobacco has not been a problem. None of the government's expert witnesses have previously seen display of tobacco as a major problem. Nor did expert witness Karl Erik Lund mention the display ban as a measure in his report to the authorities in 2002, "A Review of the Research Literature on Measures to Reduce Smoking Among Young People".

Until the World Health Organisation (WHO) Framework Convention on Tobacco Control guidelines in 2006-2007, there was no literature indicating that visible tobacco display was a problem or that it was reported as a problem.

Lund and his colleagues in SIRUS in the SIRUS Report 1/2008 authored a document that formed as the basis for the Display Ban. It was difficult to find a knowledge base for display bans. There was little or no research to suggest that display is a problem that justifies a prohibition. Nevertheless, SIRUS concluded that there was reason to assume that a display ban would reduce tobacco use and de-normalise tobacco.

The pattern found in the SIRUS Report 1/2008 is repeated by the government's expert witnesses. The pattern is characterised by a review of available scientifically objective reports. The selection of studies is selective. It is then concluded that it is not possible to derive very much from the data. Nevertheless, the experts conclude that the Display Ban is suitable and necessary.

This is a core point in this case. Philip Morris considers that the natural conclusion one should draw when one does not know, is that one does not know. The government's conclusion is

that they choose to believe. It is fundamentally problematic that reports conclude with certainty where there is uncertainty. It is not enough to hope that the measure will work.

In this context, reference is made to the point of departure in the terms of reference for the SIRUS 1/2008 report from the Ministry of Health. The ministry notes that there is limited documentation on the effects of a display ban, nevertheless the ministry regards such a ban as an extension of the advertising ban. Correspondingly in the Directorate of Health and Social Affairs' report of 1 November 2006 on display bans; there it is concluded that the display ban has no effect, but that the measure appears to have a potential on youngsters and to prevent relapse among former smokers.

This contradicts Professor Sedvall's witness testimony that there is no such thing as impulse relapse. A relapse is always the result of a deliberate decision.

The pattern also recurs in Lavik/Scheffels 2011, "Evaluation of the Display Ban". No effect can be demonstrated, but it cannot be ruled out either.

There is no basis for transferring research on the effect of tobacco advertising to the effect of tobacco displays. SIRUS 1/2008 argues that advertising is communication, that display is communication, and ergo that display is advertising and that the results of advertising research therefore must apply to display. There is no reliable basis for such transfer. Reference is made to the expert witnesses Professor James J. Heckman and Professor Fred E. Selnes, who consider that it is difficult to transfer the result from one research discipline to another. Also Wakefield's survey from 2006 draws different conclusions from advertising and display.

The Ministry of Health had, as a premise for the terms of reference for the SIRUS Report 1/2008, that the Display Ban was an extension of the advertising prohibition, and that there was therefore a need for updated knowledge on the effects of advertising and advertising prohibition on smoking behaviour.

The SIRUS Report 1/2008 concludes through six factors that research into advertising shall be part of the basis for the Display Ban. All the six factors can be rebutted. Transfer value is postulated without any basis in the evidence for this.

It has no significance for the assessment of tobacco displays, that display is defined as advertising in statutory regulations on the prohibition of tobacco advertising. This is a legal

definition. The EU's Tobacco [Advertising] Directive does not, for example, cover displays. It is a legal, technical legislative definition and does not say anything about the transfer value from advertising. It is not based on any science. The same applies to a statement in an Official Norwegian Report (NOU) from 1974 about the tobacco industry's dispositions regarding packet design and product display, in which it is stated that display satisfies the criteria for advertising.

Nor does the fact that the tobacco industry has invested resources in design of packets etc. prove that there is transfer value between advertising for tobacco and visible display of tobacco. This has no significance for smoking uptake or relapse after quitting.

The reference to it seeming logical that displays activate the same cognitive processes as advertising, and the argument that the industry's strong resistance to display bans is a confirmation of the advertising effect, may be hypotheses but prove nothing.

The government had no basis for introducing the ban and recent literature also fails to support it. The updated SIRUS report from March 2012 refers to new surveys and scientific articles. Philip Morris here refers to expert witness Professor Heckman's review of the articles. He concluded that there is no correlation between displays and total consumption. The same was said by the expert witness Professor Selnes. There are no studies establishing a causal connection between display bans and tobacco consumption, youngsters beginning to smoke, or relapse in former smokers. Nor does a broader approach yield any answers. There is no basis for suppositions on effect such as the conclusion of SIRUS Report 2012.

Nor does the new econometric analysis, from expert witness Hans Olav Melberg, document that the Display Ban has had any statistically significant effect on tobacco consumption. Melberg's econometric analysis does not satisfy recognised scientific criteria.

There are no grounds for assuming that the tobacco consumption has been reduced as a consequence of the Display Ban. The declining trend on the market was the same before and during the Display Ban, and inasmuch as there was a dip in 2010, all analyses blame this on the tax increase of 1 January 2010. The same applies to the consumption of snus, where the upward trend before the Display Ban has continued in the same manner after 2010.

As regards the decline in cigarette consumption in the 16–24 age-group, reference is made to expert witness Professor Maria M. Meschi's testimony that the decline must be ascribed to

changes in SSB's methodology for reporting smoking prevalence in the population. There are no grounds for attributing the change to the Display Ban.

Nor has corresponding display bans in other countries had any effect on tobacco consumption.

It is clearly unreasonable to believe that the Display Ban has an effect. The measure thus fails the suitability test, cf. the EEA Agreement Article 13.

Re the government's use of the WHO's Framework Convention and EU-related documents

There is no reason to believe that the WHO, in its work with guidelines and recommendations on display bans, has relied on any different or more research than that upon which SIRUS has built its report of 2008. In other words, it does not constitute evidence for the effect of the measure that WHO supports a display ban.

Article 13 of the Framework Convention speaks only of a comprehensive advertising ban. It is only in the guidelines, which are not legally binding, that the Display Ban is included. In any case, for Norway's part it follows from the EEA Agreement Article 2 that Articles 11 and 13 shall take precedence, otherwise there is a breach of EEA law.

The EU Directive 2003/33/EC contains a legal definition of advertising. It follows from Article 8 that compliance with the advertising ban shall not restrict free trade in goods and services. The advertising ban in Articles 3 and 4 is not a general one, but is restricted to various forms of advertising, cf. the European Court of Justice's judgment in case C-380/03 paragraphs (87 and 88). The display ban is not a part of the advertising ban in the directive, but the member states are free to adopt this within the framework of Articles 8 and 9.

It has no significance in this case that the Commission, the Directorate-General for Health and Consumers, in 2010 circulated a proposal for a revision of the Tobacco Directive for consultation, in which a display ban is mentioned as one of several alternative measures. The Rand Europe report that underlies the proposal in the consultation letter, does not express the European Commission's opinion.

Nor does the Council recommendation of 2 December 2002, on the prevention of smoking and on initiatives to improve tobacco control, have any significance.

Necessity

Even if the ban should fulfil the criterion of suitability, the ban is not a necessary measure for achieving the objective of protecting public health. Alternative measures that are less infringing on the free exchange of goods and would protect public health more effectively, were not considered before the Display Ban was introduced.

Philip Morris points to sufficient enforcement of the age limit for tobacco [sale], the introduction of licensing schemes for tobacco retail, anti-smoking campaigns in the mass media, school programmes and pricing measures. These are measures of which the government is aware and whose great effectiveness is known. Instead, the government chose a measure that is uncertain and undocumented.

There is agreement that the age limit for purchase of tobacco is not enforced well enough today. In case E-9/00 *Rusbrus*, paragraph (56) noted that a more effective enforcement of the age limit would be a more suitable and less restrictive measure. Enforcement of age limits was also considered as an alternative measure in the Rosengren case.

A licensing system to prevent youngsters from buying tobacco was mentioned by SIRUS in its evaluation of measures as early as 2002 without the government having done anything about it. This is in strong contrast to the effect of the Display Ban. Licensing has solid provable effects.

Mass media campaigns would have a much greater de-normalisation effect than the Display Ban. The same applies to the risk of relapse after quitting.

The Display Ban goes far beyond what is necessary to attain the object of the Tobacco Control Act. Display arrangements could have been regulated in a manner that would have permitted meaningful inter-brand competition, and that would not have meant an unlawful trade restriction.

The government considers that the alternatives to which Philip Morris refers cannot be taken into account because they are qualitatively different. There is no case law that supports such a view. Examples of cases in which other qualitatively different measures were regarded as sufficient and less restrictive are cases E-9/00 *Rusbrus* and C-17/00 *De Coster*.

The government has further argued that all tobacco control measures are supplementary. This is an unacceptable argument and makes a proportionality test impossible. The government has transformed the case into one about tobacco policy as a whole. Alternative measures shall be

tested and this testing cannot be evaded by saying that all alternative measures are supplementary.

It is stated in the preparatory works that the authorities considered more limited forms of display as alternatives to the Display Ban. It is, however, not entirely clear what was done, whether the alternatives were researched, what arguments were used and what was evaluated in the way of the effects of limited display.

A regulation of a limited display would have been sufficient to address the government's concern for public health, and facilitated continued inter-brand competition.

3 The claim of the Norwegian Government, represented by the Ministry of Health and Care Services, and the legal grounds for the claim

The Norwegian government, represented by the Ministry of Health and Care Services, entered the following claim:

1. The court shall find in favour of the Norwegian Government, represented by the Ministry of Health and Care Services.

2. The Norwegian Government, represented by the Ministry of Health and Care Services, shall be awarded the costs.

As legal grounds for the claim, the government has adduced the following main arguments:

The tobacco display ban is fully compatible with the EEA Agreement. The ban is not a measure with an effect equivalent to that of a quantitative import restriction under the EEA Agreement Article 11, as there does not exist any discrimination based on nationality, and in any case it is not sufficiently clear.

Anyhow, the Display Ban is a suitable and necessary instrument for achieving the objectives of reduced tobacco use in general and among young people in particular.

