REPORT FOR THE HEARING

in Case E-16/10

- revised - [*]

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (Oslo tingrett), Norway, in a case pending before it between

Philip Morris Norway AS

and

the Norwegian State, represented by the Ministry of Health and Care Services,

concerning the interpretation of Articles 11 and 13 of the EEA Agreement, in particular whether they preclude a rule prohibiting the visible display of tobacco products in retail outlets as prescribed by Norwegian law.

I Introduction

1. By a letter dated 12 October 2010, registered at the EFTA Court on 19 October 2010, Oslo District Court, Norway, made a request for an Advisory Opinion in a case pending before it between Philip Morris Norway AS ("the Plaintiff") and the Norwegian State, represented by the Ministry of Health and Care Services ("the Defendant").

II Facts and procedure

2. The parties disagree whether national legislation that introduces a display ban on tobacco products constitutes an unlawful restriction pursuant to Article 11 of the Agreement on the European Economic Area ("EEA"). It is also disputed, assuming a restriction contrary to Article 11 EEA exists, which criteria are

[*] Amendments to paragraphs 14, 18, 19, 53, 63, 66, 70, 74, 85-86, 88, 94, 97 and 152.

decisive to determine whether a display ban is suitable and necessary on public health grounds pursuant to Article 13 EEA.

3. The Plaintiff is a subsidiary of the world's biggest tobacco producer and imports tobacco products to Norway. As such, the Plaintiff is subject to a total prohibition on the advertising of tobacco products, a ban introduced in 1973. That prohibition entails a ban on all forms of marketing in all kinds of media, including newspapers, radio, television and posters. This general prohibition also applies to direct and indirect advertising, such as using trademarks or logos used to depict tobacco products. The ban also applies to advertising in retail outlets in the form of posters and similar objects at the cash register or in other places in the retail store that depict trademark, logo and/or characteristics of the product.

4. In 2009, the Defendant introduced legislation to amend the existing legal framework establishing an advertising ban on tobacco products. Under the new provisions, the advertising prohibition extends to the visible display of tobacco products and smoking devices. However, the legislation permits one exception to the prohibition on the visible display of tobacco products. Under that exception, the ban does not apply to dedicated tobacco boutiques. The new legislation took effect on 1 January 2010.

5. The Plaintiff filed a lawsuit before Oslo District Court against the Defendant seeking to have the ban set aside on grounds of incompatibility with the EEA Agreement. The Plaintiff argues that the display prohibition entails an unlawful restriction contrary to Article 11 EEA as it hinders the free movement of goods. In contrast, the Defendant argues that the prohibition is compatible with the EEA Agreement.

6. On 25 June 2010, Oslo District Court decided to request an Advisory Opinion from the EFTA Court on the interpretation of Articles 11 and 13 EEA. In its request, Oslo District Court notes that there is relevant case-law from the Court and the Court of Justice of the European Union ("the ECJ") on traditional marketing. However, it considers it necessary to obtain additional guidance from the EFTA Court on the lawfulness of a general prohibition on the visible display of tobacco products within the context of Articles 11 and 13 EEA.

III Questions

7. The following questions were thus referred to the Court:

> **1. Shall Article 11 of the EEA Agreement be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods?**
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> **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 having regard to public health?

IV Legal background

EEA law

8. Article 11 EEA reads as follows:

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

9. Article 13 EEA reads as follows:

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

National law[1]

10. In Norway, the total prohibition on the advertising of tobacco products was established in the Law of 9 March 1973 No 14 relating to the prevention of the harmful effects of tobacco (Lov om vern mot tobakksskader 9. mars 1973 nr. 14 – "the Tobacco Act I"). Section 4 reads as follows:

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

11. The Law of 3 April 2009 No 18 (Lov om endringer i lov 9. mars 1973 nr. 14 om vern mot tobakksskader – "the Tobacco Act II") extended the advertising prohibition to the visible display of tobacco products. It took effect on 1 January 2010 and amends various provisions of the Tobacco Act I. Section 5 of the Tobacco Act I, as amended, now reads as follows:

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[1] Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

§5. Prohibition against the visible display of tobacco products and smoking devices.

The visible display of tobacco products and smoking devices at retail outlets is forbidden. The same applies to imitations of such products and to token cards which give the customer access to acquire tobacco products or smoking devices from vending machines.

The prohibition in the first paragraph does not apply to dedicated tobacco boutiques.

At the retail outlets it is allowed to provide neutral information regarding the price and which tobacco products are for sale at the premises. The same applies to smoking devices.