The EFTA Court's Advisory Opinion provides for a new restriction test that must be interpreted in the light of EU case law. There is no reason to believe that the EFTA Court

intended to diverge from the European Court of Justice's case law, and there are no grounds for deviating from previous case law. The EFTA Court's statement is advisory and not binding upon the [national] court, but shall be assigned considerable weight, cf. Rt. [Supreme Court Reports] 2000 page 1811.

Restriction

The Display Ban is a selling arrangement that can only be deemed to be a restriction within the meaning of Article 11 if, in law or in fact, it involves discrimination based on nationality.

The parties do not agree as to how the EFTA Court's specific advice in paragraph (50) and the reply to the first question, are to be interpreted.

If Philip Morris' interpretation is accepted, this means that it is accepted that it is sufficient to determine that there exists a market hindrance. The EFTA Court has rejected the notion that this is to be tested. In paragraphs (42 and 43) the EFTA Court notes that the Display Ban by nature acts as a market hindrance for new products. This is a reference to the fact that a market hindrance test would have meant that the Display Ban was a restriction.

The government agrees that the Display Ban gives an advantage to established brands, inter alia in consequence of great brand loyalty and the greater difficulty of establishing new brands; this was also argued in the government's submission to the EFTA Court. The criterion, however, is discrimination based on nationality, not merely big actor versus small actor or established actor versus new entrant.

The matter to be evaluated is what is contained in the EFTA Court's statement paragraphs (44-47). In paragraph (45) the EFTA Court states that the Display Ban is a selling arrangement. There is no restriction if the provisions in law and in fact, affect the sale of domestic products and sale of goods from other EEA states equally, cf. paragraph (46). It is the party asserting that such discrimination exists that has the burden of proof that the selling arrangement involves a not insignificant *de facto* discrimination.

In the specific evaluation set up by the EFTA Court, it is a criterion that the Display Ban must affect the marketing of previously national products differently than other foreign products, and that any difference must be clearly determinable. In that connection it is a requirement

that it cannot be ruled out that the Display Ban affects previously Norwegian products more favourable due to local habits and customs linked to tobacco consumption, cf. paragraph (48).

The EFTA Court's Advisory Opinion has common features with the decisions in C-405/98 Gourmet and E-4/04 Pedicel, in that it is not decisive in itself that it is a matter of a comprehensive ban, and that market shares are not a subject of discussion. Further, that it is not in itself decisive that new brands are more affected. In contrast to these cases, the EFTA Court did not find grounds for concluding in our case. It is emphasised that any differential treatment must be clearly ascertainable, and that this is because it is unclear whether there are any decisive differences between previously Norwegian brands and other brands – that is to say, whether the consumers are more familiar with the previously Norwegian brands and therefore automatically prefer these.

It is not in itself decisive that new/small actors/brands are more affected than big or established ones. This was not a matter for consideration in Gourmet or Pedicel or in other cases. On the contrary, there are judgments that indicate that it is accepted that regulations affect small actors harder, cf. C-387/93 *Banchero* paragraphs (38 and 40) and C-189/95 *Franzen*, paragraphs (65-66).

There are no grounds for diverging from previous EFTA/EU case law, and the EFTA Court's statement must be interpreted in the light of such case law. It is a novelty that the discrimination test shall be related to previously nationally-produced goods. The EFTA Court's Advisory Opinion paragraph (49) cannot be understood as meaning that it is a decisive argument that new products are more affected than established products. This was agreed between the parties during the consideration, and if the court thought it decisive it would have said something more about this. Moreover, this would be to build on a market hindrance test that the EFTA Court has rejected in paragraphs (42-43). The EFTA Court's doctrine in paragraph (49) is unclear; the specific advice in the case is to be found in paragraph (50).

The products that until recently were produced in Norway and still are on the market, are RYO, and the cigarette brands Petterøes, Tidemann Rød and South State [Blue Master]. Prince was previously produced in Norway but on licence from Denmark, and in this context it cannot be regarded as a national product. It cannot be the production location that is decisive, but what is included by the concept of local custom. If Marlboro was produced in

Norway, that would not make Marlboro a Norwegian brand. The point in the evaluation is that a Norwegian brand that is produced in Norway has an advantage because it has an affiliation to Norway.

It is correct that the market for RYO is dominated by previously Norwegian-produced goods. But the market for FMC is dominated by foreign brands. The market for RYO has been falling since the 1970s and is now, considered together, on the same level as Prince. The market for snus is growing.

For FMC there is an increasing trend among international brands. The market share for Prince is falling.

It is not the case that the market is dominated by previously national brands as in the beer market, which was the topic of E-9/00 *Rusbrus*. The big international tobacco brands are big and well-known in Norway.

There are few surveys on people's attitudes to the brands. The 2012 report from Janne Scheffel of SIRUS, "Preferences for Tobacco Brands on the Norwegian Market", did not show that there are preferences for Norwegian brands or brands associated with Norway. It emerged that foreign brands had a positive image, while traditional Norwegian brands and Prince were viewed more negatively.

There are no grounds for Norwegian consumers not knowing foreign brands and not wanting to choose them. It is not the customs which lead to the foreign brands being affected harder on the Norwegian market than national ones.

The composition of products on the Norwegian market is different from in other countries. This is a side-issue, but means that what the consumers see in the way of advertising in international magazines and visible display of tobacco in other countries, are the big international brands – not the local brands. Prince does not do advertising in other countries than for example Denmark. This gives international brands an edge.

It is not documented that there are special customs on the Norwegian tobacco market in such a way that previous Norwegian brands have easier access to the market and that international brands are affected harder. It has not been documented that such an effect can clearly be demonstrated.

Proportionality

The proportionality test is trinomial. The measure must address a legitimate concern, be suitable and necessary. The government has no duty to justify laws under the EEA law. It is the effect of the law that is decisive, not the stated purpose. States have a large margin of discretion to decide the level of protection of public health and how this level shall be attained. This dictates reticence also in testing of the measures' necessity. Concerns corresponding to the traditional precautionary principle for uncertainty regarding damage to health are applicable to the effect of health-related measures, cf. the EFTA Court paragraphs (82-83).

Suitability

The legislator has considered the Display Ban to be a suitable measure. The display of tobacco is regarded as being covered by the advertising ban in the Tobacco Control Act Section 2, but in such a way that it was exempted by Section 8 No. 5 of the statutory regulations on tobacco advertising. That the display of tobacco is considered as advertising is also assumed in the knowledge-gathering prior to the legislative change that introduced the ban. In the preparatory works to the Act it was assumed that display is advertising, and that the Display Ban would have the effect of the advertising ban in the long term.

There are no requirements for clear scientific evidence or convergent evidence for suitability, cf. the EFTA Court paragraph (83). It is sufficient to demonstrate that there was reasonable to assume that the measure would be able to contribute to the protection of human. The EFTA Court allows for a limited judicial review. There is no requirement for scientific documentation or substantiation of the effect of a measure for it to be deemed suitable. This is in line with previous case law.

The EFTA Court goes far in the direction of concluding that the Display Ban is a suitable measure, cf. paragraph (83). Reference is made to the fact that the formulation of reply to the District Court's second questions is limited to necessity, cf. also paragraph (88). The EFTA Court transfers the burden of proof to Philip Morris and sets up a requirement for "clear evidence" for the measure not being suitable for restricting tobacco consumption, at least in the long term.

The EFTA Court concludes that the measure is suitable in the same manner as in the case law where bans on alcohol and tobacco advertising are deemed to be suitable measures. The same reasoning related to tobacco advertising is the backdrop for the directives regulating tobacco advertising; Directive 89/552/EØF, the Television Directive, and 2003/33/EC, the Tobacco Advertising Directive.

In April 2010 the European Commission published proposals for the regulation of visible tobacco displays, both [proposals for] limiting displays and a total ban. The proposal is based on a report from Rand Europe 2010, which finds that displays have a similar effect as advertising at the point of sale.

In guidelines to the WHO's Framework Convention, the display of tobacco is equated with advertising and a total display ban is therefore recommended to achieve a comprehensive advertising ban.

Several EU/EEA states have introduced display bans without the European Commission and the ESA having any comments to this.

The Commission and ESA have in their submissions to the EFTA Court in this case assumed that displays work in the same manner as advertising. The European Commission has referred to the fact that the WHO recommends display bans.

No clear evidence has been submitted for the Display Ban not having an effect. Reference has been made only to individual studies that conclude that an effect cannot be demonstrated with a high degree of certainty. Philip Morris has endeavoured to document that there are no studies that scientifically confirm that the ban has an effect. This is, however, generally agreed. Philip Morris does not deal with the test that the EFTA Court has outlined, but maintains that the government has not proven that the ban has an effect.

In the government's view it is most probable that the ban has an effect in the long run. What exists of scientific material clearly draw in that direction. Econometric studies are not by themselves suitable to measure effect. The ban is directed at many target groups, and an econometric survey of total consumption will not tell us anything about how the ban works on different age groups or among groups of smokers and former smokers.

Necessary

It follows from the EFTA Court paragraph (83) that a certain degree of scientific uncertainty about the measures' necessity has no significance for the evaluation of whether the measure is necessary.

It is the states that determine the level of protection and how this protection shall be attained. Alternative measures must be considered in light of the objective of the Display Ban, they must be overlapping and yield just as good an effect.

The objective is to remove the influence of visibly displayed tobacco on individuals at points of sale, particularly on children and young people and people who want to quit or who have recently quit; further to reduce the idea of tobacco as an ordinary commodity like bread and soap. The paramount goal is a tobacco-free society.

Alternative measures proposed by Philip Morris do not have equivalent effects. They do not remove the advertising effect, or the idea that tobacco is a normal product; nor do they reach all the target groups. A licensing system with intensified age control will not address the purpose of removing the influence of displayed tobacco, or the objective of de-normalising tobacco use.

It is necessary to deploy a broad spectrum of measures that in various ways can contribute to reduced tobacco use. In Norway there was a large number of measures even before the Display Ban was introduced, and there are proposals for further measures. None of the other existing or proposed measures remove the influence of visible displays. Partial bans on tobacco advertising has limited effect.

4 The Norwegian Cancer Society's submission

The Norwegian Cancer Society supports the Display Ban. If the Display Ban is anulled, it will mean two steps backwards for the work that the Norwegian Cancer Society is doing vis-à-vis children and youngsters. It will be a retrograde step for the work of de-normalising tobacco use.

Different measures such as price regulation, accessibility, quitting assistance, attitudes and behaviour in the form of advertising on the one side and campaigns against tobacco use, work together as a whole. The Display Ban is in this context effective and necessary.

- Translation from Norwegian -

The WHO has only a single convention, and it is the Framework Convention on Tobacco Control. The Convention has been ratified by 175 states. That fact that so many countries have agreed on a legally binding text, emphasises the significance of that text. It shows how seriously the WHO and the world community treat tobacco use as the cause of health damages and death.

The purpose is to protect public health. It is relevant as an interpretation factor for understanding the scope of the public health legislation and health conventions in general; such as the UN Convention on Economic, Social and Cultural Rights Article 12 on the right to health. When using the EEA Agreement Article 13, account must be taken of the Framework Convention on Tobacco Control in order to understand the public-health angle.

Norway was one of the promoters of the Framework Convention on Tobacco Control and the first country to ratify it. Norway thus demonstrates publicly that the Convention is important and is then obliged to live up to it. The Convention guidelines must be perceived as binding when they use “should”.

The Framework Convention on Tobacco Control states by way of introduction that states shall prioritise their right to protect public health. There is an inherent conflict in that the government is to protect public health while the tobacco industry on the other hand desires a market position for a product that is harmful to health. All in all, the tobacco industry wants to protect its product as legal, and is working against government regulation.

It is revealing that it is enshrined by the Convention that the states shall protect their health policy against the tobacco industry, cf. Article 5 No. 3. It has been necessary to include in the guidelines to Article 5 No. 3 that society must be made aware of how the tobacco industry operates so as to be able to work against it. This year the World No Tobacco Day, 31 May 2012, was dedicated to the theme of the tobacco industry’s meddling in health regulations, and this will remain the theme for the rest of the year.

The Display Ban is suitable and necessary; this is established in the guidelines to the Convention. The world community has endorsed this interpretation, including the EU. This means that the measure is obviously suitable.

In Norway, the Display Ban has a greater effect than in countries where advertising is still allowed. Such strict regulation is entirely necessary. The tobacco industry should be treated

differently from other industries on the grounds of the great health risks. The intervention is proportional to the gravity of the harmful effect of tobacco.

The Norwegian Cancer Society supports the claim of the Norwegian Government, represented by the Ministry of Health.

5 The District Court's opinion

The District Court has concluded that the prohibition against visible display of tobacco products is not a restriction within the meaning of the EEA Agreement Article 11. The District Court has also considered the measure in the light of the criteria of Article 13 and considers that it is suitable and necessary in order to ensure the protection of public health.

There is agreement that Philip Morris imports into Norway tobacco products that originate in an EEA state, and that the EEA agreement is applicable. The District Court will not discuss this further.

The general ban on tobacco advertising is not in dispute. Nor is there disagreement that tobacco use involves a health risk.

5.1 Restriction

Legal point of departure and the EFTA Court's statement

Pursuant to the EEA Agreement Article 11, a measure that has an effect equivalent to that of a quantitative import restriction is in conflict with the EEA Agreement. Article 11 is worded as follows:

> "Quantitative import restrictions and all measure with equivalent effect shall be prohibited between the contracting parties."

The purpose of the provision is to preserve the free movement of goods and services. Measures that hinder free movement of goods are in conflict with the EEA Agreement unless the measure is exempt under Article 13.

The EFTA Court confirms the point of departure in paragraph (39) of its Opinion with reference to case law. The prohibition is applicable to all rules that, directly or indirectly, in actuality or potentially, may hinder trade within the EEA, as such measures have an effect equivalent to that of quantitative import restrictions.

In paragraph (41) the EFTA Court outlines which measures are regarded as having an effect equivalent to that of quantitative import restrictions. Firstly, measures are covered if their purpose or effects are that products from other EEA states receive a less favourable treatment than domestic products. Further covered are rules that stipulate product standards for imported goods, and any other measure that hinders market access for products originating in another EEA state.

It is obvious that the Display Ban does not stipulate product standards or has as its objective to regulate trade in goods between EEA states.

In paragraph (42) the EFTA Court states that the Display Ban by nature may have a restrictive effect on the marketing of tobacco products in the market in question, particularly for the launch of new products. The District Court understands this to mean that the EFTA Court is of the opinion that the Display Ban in principle will be a measure that can hinder market access, and in principle Article 11 is therefore applicable.

The EFTA Court further states in paragraph (43) that national provisions that apply to products from other EEA states and that restrict or prohibit certain selling arrangements, in general have the characteristic of being regarded as hindering trade between EEA states, directly or indirectly, in actuality or potentially. In principle such provisions are also covered by Article 11.

An exception from this, however, is when the provisions constitute a selling arrangement and this applies to all affected businesses, and in law and in fact affects the marketing of domestic products and products from other EEA states equally. The EFTA Court states further in paragraph (44):

> "If that is the case, the application of such rules to the sale of products from other EEA States is not by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products (see, for comparison, *Keck and Mithouard*, cited above, paragraphs 16 and 17, and *Commission v Italy*, cited above, paragraph 36)."

The EFTA Court thereafter states, in paragraph (45), that the Display Ban is a selling arrangement:

> "National provisions, such as those at issue which provide that products cannot be displayed or only displayed in a certain manner relate to the selling arrangements for those goods in that they lay down the manner in which these products may be presented at venues legally permitted to sell them. The Court thus finds that the display ban in question constitutes a selling arrangement within the meaning of the case-law cited in paragraphs 40 and 43."

The parties agree that there is no discrimination in law. The Display Ban applies to all businesses on the Norwegian market and affects all products equally.

The District Court shall accordingly decide whether the Display Ban actually affects the sale of domestic products and sale of goods from other EEA states equally. If there is equal treatment, then there exists no restriction within the meaning of Article 11.

In paragraph (50) the EFTA Court indicates specifically what the [national] court shall consider in order to test whether the Display Ban involves a *de facto* discrimination, and sets up criteria for the clear ascertaining of an effect:

> "It is for the national court to determine whether the application of national law is such as to entail that the national rules on the display of tobacco products affect the marketing of products previously produced in Norway differently than the marketing of products from other EEA States or whether such an effect cannot be clearly verified and, therefore, is too uncertain or indirect to constitute a hindrance of trade (see, for comparison, Case C-291/09 Guarnieri & Cie, judgment of 7 April 2011, not yet reported, paragraph 17, and the case-law cited). In this determination, the national court must have regard to the facts of the case and the considerations set forth in paragraphs 39 to 45 and in this paragraph."

The parties agree that the EFTA Court thereby creates a new category of products to be included in the evaluation of whether there discrimination exists. Domestically produced tobacco products are here replaced with products that were previously produced in Norway, in paragraph (49) this is worded: "until recently, manufactured in Norway".

The reasoning of the EFTA Court may be seen from the court's statement in paragraph (48). The EFTA Court refers to case C-391/92 *The Commission versus Greece*, and states that it is not decisive for the evaluation whether there is domestic production of tobacco products in

Norway. The EFTA Court thereafter notes that it cannot be ruled out that production in Norway may be resumed at a later time. The EFTA Court further states:

> "Bearing that in mind and taking account of the factual situation in the case at hand, it cannot be ruled out that some imported tobacco products, in particular those that were manufactured in Norway until 2008, enjoy a more favourable position on the Norwegian market than other products due to local habits and customs linked to tobacco consumption (compare *Pedicel*, cited above, paragraph 46)."

The District Court cannot see that it is an obvious consequence of *Commission v Greece*, compared with the possibility of future Norwegian tobacco production, that an evaluation shall be made of imported tobacco products that were previously produced in Norway vis-à-vis other imported products. The EFTA Court sets up an evaluation as if there were still tobacco production in Norway. It is also unclear what the EFTA Court means when it in addition says, "taking account of the factual situation in the case at hand". The District Court assumes that the EFTA Court refers to the fact that the Display Ban is functioning in a market with a total ban on advertising for tobacco products.

Case C-391/92 *Commission v Greece*, concerned regulations requiring that processed milk for infants should be sold exclusively by pharmacies rules stating that infant formula could only be sold in pharmacies. There was no production of processed milk in Greece, and nor were there any national alternative and competing products. The European Court concluded that the rules on selling arrangements did not distinguish between country of origin or businesses in Greece, and had no different effect on the sale of products from other EU states than on domestic producers. The European Court stated further that the evaluation had to be the same regardless of whether or not Greece had domestic production of formula, because this fact could change over time, and also in order to secure uniform practising of the rules between the member states. In other words, there would not have been discrimination even if in this case there did exist national production of processed milk.

Any future Norwegian produced tobacco products would undoubtedly be subject to the Display Ban in the same manner as all tobacco products are today. The point in *Commission v Greece* is, as the District Court understands it, that there is not automatically a restriction (discrimination) because solely imported products were affected by a selling arrangement in the absence of national products.

The evaluation of whether imported previously Norwegian produced goods have a more favourable position than other imported goods shall be linked to whether these products have a more favourable position due to local habits and customs linked to tobacco consumption.

It appears from case E-4/04 *Pedicel*, paragraph (46), to which the EFTA Court refers, that it cannot be ruled out that an advertising ban for a product which is lawfully sold there may have a greater impact on products from other EEA states. The EFTA Court further states in paragraph (46), with reference to case C-405/98 *Gourmet*, that:

> "in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers is liable to impede market access for products from other Member States more than for products from domestic producers. (...) The information presented to the Court does not indicate that this presumption does not apply in relation to the circumstances in Norway."

Without the EFTA Court's introduction of a new category of "national products" that a selling arrangement may discriminate in favour of, it follows from previous case law on selling arrangements that the absence of tobacco production in Norway means that there is no restriction. This is also argued by both the ESA and the Commission in their submissions to the EFTA Court, cf. paragraphs (35) and (36).