The Ministry can through regulations provide for rules on the implementation and supplementing of these provisions and provide exemptions from such.

12. Section 2 of the Tobacco Act II defines certain concepts relevant to the display prohibition:

§2. Definitions

By tobacco products it is understood in this Act, products which can be smoked, sniffed, sucked or chewed, provided that they, wholly or partly, consist of tobacco.

By smoking devices it is understood in this Act, products which by design are mainly for use in connection with tobacco products.

By dedicated tobacco boutiques it is understood retail outlets which mainly sell tobacco products or smoking devices.

V Written observations

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

- the Plaintiff, represented by Peter Dyrberg, advokat, Brussels, Jan Magne Juuhl-Langseth, advokat, Oslo, and Michel Petite, avocat, Paris;
- the Defendant, represented by Ketil Bøe Moen, advokat, and Ida Thue, advokat, Office of the Attorney General (Civil Affairs), Oslo;
- the Republic of Finland, represented by Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs, acting as Agent;

- Iceland, represented by Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs, acting as Agent;
- the Republic of Portugal, represented by Luís Fernandes, Director of the Legal Service of the Directorate General for European Affairs and Maria João Palma, Legal Consultant of the Directorate General for Economic Activities, acting as Agents;
- Romania, represented by Emilian Carlogea, Director for Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment, acting as Agent;
- the United Kingdom, represented by Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, acting as Agent, and Ian Rogers, barrister;
- the EFTA Surveillance Authority, represented by Florence Simonetti, Senior Officer, and Fiona Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission, represented by Peter Oliver, Legal Advisor, and Günter Wilms, Member of its Legal Service, acting as Agents.

The Plaintiff

The first question

14. The Plaintiff claims that the ban on the visible display of tobacco products constitutes "a measure with equivalent effect to a quantitative restriction" on the free movement of goods within the meaning of Article 11 EEA. This claim is supported by two arguments. First, the plaintiff argues that the total display ban is inherently discriminatory and as such constitutes a restriction on free movement of goods within the meaning of Article 11 EEA. Second, the Plaintiff asserts that the display ban entails a restriction on free movement of goods because it hinders market access.

Restriction on free movement of goods within the meaning of Article 11 EEA

Prohibition of measures capable of restricting free movement

15. With regard to the argument that the display ban constitutes a restriction within the meaning of Article 11 EEA, the Plaintiff argues that guidance is to be found in Article 34 of the Treaty on the Functioning of the European Union ("TFEU"), which includes a provision similar in substance to Article 11 EEA, concerning "measures having equivalent effect to quantitative restrictions" and the interpretation placed on these provisions in EU law.[2] According to established

[2] The Plaintiff refers to a legal opinion produced by Sir Francis Jacobs, former Advocate General of the Court of Justice of the European Union, on the questions to be answered in this case. The opinion was submitted to the Court as Annex I to the Plaintiff's written pleadings.

case-law, the concept of "quantitative restrictions" is considered to entail "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[3]

16. Notwithstanding the importance of measures that actually restrict free movement of goods, the Plaintiff emphasises the need to go further. Thus, the potential effects of the legislation in question are also relevant. The Plaintiff submits that if the legislation is capable of having restrictive effects, it must be regarded as having an effect equivalent to a quantitative restriction.[4]

Discriminatory Measures

17. The Plaintiff argues that national legislation that restricts or prohibits certain selling arrangements is not, as such, a direct or indirect hindrance to trade between Member States, if the legislation applies to all relevant traders and it affects the marketing of domestic products and imported products in the same manner.[5] However, in the Plaintiff's view, a total advertising ban is considered to constitute a *per se* restriction on the free movement of goods in EU law.[6] Further, according to established case-law, a total ban on the advertising of alcoholic products may be considered a restriction on the free movement of goods, without any need for an analysis of the factual effects of such a ban on a particular market.[7] In addition, the Plaintiff submits that a total advertising ban, as prescribed by national law, is liable to favour domestic products over imported products because consumers tend to be more familiar with domestic products than imported ones.[8]

18. The Plaintiff contends that the absence of tobacco production in Norway does not alter that the ban on visual display of tobacco products constitutes a *per se* restriction on the free movement of goods. The absence of domestic production is irrelevant to the applicability of Article 11 EEA. In the Plaintiff's view, such absence simply results in the situation that the challenged national

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[3] For a definition of "quantitative measures", the Plaintiff refers to Article 34 TFEU and Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

[4] The Plaintiff refers to Case C-184/96 *Commission* v *France* [1998] ECR I-6197, paragraph 17, Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13, and Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649.