In paragraph (49) the EFTA Court indicates what is to be part of the evaluation of whether the Display Ban affects the marketing of products from other EEA states to a greater extent than the marketing of imported products that until recently were produced in Norway:

> "In order to assess whether that is the case, an analysis of the characteristics of the relevant market and of other facts is necessary. The national court must, in particular, take account of the effects of the display ban on products which are new on the market compared to products bearing an established trademark. In that regard, the Court notes that, depending on the level of brand fidelity of tobacco consumers, the penetration of the market may be more difficult for new products due to the display ban which applies in addition to a total advertising ban."

The parties do not agree with regard to how the EFTA Court's statement is to be understood, when it is stated that the District Court in particular must take account of the effect on products that are new on the market compared with established products. The District Court agrees with the government that the statement cannot be understood in such a way that new

products' chances of entering the Norwegian tobacco market shall be decisive for the question of whether a restriction exists. This would represent a market-hindrance test independent of the question of whether there is *de facto* discrimination against imported products and in favour of previously Norwegian produced goods. The EFTA Court's guidance on this point must be viewed in the light of previous case law.

In the Pedicel and Gourmet cases, the courts did not find it necessary to undertake a detailed review of the factual circumstances to ascertain that the alcohol advertising ban caused greater inconvenience for market access for goods originating in other member states than for domestic goods. In our case the EFTA Court does not conclude with an equivalent presumption for tobacco products, and indicates that any possible discrimination must be clearly verified.

The central aspect of the cases concerning alcohol advertising was that consumers are more familiar with the local products and in the absence of advertising will choose them instead of imported ones. No division between new and established products is made, but it is held that imported products will in general have a less favourable position than locally produced ones because the consumers are more familiar with the local ones and prioritise these.

It is not in itself decisive that the Display Ban, particularly viewed in connection with the advertising ban, is comprehensive. It follows implicitly from the fact that *de facto* discrimination is required whenever national provisions entail a selling arrangement, C-268/01 *Keck and Mithouard* paragraph (16). The District Court also refers to paragraph (44) in the joined cases C-34/94 *De Agostini*, which states that a total advertising ban is not a restriction unless *de facto* discrimination based on nationality is verified. Furthermore, there is case law that accepts national regulations which affect small actors in the market. The District Court refers to case C-387/93 *Banchero* regarding the regulation of tobacco retail outlets. In paragraph (38), cf. paragraph (40), it ensues from the context that it is not of significance that less popular brands may be difficult to find, as this will not affect foreign tobacco products more than domestic products.

In the preparatory stage to the request to the EFTA Court the parties agreed that the Display Ban would make it harder for new products to enter the market. It appears from the government's submission of 19 January 2011 to the EFTA Court that the ban does not hinder the introduction of new products, but (paragraph 198):

> "Indeed, the Government hopes that the introduction of new products will be more difficult with the display ban. As the prevailing research indicates, there is good reason to expect such an effect."

In light of this agreement, even though there are differences of some degree in the parties' view of this issue, and the case law which the EFTA Court relies on, this court cannot understand that the EFTA Court considers that it is of decisive significance for the question of restriction that in general market access for new products in fact becomes more difficult. The EFTA Court could have at least, given this clear basis, stated that it was decisive or laid down that the Display Ban has such effect and is a restriction within the meaning of Article 11.

As the District Court sees it, the statement in paragraph (49) must be seen as an element in the court's analysis of what characterises the tobacco market compared with social traditions and local custom related to tobacco use. In the assessment in paragraph (50) and in the answer to the first question in the Opinion, no explicit division is made between new and established products on the market.

The District Court understands the evaluation on which the EFTA Court gives its advice, as something else than the possible restriction analysis which the European Commission reads in the EFTA Court's statement paragraph (37), but which is not pursued further in the court's remarks.

Further evaluation of whether there exists de facto discrimination based on nationality

The question is whether the Display Ban affects the marketing of products that until recently were produced in Norway differently from the marketing of products from other EEA states, and whether such an effect can clearly be ascertained.

The question is whether national products have a more favourable position due to local habits and customs linked to tobacco use.

Philip Morris has the burden of proof that the Display Ban actually and not just potentially, affects the marketing of imported tobacco products differently than imported tobacco products that were previously produced in Norway, cf. Barnard, *The Substantive Law of EU*, third edition 2010, pp. 136-137.

The tobacco market

The District Court will look first at what characterises the Norwegian tobacco market and whether there exists local brands that have a favourable position due to local customs.

As shown by the introductory presentation of the case, the Norwegian market consists of three main categories of tobacco products, RYO, FMC and snus. The cigarette market consists of international brands and some minor brands that were previously produced in Norway. The cigarette market is declining. In the RYO market there are practically only imported brands that until recently were produced in Norway. This market is shrinking and has a steeper falling curve than cigarettes. The snus market consists exclusively of imported products and none in the category of imported products that until recently were produced in Norway. The snus market is growing.

The trend in the tobacco market is that the use of smoking tobacco (FMC/RYO) is decreasing, while use of snus is increasing – particularly among young people. Expert witness Karl Erik Lund, research director of SIRUS, testified that the decline in the cigarette market in conjunction with the increase in snus means that overall tobacco sales are relatively stable.

A disputed question is in what category to place Prince. Up to 2008, Prince was produced in Norway, but on licence from a Danish company. In the context the EFTA Court has outlined in paragraph (48), namely the significance of local customs related to tobacco use, and questions of discrimination based on nationality, the District Court cannot see that Prince should be placed in the category of a product “until recently” produced in Norway. Prince is in this context an international brand that also has relatively large market shares in Denmark and Sweden. The other previously Norwegian-produced brands, including RYO, are to be found more or less solely in the Norwegian tobacco market. The situation for Prince is in the District Court’s opinion equivalent to that of Marlboro or another big international brand that until recently was produced on licence in Norway. Philip Morris has argued that Prince is perceived as a Norwegian brand and that the central fact is that Prince has established itself on the market – which has been formed by local brands. No evidence has been put forward for Prince being perceived as a national brand. As the District Court sees it, both Prince and Marlboro have established themselves as big brands in the Norwegian market in a period where the conditions were favourable for this. The District Court finds that Marlboro has been present in the Norwegian market since the 1970s, as the General Manager Michael Saxon testified.

With regard to smokers' preferences, a note from Janne Scheffels of SIRUS has been submitted, *Preferences for Tobacco Brands on the Norwegian Market*, March 2012. The concluding summary in the note states that:

> "Brand-building is based on the idea that consumers choose what products to buy not only for functional reasons, but because consumption has a symbolic dimension. To use a brand can serve to communicate and consolidate identity. (…)
>
> Norwegian data from interview studies point in the direction of cigarette brands having a symbolic meaning as an expression of social and individual identity. A status hierarchy that builds on the main criteria of strength, class profile, femininity/masculinity and urbanity/rurality places the brands Petterøes and Prince on the bottom, whereas Marlboro, Lucky Strike and in part also Kent are valued most positively. The last criterion also involves an association to nationality: it seems that foreign brands are valued more positively than brands of Norwegian or Scandinavian origin (…)"

Even if the study may have a limited scope as a consequence of the survey basis, it does not support the existence of local customs related to tobacco use in the sense that users choose or know national brands rather than foreign. However, the District Court understands this to mean that choice of tobacco brand is correlated with the identity the user has and/or may want to communicate. In this context international brands were evaluated more positively than national brands.

What is special about the Norwegian market is the use of RYO. As stated in the introduction, RYO is much more widespread in Norway than in Denmark and Sweden. Party representative Michael Saxon testified that use of RYO, in the way it is widespread in Norway, is found in no other tobacco market. The District Court relies on this basis further. The total sale of RYO as of 2011 is somewhat higher than the number of sold Prince cigarettes, which is the best selling cigarette brand. In conjunction with the fact that all RYO until recently was produced in Norway, the question is then whether these brands have a more favourable position in the Norwegian market as the consumers would choose these because they are most familiar with them, in the absence of visible display of tobacco products. The District Court will come back to this in the summary.

Sales figures and market shares before and under the Display Ban

The District Court will then look at whether sales figures and market shares for tobacco products and brands constitute a basis for saying that the Display Ban affects the marketing of imported products in a different manner than imported products that until recently were produced in Norway. A measure of this is the various brands' market share before and after the introduction of the Display Ban 1 January 2010.

Of the larger international cigarette brands, as of 31 December 2011 Marlboro, Barclay/Kent, and Lucky Strike have by and large retained their market share from before the Display Ban, but in such a way that Marlboro and Lucky Strike have experienced an increase after the introduction. Prince has continued its declining curve from 2005 also after the introduction of the Display Ban. Paramount, which established itself on the market in 2007 with 4.7 percent, has increased its market share from about 7 % in 2009 and 2010 to 8.7 % in 2011. The District Court understands this to mean that Paramount is a budget brand. All together the six biggest cigarette brands had 93.5 % of the market in 2011. Of these only Petterøes, with 7.1 %, was until recently produced in Norway, while the international brands have 86.4 % of the market. Even if Prince with its 37.9 % is excluded, the four biggest international brands have a market share of 48.5 %.

As regards the cigarette brands that until recently were produced in Norway, Petterøes has retained its market share, while other national brands, Teddy and South State, are out of the market. Even before the Display Ban was introduced, cigarette brands that until recently were produced in Norway, for example Blue Mastis, exhibited a declining trend.

Other small minor international brands or variants of an international brand, such as FMC and RYO, have also left the market. Philip Morris has submitted a list of products whose market share is so small that the distributors have removed them from their offers to the shops (delisting), factual summary pages 2399-2400. The product is then in practice out of the Norwegian market. The overview shows that more products have been delisted after the introduction of the Display Ban than before, at the same time as fewer new products, and no new brands, have been launched during the Display Ban, cf. factual summary page 40.

The overview shows delisting of both big brands and small brands, and in both groups – imported products and imported [but] until recently produced in Norway. No detailed analysis has been submitted of how long the individual brands that have been delisted, have been

present on the market or what market shares they achieved in the period prior to the Display Ban.