[5] The Plaintiff refers to Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

[6] The Plaintiff refers to the Opinion of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, point 50.

[7] Case C-405/98 *Gourmet International* [2001] ECR I-1795, paragraphs 18, 20 and 21, and Case C-239/02 *Douwe Egberts* [2004] ECR I-7007, paragraphs 53-54.

[8] The Plaintiff refers to *Douwe Egberts*, cited above, paragraph 53.

measure disadvantages only imported products and is, as such, a discriminatory restriction on free movement of goods.[9]

19. Thus, the Plaintiff argues that a ban on visual display of tobacco products is inherently discriminatory and the absence of domestic production is either irrelevant or supports the finding of discrimination.

Advertising ban and its extension as a display ban

20. The Plaintiff asserts that the total advertising ban constitutes a *per se* restriction on free movement of goods within the meaning of Article 11 EEA. According to the Plaintiff, that principle applies *a fortiori* to the dispute in the present case. The additional visual display ban eliminates the only remaining means of communication left to tobacco producers in order to convey characteristics of tobacco products to consumers. As the advertising ban enables consumers only to acquaint themselves with information relating to tobacco products at points of sale, the visual display ban closes this last remaining channel of communication, making the entry of new imported brands impossible.

21. This also discriminates in particular against imported brands. Norwegian tobacco brands date as far back as 1885 and were produced in Norway until 2008. These brands enjoy a strong presence due to local habits and customs. The display ban distorts the position of new imported brands – many of which are unfamiliar to consumers.

The display ban and specialist Internet websites selling tobacco

22. In the view of the Plaintiff, the display ban applies to specialist Internet websites exclusively selling tobacco. In contrast, the display ban does not apply to specialist tobacco shops that sell tobacco products to consumers. Therefore, specialist tobacco websites are unable to display their products.

23. The Plaintiff contends that this framework constitutes unequal treatment of sales depending on whether they are made in a shop or over the Internet. The Plaintiff points out that even though Norwegian tobacco shops are also not permitted to display products on their websites, they are able to do so in their stores. Such treatment constitutes indirect discrimination against imported products and has an effect comparable to a quantitative restriction within the meaning of Article 11 EEA.[10] Therefore, the display ban is more of an obstacle to foreign tobacco shops than to domestic ones.

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[9] The Plaintiff refers to Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 17, Case C-416/00 *Morellato* [2003] ECR I-9343, paragraph 37, and the Opinion of Advocate General Mengozzi in Case C-108/09 *Ker-Optika* [2010] ECR I-0000, point 67.

[10] Reference is made to Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887 and *Ker-Optika*, cited above.

The display ban restricts free movement as it hinders market access

Measures that hinder market access of products from other EEA States constitute a restriction within the meaning of Article 11 EEA

24. According to the Plaintiff, case-law has established that national measures which hinder market access of products from other Member States amount to a restriction on the free movement of goods.[11] Case-law has clarified, therefore, the extent to which rules may be considered restrictions on free movement for the purposes of Article 11 EEA.

25. It follows from this case-law, the Plaintiff continues, that any rules that (i) have the aim or effect of discriminating against imported goods; (ii) lay down requirements for imported goods, or (iii) hinder access of imported goods to the market of a Member State must be considered restrictive for the purposes of Article 11 EEA. In the light of that analysis, a total visual display ban must be considered a restriction on the free movement of goods because it is inherently discriminatory[12] and because it hinders market access of imported products.[13]

Display ban and market hindrance

26. With regard to how the ban hinders market access from other EEA States, the Plaintiff argues that the display ban effectively forecloses one part of the EEA to entry of new brands from other EEA States. With such a restriction imposed on the tobacco market, it is difficult for producers to develop recognition of new brands.[14]

27. The Plaintiff asserts that the ban prohibits the use of brands to such an extent that they cannot be advertised or displayed in shops or on websites in a meaningful way. Thus, any possibility of communicating brands prior to sale is made not only difficult but also impossible, in particular for products not familiar to domestic customers. The communication of brands, the Plaintiff argues, is of particular importance when marketing of tobacco products through advertising is banned – a position supported by an earlier Commission decision pertaining to the tobacco industry.[15] Thus, whilst the advertising ban makes market entry

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[11] Reference is made to Case C-110/05 *Commission* v *Italy* [2009] ECR I-519 and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. In addition, the Plaintiff refers to the Opinion of Advocate General Bot in *Commission* v *Italy*, points 77-84, and the Opinion of Advocate General Geelhoed in *Douwe Egberts*, cited above, point 71.

[12] The Plaintiff refers to *Keck and Mithouard*, *Gourmet International*, and *Douwe Egberts*, all cited above.