The District Court considers that the review of sales figures and market shares indicates that the Display Ban has made it more difficult for small brands/brand variants to retain their market share, but that this affects both categories (imported and imported previously produced in Norway). The six biggest cigarette brands have increased their market share from 90.4 % in 2007 to 93.5 % in 2011. This indicates that the big brands are retaining or increasing their market share at the expense of the small brands, and also at the expense of new brands trying to establish themselves on the market.

This is also explained in the Passport Report, *Tobacco in Norway*, August 2011, in which it is stated in page 23:

> "The strict rules and regulations related to the sale and marketing of cigarettes make it almost impossible to communicate new products to consumers. Consequently, consumers tend to purchase the established brands with which they have a high degree of familiarity."

Expert witness Professor Fred Selnes also referred to this effect, and has summarised it as follows in his written report of 10 May 2012:

> "The ban on product display at the point of sale (…) has reduced the competitive dynamics in the Norwegian market dramatically. The ban has on aggregate favoured and protected the brands already in the market before the ban. In addition, the ban has benefited the larger brands so that the big becomes bigger and thus reduced competitive dynamics even more in favour of the larger and established brands in the market."

An example of the contrary is Paramount, which has managed to establish itself in the market in 2007 and since increased its market share, even with a Display Ban.

The review does not provide grounds to conclude that previously Norwegian-produced cigarette brands have obtained a more favourable position as a consequence of the Display Ban. There is no basis for claiming that consumers choose previously nationally produced brands instead of imported in the absence of visible display of tobacco products.

Brand loyalty

The District Court will now look more closely at the degree of and significance of brand loyalty.

The above-mentioned Passport Report, on page 26 says the following about brand loyalty in connection with the difficulties of introducing new brands because of the authorities' focus on reducing smoking:

> "However, hard core smokers are notoriously brand loyal. Hard core smokers are more likely to find cheaper sources for their favourite brands, such as a cross-border shopping trip to Sweden, rather than switch to a new cigarette brand simply because of lower prices. Moreover, the number of younger smokers has fallen dramatically in the review period, which indicates a drop in the new number of new smokers ready to choose a new brand."

Professor Selnes also noted that brand loyalty leads to the small brands being worse off than the big ones when the products are not visible to the consumers.

Also the preparatory works to the EU Tobacco Advertising Directive 2003/33/EC, COM (2001) 283, refer to a high degree of brand loyalty. Section 7.4 reads:

> "different studies show that smokers are very loyal to their tobacco brand and that cigarettes are among the products which have the highest brand loyalty."

As the District Court sees it, a high degree of brand loyalty is also a reason why it is more difficult for new and small brands to establish themselves in the market. A high degree of brand loyalty applies equally to imported products and products until recently produced in Norway. This in itself means that it is difficult for smaller and new products to establish themselves in the market, independently of the Display Ban. The District Court cannot see that information has been presented to show that occasional smokers are less brand-loyal than hard-core smokers.

The District Court here refers to Michael Saxon's testimony that, prior to the Display Ban, around 2004-2005, Philip Morris attempted to establish a big new international brand, L&M, in Norway – without success. This brand had been launched in Denmark somewhat earlier, around 2000, and as of 2011 was the fourth most sold in Denmark. Saxon testified further that in 2008 Philip Morris also was unsuccessful in establishing the brand Next in Norway. He testified further that if a new brand does not achieve a 0.4 % market share in the course of 12 months, it is not going to survive. As regards RYO, Saxon testified that Lucky Strike attempted to establish themselves with RYO prior to the Display Ban, without success. In

addition to this, the figures from AC Nilsen also show that, in the period before the Display Ban, it was difficult for smaller brands to gain market shares in the tobacco market, including RYO. The parties agree that there has been no attempt to launch entirely new brands during the introduction of the Display Ban, but only variants of established brands.

The Display Ban does not prevent consumers who want to try other brands from obtaining an overview over the available products. The District Court notes that the consumers may see lists with an overview over what products the point of sale is offering, with names and prices. The consumers are, in other words, not prevented from obtaining information on products and selection, if it is desirable for example to consider changing one's brand. The District Court here refers to the preparatory works, which are reproduced above and also the parliamentary Health and Social Affairs Committee's Recommendation No. 49 to the Odelsting (2008-2009) page 3:

> "The majority notes that the proposal does not present an obstacle for adults desiring to purchase tobacco products. Most adult tobacco users know what products they prefer, and need no visual reminders of this. The price lists will give the customers the opportunity to inform themselves about selections and prices."

In the District Court's opinion, in evaluating the effect of the Display Ban one must take into account the fact that the difficulties of retaining/achieving market position cannot clearly be linked to the Display Ban alone, but must be seen in connection with other factors such as a high degree of brand loyalty. Philip Morris has argued that brand loyalty in combination with the advertising ban makes the Display Ban so extensive that new products are excluded from entering the market and that the Display Ban is therefore a restriction. As the District Court interprets the EFTA Court's statement and as it is described above, the District Court does not agree that brand loyalty must be seen as a contributory and not an alternative factor, when the effect of the Display Ban is to be evaluated as instructed in paragraph (50).

Summary

To summarise, the District Court considers that it cannot be determined with clarity that the Display Ban affects the marketing of previously Norwegian-produced tobacco products in a different way than to equivalent products from other EEA states. Such an effect is too uncertain to constitute a trade barrier. International brand names and products are well-known and have big market shares in the market for snus and FMC. There are no grounds for

claiming that the Display Ban is having the effect that products until recently produced in Norway are preferred to international brands. The evidence has showed that the biggest international brands have increased their market share during the Display Ban. This is not the case for previously Norwegian-produced brands.

The same applies to RYO, which in this context falls within "local customs related to tobacco use". The evaluation must in the District Court's opinion be undertaken for the tobacco market as a whole and not within each product category. All together, the Norwegian market is dominated by imported brands, and previously national brands constitute a small proportion – of which RYO has the biggest share. There is not a clear basis for concluding that the Display Ban gives earlier Norwegian-produced RYO a more favourable position in the Norwegian market than imported tobacco products, including snus and cigarettes. There are no grounds for the assertion that consumers to a greater extent choose these products because they are more familiar with Norwegian RYO brands than with imported brands and products. Sales of RYO have gone gradually down both before and during the Display Ban, with both a faster and bigger decline than for cigarettes.

An effect of the Display Ban is that it is more difficult for new and small brands to enter the market and retain market share. This, however, applies both to imported products and imported products until recently produced in Norway, and there are no clear grounds for establishing a different impact on the marketing as a consequence of the Display Ban. The District Court considers that this is emphasised by the fact that a well-known international brand, Paramount, has managed to establish itself in the market in 2007 and then – also after the Display Ban – increase to 8.7 % in 2011, probably due to a competitive price.

The sale of snus, which consists exclusively of imported brands, has continued its growth after the Display Ban. There are, however, no grounds for claiming that the marketing of snus has been affected differently than tobacco products that were previously produced in Norway. It is reasonable to explain the increase in the sale of snus in terms of a general increase in snus use at the expense of smoking tobacco (FMC/RYO). The District Court then concludes that the Display Ban does not constitute a measure with an effect equivalent to a quantitative restriction within the meaning of the EEA Agreement Article 11, as the ban does not actually affect the marketing of products from other EEA states to a greater extent than the marketing of imported products that until recently were produced in Norway.

5.2 Proportionality – suitable

The District Court is also considering the question of proportionality. It is a question of whether the measure is suitable and necessary to attain the stipulated objective.

Legal point of departure

Article 13 of the EEA Agreement reads:

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

Article 13 means that the measure must both be suitable for attaining the stipulated public-health objective, and that it does not go further than is necessary to attain that objective.

The objective of the Display Ban is to restrict the advertising effect of the display of tobacco products so as to contribute to reduced tobacco use in the population in general and among children and young people in particular, and reduced health damages, as a step towards a long-term goal of a tobacco-free society.

The District Court is not in doubt that this is a legitimate motive. The EFTA Court says the same in paragraph (77) of its Advisory Opinion.

The parties agree that smoking is harmful to health. In the Ministry of Health's consultation paper on changes in the Tobacco Control Act, January 2012, the health damages associated with tobacco use are by way of introduction described as follows:

> "According to the National Institute of Public Health, tobacco smoking is probably the single factor that has caused the greatest damage to health in the population in the last few decades. The Institute states in its *Public Health Report 2010* that we are now hopefully seeing "the beginning of the end of the tobacco epidemic", but that great efforts are still required before the epoch of tobacco-related diseases is over. If we can drive tobacco use down to a minimum

> in the course of the next few years, the epidemic of tobacco diseases may be history as we approach the year 2050.
>
> Preventing children and youngsters from using tobacco is the main focus of the ministry's work on tobacco control. Tobacco use is a behaviour that children and youngsters are socialised into, and tobacco-free adults are therefore a precondition for tobacco-free children and young people. If tobacco use is to a lesser degree a visible and accepted phenomenon in society, also children and youngsters will to a lesser extent begin to smoke and use snus."

And further under Section 2.2, Health damages from Tobacco Use:

> "Smoking is the most important risk factor for both premature death and loss of healthy life years in Norway. New calculations from the National Institute of Public Health show that every year about 5,100 individuals die of smoking. An earlier report from the Institute shows that each of them has on average lost 11 years of life. Among women in the age group 40-70, smoking is implicated in 26 % of all deaths in this age-group, the corresponding figure for men is 40 %. Men in this age-group who die of smoking, on average lose 14 years of life, while women lose 20 years of life. (…)
>
> Even if the use of snus is much less harmful to health than smoking, the use of snus can also involve risk of serious illness."

The District Court consequently finds that tobacco use is highly injurious to health and a serious public health problem. Norwegian public-health authorities have a goal of reducing tobacco use to a minimum. A main point in this context is to reduce smoking among children and youngsters.

The individual EEA state has a margin of discretion to determine the level of protection of public health and how that level shall be attained. That is, how far it wants to go in the protection [of public health] and what measures it wants to apply. The EFTA Court refers to this in paragraph (80).

However, adopted measures are only justified if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it if they are suited to attaining the goal in question and do not go further than is necessary to attain the goal, cf. the EFTA Court paragraph (81).