[13] The Plaintiff refers to *Commission* v *Italy* and *Mickelsson and Roos*, both cited above.

[14] Reference is made to Commission Decision Case COMP/M.2779 – *Imperial Tobacco/Reemtsma Cigarettenfabriken* of 8 May 2002, paragraph 54.

[15] The Plaintiff refers to Commission Decision Case COMP/M.4581 – *Imperial Tobacco/Altadis* of 18 October 2007, paragraph 68, in support of its position.

difficult, the visual display ban forecloses market entry of foreign brands and, as such, is contrary to Article 11 EEA.

28. The Plaintiff proposes that the first question be answered as follows:

> *Article 11 EEA must be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure with equivalent effect to a quantitative restriction on the free movement of goods.*

The second question

29. On the second question, the Plaintiff argues that the EFTA Court should, as follows from case-law, provide the referring court with guidance pertaining to the justification or proportionality assessment needed according to Article 13 EEA.[16] However, the Plaintiff notes that earlier decisions left the referring national court without any guidance on the assessment of proportionality.[17]

30. Rulings given by national courts as a result of answers provided by the ECJ and the Court have produced diverging results. According to the Plaintiff, such conflict is inconsistent with the fundamental objective of the EEA Agreement, that is, to ensure the uniform application of the rules of the internal market throughout the EEA. Consequently, the Court should provide guidance in the form of detailed criteria for the proportionality assessment.

31. The Plaintiff submits that the proportionality assessment should include as fundamental concepts the notions of suitability and necessity. Consequently, the state concerned must prove that the restriction is suitable and no greater than necessary to meet the aims of general public importance.[18]

32. In addition, the Plaintiff emphasises that other factors are relevant to the assessment for the purposes of Article 13 EEA. The Article must be interpreted strictly as it derogates from the principle of free movement of goods.[19] The burden of proof is on the state to show that the measures are justified and that their benefits cannot be achieved with less restrictive alternatives.[20] Moreover,

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[16] The Plaintiff refers to Case C-73/08 *Bressol* [2010] ECR I-0000, paragraph 65, and the Opinion of Advocate General Maduro in Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, point 32.

[17] Reference is made, *inter alia*, to *Gourmet International*, cited above, and the subsequent decision of the national court.

[18] The Plaintiff cites *Rewe-Zentral*, cited above, paragraph 8; Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 42; *Ahokainen and Leppik*, cited above, paragraph 39; Case C-170/04 *Rosengren* [2007] ECR I-4071, paragraph 47; and Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 47.

[19] The Plaintiff refers to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep., p. 4, paragraph 53, and the Opinion of Advocate General Maduro in *Ahokainen and Leppik*, cited above, point 21.

[20] Reference is made to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep., p. 89; Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep., p. 167, paragraph 88; Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep., p. 11, paragraph 50; and Case E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep., p. 104, paragraph 61.

the justification for the derogation permitted by Article 13 EEA must not be based on speculation but on scientific evidence.[21]

33. Finally, the Plaintiff emphasises the need for the measures implemented to serve a legitimate aim. Although it accepts that reducing smoking is a legitimate objective, on its view, that does not relieve the state from the burden of showing that the ban serves its aim and that the benefits of the measure in question cannot be achieved with less restrictive means. Therefore, according to the Plaintiff, if a measure restricts trade in tobacco products but does not reduce tobacco consumption and achieve its stated public health objective, this cannot constitute legitimate justification for the elimination of the use of tobacco brands as the Defendant has done in the present case.

Criteria for proportionality assessment

34. According to the Plaintiff, the state has to produce evidence showing that the circumstances addressed by a measure actually create a risk to public health and that the contested measure reduces that risk.[22]

35. The Plaintiff asserts that there is no disagreement on the first issue, i.e. that tobacco products have a negative effect on public health. With regards to the second issue, the Plaintiff observes that the parties disagree, in that the Plaintiff considers that the display of tobacco products is not a risk to public health unless it increases tobacco consumption. Therefore, in its view, the relevant issue in the present case is, first, whether a ban on the display of tobacco at point of sale will reduce consumption, and, second, if so, whether such an effect can be achieved by other less restrictive means.

Criteria for suitability

36. The Plaintiff contends that the visual display ban is unsuitable for reducing tobacco consumption. According to the contested measure, tobacco products must be blocked from view at points of sale. That will, however, not affect their availability, as they will be stored in closed cabinets labelled “tobacco”. Therefore, in the Plaintiff’s view, the measure is only an additional inconvenience that will have only marginal effect on consumption.[23] As positive effects of the display ban cannot be assumed, the Defendant should be obliged to present evidence showing that the display of tobacco products actually creates health risks and that the elimination of the visible display of tobacco reduces such risks.