Interpretation of the EFTA Court's Advisory Opinion about evidentiary requirements

- Translation from Norwegian -

The parties do not agree on the requirements of evidence for a measure being deemed suitable within the meaning of Article 13.

In paragraph (82) the EFTA Court takes its point of departure in the precautionary principle that applies to uncertainty related to public health risks, and emphasises that such uncertainty does not prevent an EEA state from taking protective measures:

> "Where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, an EEA State may take the measures that reduce, as far as possible, a public health risk (see, for comparison, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 30)."

In paragraph (83) the EFTA Court continues with stating criteria for evidence for a measure's suitability and necessity, when the EEA state has chosen a high level of protection of public health:

> "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."

As the District Court sees it, the case concerns an area in which Norwegian authorities are justifiably aiming at a very high degree of protection. This is undisputed.

There is, however, disagreement on whether the EFTA Court's use of the precautionary principle as grounds for acceptance of scientific uncertainty related to suitability and necessity, is correct.

The District Court does not take a position on whether the evidentiary requirement the EFTA Court sets up can be derived from the precautionary principle in the traditional sense or not. But the District Court considers that the EFTA Court's statement is in accordance with what follows from case law on public health measures.

The District Court refers to some of the decisions that the government's counsel reviewed in his closing statement.

In case E-1/06 *Spilleautomater*, where the objective of the measure was to combat gambling addiction, the EFTA Court set up no criterion regarding actual evidence of the effect. The EFTA Court stated in paragraph (51) that it was "reasonable to assume" that the government was better able to tend legitimate concerns of fighting gambling addiction better than a commercial operator. In addition the court stated: "Furthermore, it is plausible to assume that in principle the State can more easily control and direct a wholly State-owned operator than private operators."

In the joined cases C-1/90 and 176/90 *Aragonesa*, concerning an advertising ban for beverages with an alcohol content higher than 23 %, the European Court of Justice stated in paragraph (17) that the measure "does not appear to be manifestly unreasonable as part of a campaign against alcoholism."

Case C-262/02 *Loi Evin* concerned a ban on alcohol advertising in broadcastings on French television of foreign sport arrangements in which advertising billboards are shown on the television screen. No requirements for documentation of suitability were established, but it was noted that the measure was "appropriate to ensure their aim of protecting public health", paragraph (31). It was also found that the measure did not exceed what was necessary in order to attain the goal. It was noted that the measure limited the situations in which advertising billboards for alcoholic beverages were shown, and that there were thereby fewer cases in which the viewers "might be encouraged to consume alcoholic beverages."

In case E-4/04 *Pedicel,* which concerned a ban on alcohol advertising, the criterion of suitability was not discussed, but the EFTA Court referred to the above-mentioned cases from the European Court of Justice. The case was decided by the Norwegian Supreme Court, cf. Rt. 2009 page 839. The parties in the case agreed that the advertising ban was a suitable measure. The Supreme Court nevertheless explained the criterion of suitability in paragraph (34):

> "It is undoubtedly associated with great practical difficulties to measure the effect of different alcohol-policy measures, and there are obvious difficulties in transferring surveys undertaken under one alcohol-policy regime to countries with a different tradition as regards the use of alcohol and with a different alcohol policy. There ought to for example be reasonable to expect that access to advertising would increase total consumption more in countries with a relatively low consumption of alcohol, than in a country where the alcohol use approaches what one might consider the saturation point. There is thus no reason to deal with individual surveys. In this respect it is sufficient to note that the summaries undertaken by various

> international organisations or bodies, concludes with a reasonable degree of consensus that there exists a connection, if modest, between advertising and total consumption."

The District Court accordingly considers that there is no reason to deviate from the point of departure adopted by the EFTA Court in paragraph (83). There is no basis for raising a requirement for scientifically certain evidence in order to conclude that the Display Ban is suitable for achieving the purpose.

It is against this background that the EFTA Court's statement in paragraph (84) must be understood. Section 84 reads:

> "In this regard, the Court finds that a measure banning the visual display of tobacco products, such as the one at issue, by its nature seems likely to limit, at least in the long run, the consumption of tobacco in the EEA State concerned. Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health."

The District Court understands this in such a way that the EFTA Court firstly states that the Display Ban appears in principle to be suitable, and is relating this to the objective of restricting tobacco use in the long run. The District Court also understands the EFTA Court to conclude that a measure such as the Display Ban may be regarded as suitable, if there is no clear evidence that it is not suitable. The EFTA Court imposes on Philip Morris the duty to present clear evidence for the measure not being suitable.

In its closing statement Philip Morris referred to case C-170/04 *Rosengren* and considers that the EFTA Court, by its reference in paragraph (85) to case C-421/09 *Humanplasma* paragraph (38) with further reference to case law, considered that a proportionality assessment should be made as in the Rosengren case. The District Court does not understand the reference to Humanplasma paragraph (38) in the same way, but as a reference to case law that supports what the EFTA Court states in paragraph (85). The further reference in Humanplasma to Rosengren concerns paragraph (50), which states the same principle as the EFTA Court states in paragraph (85). The District Court cannot see that the reference to Rosengren paragraph (50) via Humanplasma paragraph (38) involves a different understanding of the suitability test set up by the EFTA Court than what the District Court has employed above.

Evaluation of suitability – introduction

The question for the District Court to consider is whether there exists clear evidence for the Display Ban not being suitable for restricting the consumption of tobacco in Norway, at any rate in the long term.

Because of the parties' dissimilar understandings of the EFTA Court's statement in paragraphs (83) and (84), the parties' evidence has related to rather different topics.

Philip Morris has argued that scientific evidence must be required for there being a causal connection between the Display Ban and reduction in tobacco use, and that it is clearly unreasonable to assume that the ban has an effect. The presentation of evidence has been concentrated on the lack of scientifically certain evidence for the connection between a display ban and smoking behaviour. On two main points, Philip Morris has argued defects in the argumentation for the Display Ban having an effect: firstly, that clear conclusions cannot be drawn about the effect of visible display of tobacco products from research on the significance of advertising for tobacco use; and further that econometric studies disprove that the Display Ban has an effect.

The government has related the presentation of evidence to the EFTA Court's statement that it is sufficient for the authorities to demonstrate that it was reasonable to assume that the measure would contribute to protecting public health. The District Court has not understood the government or the government's expert witnesses as considering that there exists scientifically certain evidence for a causal connection between a display ban and reduction in tobacco use.

Evaluation of suitability – the Display Ban and the advertising ban

The District Court agrees with the government that the statement in paragraphs (83) and (84) must be understood in such a way that the EFTA Court is assuming that visible display of tobacco products can be equated with advertising, or that the effect of display bans can be compared to the effect of advertising bans. The EFTA Court uses the same formulations as in decisions that concerns advertising bans, cf. the District Court's review of these above. In these decisions advertising bans are deemed to be a suitable instrument in the light of the objective of the advertising ban – that consumption shall be reduced. Both the ESA and the Commission in their submissions to the EFTA Court in our case have evaluated the Display Ban on a par with an advertising ban.

As stated in the introductory presentation of the case, the legislator dealt with and considered whether the effect of visible display of tobacco could be compared with the effect of tobacco advertising.

Philip Morris has argued that there is no scientific certainty that advertising research can be transferred to the visible display of tobacco, and has referred to the testimonies from expert witnesses Professor James J. Heckman and Professor Fred E. Selnes.

In the District Court's opinion, the questions are similar to those dealt with by the Supreme Court in *Pedicel,* Rt. 2009 page 839, paragraph (34), quoted above. This, considered together with the EFTA Court's formulation of evidentiary requirements, and that it is absence of effect for which clear evidence needs to be presented, dictates that it is clearly sufficient to refer to summaries performed by various international organisations or bodies. In our context such summaries conclude with a reasonable degree of consensus that visible display of tobacco products has effects equivalent to advertising, particularly when visible displays function in connection with a total ban of tobacco advertising.

The District Court finds that it is accepted knowledge that advertising of tobacco has significance for consumption. This is the basis of the WHO Framework Convention on Tobacco Control. In the preamble to the framework convention, it is stated inter alia that the parties to the convention are "seriously concerned about the increase in the worldwide consumption and production of cigarettes and other tobacco products." It is also stated in Article 13 No. 1 that the parties "recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products."

The significance of tobacco advertising is considered also in the preparatory works to the EU Tobacco Advertising Directive, 2003/33/EC, COM (2001) 283. It is there stated that advertising bans are intended to restrict the sale and use of tobacco. Further it is stated that the purpose of tobacco advertising is to increase total sales, not exclusively for smokers to switch to another tobacco brand, as the tobacco industry argued. Section 7.4 reads:

> "In this context, advertising would appear to be one of the factors responsible for the expansion of the market for tobacco products. The abundance of words and images seeking to promote the consumption of tobacco products glosses over any hint of harmfulness of tobacco and incites young people to adopt what appears to be a socially acceptable behaviour pattern. (...)

> According to the tobacco industry, the aim of advertising is simply to persuade smokers to change brands, and as such enhances the competition between the various products on the market. Any form of advertising by definition seeks to increase the targeted product's share of the market. However, different studies show that smokers are very loyal to their tobacco brand and that cigarettes are among the products which have the highest brand loyalty.
>
> Omnipresent tobacco advertising impinges on the consciousness of all sections of the population, children and adults, smokers and non-smokers, not to mention smokers who would like to quit. In particular, concerning children, a large number of whom make acquaintance with cigarette-smoking at a very early age, it is reasonable to assume that having been educated by advertising to brand-loyalty, they may, for that reason alone, become regular smokers."

Philip Morris argues in the same way against the Display Ban as the tobacco industry has argued against the advertising ban. That visible display of tobacco products has an effect on competition between brands, but at the same time, no significance for the recruitment of new smokers.

WHO has found that visible display of tobacco products is advertising. The guidelines to Article 13 of the Framework Convention reads:

> "Display of tobacco products at points of sale in itself constitutes advertising and promotion. Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display."

In the light of this the following recommendation is made to the member states:

> "Display and visibility of tobacco products at points of sale constitutes advertising and promotion and should therefore be banned. Vending machines should be banned because they constitute, by their very presence, a means of advertising."

The same is stated in RAND Europe report, *Assessing the Impacts of Revising the Tobacco Products Directive, Study to support a DG SANCO Impact Assessment*, September 2010. The report was the basis for a proposal from the European Commission, Health and Consumers Directorate-General, 2010, for inter alia a tobacco display ban as part of the revision of the Tobacco Products Directive 2001/37/EC. In the summary of the Rand report, on page 235, the

proposal “Ban the display of products at PoS” named among the measures with the greatest effect. It is stated further that:

> “Reduction in smoking prevalence among youths in particular is likely as evidence shows promotion at PoS influences youth smoking behaviour and uptake of smoking. A similar impact may be observed, albeit smaller, on adult smokers as bans on promotion remove smoking cues. (…) The strongest measure which would consist of a complete ban on PoS promotions and displays, would have the strongest health impact of all the measures as it would remove all smoking cues form the sight of consumers.
>
> Impact likely to be strongest on youths although some adult smokers and would-be quitters may also be positively affected.”

In the SIRUS Report 1/2008 Karl Erik Lund and Jostein Rise concluded that there was reason to assume that tobacco products displays as purchase influence factors function along the same lines as ordinary advertising, but that it is difficult to estimate to what extent the strength of the purchase influence factor is greater or lesser than in the vase of ordinary advertising. The report is based on social-science methodology in which knowledge is created by collating a dispersed data basis from several different research disciplines, traditions and approaches. The conclusion is based on several elements, inter alia that:

> “the tobacco industry has invested considerable resources in developing packet design that communicates a message to existing consumers and potential customers. In the producers’ eyes, therefore, the packaging is a communication medium that has actually increased in importance because more and more countries are imposing restrictions on ordinary tobacco advertising.”

The report referred to quotations from industry journals and previously internal and secret, now released documents from the tobacco industry, inter alia on the significance of communication at the point of sale:

> “The primary point of communication between ourselves and our consumers will be inside a retail outset. In summary, the spend focus has shifted from media, outdoor and consumer promotions to in-store management, contracting for display space and partnerships with retailers to build business.”

As regards research on packet design the SIRUS report refers to Wakefield et al. (2002), who, from a study of previously internal secret documents from the American tobacco industry,

note that the design of the tobacco packet is an integral part of the industry's marketing strategy. Packet design is to serve two purposes: to catch the eye in the shop's display of tobacco and communicate a message about image.

In connection with the case before the District Court, Elisabeth Kvaavik of SIRUS, on commission from the Defendant, has undertaken an updated evaluation of the expected effect of a tobacco display ban. In its report of March 2012, SIRUS maintains the conclusion on the importance of tobacco products display as a purchase influence factor. The report concludes that the Display Ban may be expected to have an effect on young individuals, on smokers who have recently quit or are considering quitting, and to have a social-marketing effect – all in the form of reduced number of users or reduced consumption of tobacco.

The District Court also refers to expert witness professor Frank J. Chaloupka, who in his written report of 22 April 2012 summarises the subject as follows:

> "Given the evidence discussed above and given my own experiences researching the impact of tobacco company marketing on tobacco use, I conclude that the marketing of tobacco products significantly influences tobacco use, particularly among young people. Tobacco product displays are a key component of tobacco company marketing strategies, particularly in places like Norway where other types of marketing have already been banned. Banning tobacco product displays at the point-of-sale will almost certainly add to the effectiveness of comprehensive marketing bans in reducing tobacco use, with the impact of a display ban likely to grow over time as tobacco use is denormalized. A display ban is expected to have greater impact on youth uptake of tobacco use by eliminating one source of the branding and imagery that appeal to potential users and by changing perceptions that tobacco use is normative."

Chaloupka also emphasises that a display ban has a greater effect when other forms of marketing of tobacco are prohibited, and notes that he is using an approach that corresponds with that used by several organisations:

> "My approach is consistent with that used by a number of organizations in their assessments of the evidence on various aspects of tobacco use, including the U.S. Surgeon General, the International Agency for Research on Cancer, the U.S. National Cancer Institute and the Food and Drug Administration. My approach begins with the conclusions that point-of-sale displays are one element in overall tobacco company marketing efforts and than marketing influences tobacco use, and then recognizes that the importance of point-of-sale displays is greater in environments where other forms of tobacco company marketing have been eliminated."

Expert witness professor Gerard B. Hastings testified in the same direction as Professor Chaloupka.

The District Court will not discuss further the reports from SIRUS and Professor Chaloupka or the surveys referred to. Nor will the court deal further with the criticism of the reports made by Philip Morris and individual expert witnesses. The District Court has no grounds for assuming otherwise than that the reports are anchored in reputable social-science methodologies. A primary component of the criticism is that none of the reports or the surveys on which they build specify a scientifically certain causal connection between display and tobacco use. As far as the District Court can understand, none of Philip Morris' expert witnesses have approached the issue on the basis of a correspondingly broad social-science methodology.

Expert witness Professor Fred E. Selnes testified that he did not consider product displays as advertising, and that studies of traditional advertising cannot be transferred to the effect of a display ban. The District Court understood Professor Selnes to be talking about displays in general, and that he had not studied or researched the tobacco industry specifically, nor the tobacco industry's packet design. Moreover, Selnes assumed a requirement for scientifically certain evidence for causal connection between the display of tobacco products and tobacco consumption.

Expert witness Professor James J. Heckman considered it was not legitimate to borrow evidence from research into tobacco advertising and use it to conclude about tobacco displays. The District Court also understood Professor Heckman to be demanding scientifically certain evidence for a connection between displays and smoking behaviour.

In the District Court's opinion no clear evidence has been submitted for visible display of tobacco not having the effect of advertising.

Evaluation of suitability – econometrics

Philip Morris has, in addition to disputing the comparison with advertising and the advertising ban, referred to econometric surveys of the effect of the Display Ban in Norway and in Canada, Iceland and Ireland.

Econometrics, which is a mathematical-statistical method, aims to isolate the effect of the Display Ban in interaction with other measures, for example price and tax increases and

smoking trends. The method takes its point of departure in a null-effect hypothesis, that is to say a hypothesis that the measure does not have any effect. The study the answers whether the null-effect hypothesis can be rejected or not, and with what statistical significance.

The method allows for various choices of variables and choice of content in the variables, and depending on this, various results may emerge. Several of the expert witnesses have underlined that this is a weakness of the method. For example, one can get different results depending on whether one measures sales figures for tobacco on the basis of wholesale or retail, and on how many periods of sales figures are entered (the number of observations), the number of smokers and what tobacco prices are entered. For several of the variables and their content, for example price and choices of type of sales figures, there are differences in the analyses made on the effect in Norway.

It is not necessary for the District Court to discuss these surveys in detail and each of the parties' in-depth objections to the surveys to which the opponent refers. As the District Court sees it, the results of the econometric surveys are in any case not clear evidence for the Display Ban not having an effect. The analyses cannot conclude that the Display Ban quite certainly has had, or quite certainly will have, an effect.

There are two factors that the District Court would point out in this connection, which were pointed out by the government's expert witnesses Professor Chaloupka and Senior Lecturer Hans Olav Melberg, both of whom also employ econometric analysis.

Firstly, the Display Ban is expected to yield long term effects. This is what the EFTA Court relates its evaluation in paragraph (84). Econometric analyse is not automatically suited to measuring such an effect given that the Display Ban has not functioned any longer than two an a half years. Moreover, surveys of total figures for tobacco consumption will not detect effects for smaller groups. For example, smokers who want to quit or are in the process of quitting, or the effect on young people and whether young people are influenced not to start smoking. A decline in smoking uptake among youngsters will not be seen as a visible reduction in the number of smokers because the number of those beginning to smoke is insignificant in relation to the large number of existing smokers. Such effect will not impact the total number of smokers until the long term.

The District Court refers also to expert witness Professor James J. Heckman. He emphasised that there is no scientific basis for saying that there is a causal connection between the Display

Ban and a reduction in smoking. But he also testified that we have no scientifically certain evidence for ruling out such an effect of the ban.

Also, expert witness Professor Göran Sedvall testified that there are no scientific studies that concludes that the Display Ban has or does not have has an effect on smokers who have quit or are trying to. In his written report, April 2012, is stated:

> "Simply put, no studies exist which demonstrate that POS displays cause adult smokers to lapse/relapse. Moreover, no study published to date has attempted to examine the question whether POS displays cause adult smokers to lapse or relapse as part of its study design."

Evaluation of suitability – conclusion

The District Court's conclusion is accordingly that there is no clear evidence for the Display Ban not being a suitable measure for limiting the consumption of tobacco in Norway in the long run. The District Court therefore considers that the measure is suitable for addressing the issue of public health.

It is not necessary for the District Court to discuss in more detail the degree of effect of the Display Ban. The District Court would, however, remark that the surveys based on social-science methodologies, with knowledge acquisition and collation research from several different disciplines and methods, all conclude that the Display Ban probably has the effect declared as the objective for the introduction of the measure in Norway. From the EFTA Court's statement, the District Court cannot judge otherwise than that such an approach to assessing suitability is relevant.

5.3 Proportionality – necessary

The second question under the proportionality test is whether the Display Ban exceeds what is necessary to attain the objectives of the measure.

Legal point of departure

In paragraph (85) the EFTA Court emphasises that Article 13 must be interpreted strictly because it makes an exception to the free movement of goods. It is for the national authorities to demonstrate that the measure is necessary to attain its declared objective and that the goal

cannot be attained by use of less comprehensive bans or restrictions or by bans or restrictions that affect intra-EEA trade to a lesser extent. It follows from the EFTA Court's statement paragraph (83) that the measure may be lawful even if there exists a certain scientific uncertainty regarding the Display Ban's necessity.

The decisive factor is whether other alternative, less interventionist measures than the Display Ban could yield a corresponding result, cf. the EFTA Court paragraph (86).

The District Court has not understood the government to be saying that alternatives that are qualitatively different cannot in general be considered in the necessity evaluation, as Philip Morris is appearing to interpret the government's arguments. The District Court does, however, understand the government to hold the opinion that no qualitatively alternative measures will yield an equivalent effect in this specific case.

The objective of the statutory provisions on display ban

The objective of the Display Ban is a general reduction in tobacco use in the population and particularly among young people, as a step towards a paramount objective of a tobacco-free society. Given the purpose and justification for the measure, the Display Ban must be seen as an extension of the advertising ban and as a measure for closing what the authorities regarded as a loophole in the advertising ban. Reference is made to the District Court's review above under the suitability question, regarding the comparison between advertising and display.

As the objective of the Display Ban is described in the preparatory works, the District Court finds that the objective is more specifically to remove the advertising effect of visible displays of tobacco at points of sale. The Display Ban shall further contribute to de-normalisation of smoking in that tobacco products are not visibly displayed together with or at the same location as corner-shop and supermarket goods. In addition, the measure is specially directed at preventing children and youngsters from beginning to smoke. This is an element of both the advertising effect and of de-normalisation. It is also noted that the Display Ban can contribute to facilitating quitting and preventing relapse for smokers who have quit, by the tobacco products not being visible in the shop. All in all, over time this will lead to a decline in tobacco use and a positive effect on public health.

Tobacco control measures – significance for the necessity evaluation

Norway has one of the strictest tobacco regulatory regimes in Europe. *The Tobacco Control Scale 2010 in Europe* ranked Norway as number three after the United Kingdom and Ireland. The ranking was done on a point system for various measures. The measures considered were price, smoke-free locations, money spent on mass media campaigns, health warnings, assistance available for smokers wanting to quit and advertising. Under this last category of "Comprehensive bans on advertising and promotion", a "Ban on display of tobacco products at the point of sales" constituted a separate point group together [with] certain kinds of advertising bans. In this area Norway scores the highest, with 12 points, together with Ireland and Iceland which had also introduced display bans at that time.

The summation about Norway states:

> "Norway has been and remains one of the strong leaders in tobacco control in Europe since the 1960s. It recently introduced a ban on tobacco displays at the point of sale and has the highest cigarette prices in the world."

At the same time Norway scores poorly in several of the other categories. The WHO evaluated the Norwegian tobacco control work in 2010. Norway was criticised inter alia for not spending enough money on mass media campaigns and for the lack of assistance for quitting. There was moreover agreement that enforcement of the age limit of 18 years for the purchase of tobacco had not functioned adequately.

There appears to be a clear perception that tobacco control work demands a broad spectrum of measures, where different measures affect different groups of individuals. The Ministry of Health stated this in the preparatory works and emphasised that the Display Ban had to be regarded as a supplement and not as an alternative to other measures.

In this context the *National Strategy for Tobacco Use Prevention Work of 2006-2010* referred to the US Surgeon General, the WHO and the World Bank, all of whom emphasise the significance of an extensive mixture of methods and strategies. The Ministry of Health states that it is indicated that an integrated approach can yield synergy effects in that the effect of a package of measures can be greater than the sum of the individual measures.

The same has been emphasised by several of the expert witnesses in the case, the District Court here refers to Chaloupka and Lund.

The District Court considers that this must be taken into account in the necessity assessment. It means that, even if there exist other measures that with a greater degree of certainty have an effect on decline in tobacco use, this does not exclude measures that can have an effect in other ways and vis-à-vis other target groups.

In Norway, there is a great number of tobacco control measures and several new ones are proposed in the ministry's 2012 consultation paper. The District Court will not discuss the various measures further.

Evaluation of necessity

As the District Court sees it, there exist no other measures that will have an effect equivalent to that of the Display Ban.

It is a key objective for the authorities that as few as possible youngsters begin to smoke, to prevent them from developing tobacco dependency. Absence of visible tobacco products in shops will be vital both in terms of the absence of advertising effect, and as a part of de-normalisation.

During the main hearing questions were asked about the government's objective of de-normalisation as an effect of the Display Ban, and that it was unclear what the government meant by it.

In the SIRUS Report 1/2008, page 49, Lund and Rise refer to the SIFO report *Out of sight, out of mind?,* (Jacobs and Lavik 2007), which describes it as follows:

> "Shop shelves contribute in many ways to normalising and thereby legitimising various forms of consumption. The shelves display a repertoire of equated possible consumption practices. Crispbread, milk, fruit, light-bulbs, condoms, confectionery and cigarettes are displayed in a complete equated and amoral manner. They share space in the category of groceries. In this way the cigarettes and the condoms borrow legitimacy from the crispbread and the milk, and their consumption is normalised. There is reason to assume that this is also of significance in relation to children's and young people's understanding of consumption and their own identity-building. Therefore, when the tobacco products disappear from the visible public space, it cannot be ruled out that they will also acquire a less prominent placement in the understanding of consumption and in identity-forming processes."

The District Court considers that this gives an understandable explanation of the normalisation effect of visibly displayed tobacco products, and the other side of the coin – de-normalisation through the absence of such display.

The District Court also refers to an evaluation of the Irish display ban, *Evaluation of the Removal of Point-of-sale Tobacco Displays in Ireland*, Ann McNeill et al., 2010, which concludes inter alia as follows:

> "At short term follow-up, the legislation appears to be contributing positively to the de-normalisation of smoking among children, and providing a more supportive environment for adults to quit and children not to smoke."

On de-normalisation in the report:

> "The law appeared to be effective at de-normalising smoking, at least in the short term: as evidence by decreases in the proportion of children thinking that more than 20% of teenagers smoke. Over a third of teenagers, nearly 2 months after the legislation, though that removal of the displays had made it easier for children not to smoke."

Expert witness Professor Gerard B. Hastings emphasised that the reduction in the estimated incidence of smoking is important because children's perception of the number of smokers is a reason for they themselves to smoke. The evaluation from Ireland showed that removal of tobacco displays changed the children's perceptions of how common it was to smoke. Hastings also pointed out that young people are receptive to the double communication involved in telling children and youngsters that smoking is dangerous at the same time as tobacco is visibly displayed where they buy their sweets.

Philip Morris has pointed to a licensing system for the sale of tobacco as an alternative measure to prevent children under 18 from buying tobacco. This is also proposed in the Ministry of Health's consultation paper of 2012, and there is no disagreement that such a measure may have significance. The District Court, however, agrees with the government that a licensing system will not remove the advertising effect of visible display, nor contribute to de-normalisation of tobacco use. Nor again will the measure reach the target-group of adults who may be affected negatively in connection with quitting.

The same applies to a stricter enforcement of the age limit for buying tobacco. It could lead to fewer people under 18 years buying tobacco, but will not remove the advertising influence and the normalising effect of visible tobacco display. Case E-9/00 *Rusbrus*, where better

enforcement of the age limit for buying alcohol was pointed out, is not comparable with our case. In the Rusbrus case the objective behind the requirement that alcopops had to be sold at the Norwegian state liquor monopoly was to make the product less accessible to young people. In that case, de-normalisation and removal of the advertising effect from display was not an objective. The same applies to C-170/04 *Rosengren* and the reference to enforcement of the age limit as an alternative measure.

Philip Morris has also pointed at mass media campaigns. This is already a measure in use, and there is agreement that mass media campaigns can have an effect on total consumption – including through the de-normalisation effect. Expert witness Lund, however, testified that the effect of such campaigns may diminish over time, and has less effect in a society where the harmful effects of tobacco are well-known.

Even if such campaigns contribute to de-normalisation, the absence of visible tobacco in the shops will in the District Court's opinion reinforce the effect and operate in the same direction. Contrariwise, continued influence by visibly displayed tobacco products could weaken the de-normalisation effect of the mass media campaigns. The District Court refers in this context to Rt. 2009 page 839, *Pedicel*, paragraph (36) on the indirect effect of advertising, the normalising effect, and where the Supreme Court refers to an example that can also illuminate the issue in our case – transferred to the influence of a visible display of tobacco:

> "An example of such a connection is referred to in the European Commission's proposed tobacco directive of 19 January 2001 (COM(22001) 283) page 6 (501PC0283):
>
> > "As regards the subtle implications of the advertising of a product such as tobacco, the United Kingdom example is significant. In this Member State two thirds of the adult smokers say they want to stop, but half agreed with the statement that smoking cannot be all that dangerous, or the government would not allow tobacco to be advertised." "

Nor will a limited display ban remove the advertising and normalising effect of a visible tobacco display. The government has in this context referred to the WHO Guidelines, where it is emphasised that the effect of a partial advertising ban is limited. This was also emphasised by the government's expert witnesses Lund, Chaloupka and Hastings. The District Court also refers to Rt. 2009 page 839, *Pedicel*, paragraph (61), where it is found that a less comprehensive measure, a quantitative restriction in the total prohibition, must be presumed to weaken the effect of the measure. The Supreme Court found it clear that such an alternative

measure cannot lead to the total ban on alcohol advertising not being deemed necessary. This must apply correspondingly in our case as regards a limited display ban.

The District Court therefore considers that the Display Ban is necessary and that there are no other alternative, less interventionist measures that could yield a corresponding result.

5.4 Costs of the case

The government has won the case and is entitled to compensation for its costs under the main rule of Section 20-2 first paragraph of the Disputes Act. The District Court cannot see that there exist any factors that might dictate that the exception provision in the third paragraph should become applicable.

The government's counsel has submitted a schedule of costs in the sum of NOK 1,364,200, of which NOK 1,056,000 is fees. The rest is expenses. Philip Morris has not made any objection to the schedule, and the District Court accepts them as the government's necessary costs of the case, cf. Section 20-5.

JUDGMENT

1. The court hereby finds in favour of the Norwegian Government, represented by the Ministry of Health and Care Services.

2. Philip Morris Norway AS is hereby ordered to pay the costs of the case to the Norwegian Government, represented by the Ministry of Health and Care Services, in the sum of 1,364,200 (one million three hundred and sixty-four thousand and two hundred kroner) within two weeks of the service of the judgment.

The court rose.

Elisabeth Wittemann