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[21] Reference is made to Case E-3/00 *ESA* v *Norway* [2000-2001] EFTA Ct. Rep., p. 75.

[22] In support of this viewpoint the Plaintiff refers to *Bressol*, cited above, paragraph 71, Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 51, and Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, paragraph 36.

[23] Reference is made to *Rosengren*, cited above, and Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep., p. 74, paragraphs 56-57.

Insufficiency of evidence adduced by the state

37. The Plaintiff argues that the Defendant has not produced sufficient evidence in support of the visual display ban. Before introducing the ban, the Defendant requested a government agency to prepare a report on the existing literature in favour of a display ban – a request that resulted in a report that provided little support for display bans. Therefore, the Defendant has not fulfilled the requirement to produce evidence supporting the visual display ban.

38. In contrast, the Plaintiff submits that there is no evidentiary basis to assume that the visual display ban on tobacco products at points of sale will reduce tobacco consumption, or even if there is any causal relationship between point of sale display of tobacco products and smoking initiation or prevalence.[24]

The experience of other jurisdictions

39. The Plaintiff points out that display bans have been implemented in other countries, such as Australia, Canada, Iceland, Ireland and Thailand. These measures and their effect have been the subjects of various academic studies that have consistently concluded that no empirical evidence can be found to support the view that visual display bans reduce smoking. Therefore, the experience from other jurisdictions shows that display bans have not been successful in reducing tobacco consumption.

40. Furthermore, the Plaintiff refers to studies undertaken in countries which have implemented visual display bans in which the effectiveness of total visual bans have been researched. Analysis of smoking prevalence before and after the introduction of such visual display bans has not demonstrated a relationship between the bans and smoking consumption. In particular, the Plaintiff submits that these studies have concluded that an introduction of a visual display ban has not accelerated the decline in smoking rates.[25]

Considerations of countervailing factors

41. The Plaintiff asserts that the visual display ban has unintended consequences, encouraging the illicit trade of tobacco products, that is, illegal tobacco, contraband and counterfeit brands of tobacco. These consequences and

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[24] The Plaintiff refers to the report of Dr James J. Heckman, Professor of Economics at the University of Chicago, concerning whether reliable evidence could be found supporting the existence of a causal link between points of sale displays of cigarettes and smoking initiation. The report was submitted to the Court as Annex 2 to the Plaintiff's written pleadings.

[25] Reference is made to reports of Dr Jose Padilla, Research Fellow of the Centre for Economic Policy Research (London) and the Centro de Estudios Monetarios y Financieros (Madrid), and of Dr Gorm Grønnevet, Doctoral Fellow at the Norwegian School of Economics and Business Administration, which researched total visual display bans introduced in various parts of Canada and Iceland. These reports were submitted to the Court as Annexes 3 to 5 to the Plaintiff's written pleadings.

their effects on legitimate tobacco trade have not been recognised by the Defendant.

42. The Plaintiff argues that the Defendant has failed to show that the alleged benefits of the visual display ban are not offset by an increase in illicit trade. According to the Plaintiff, one of the negative effects of visual display bans is the fact that cheaper unregulated tobacco products become more accessible to young smokers. Therefore, public health initiatives to curb tobacco consumption are undermined as cheap tobacco products are sold to adolescents in an unregulated environment.

Criteria for necessity

Obligation to examine less restrictive measures

43. The Plaintiff stresses that the Court should provide guidance on what the burden of justification on the Defendant entails. That is, according to the Plaintiff, the Defendant must demonstrate that the benefits from a display ban cannot be met through alternative measures less restrictive of trade. This is of particular importance as the Defendant has acknowledged that other methods of reducing tobacco consumption exist. Therefore, so the Plaintiff argues, the state is under an obligation to examine the possibility of using measures less restrictive of the free movement of tobacco products.[26]

44. The Plaintiff submits that less restrictive measures could consist in regulations limiting the size of retail displays, effective enforcement of existing age restrictions and retail licensing. It contends, however, that such measures have either not been adopted or are unenforced by the Defendant.

Less restrictive measures to reduce consumption of tobacco products

45. While acknowledging that the main objective of the visual display ban is to reduce tobacco consumption amongst children and adolescents, the Plaintiff emphasises that the important question is whether the ban is effective in securing that objective and whether less restrictive alternatives can be implemented in pursuit of the same objective.

46. With regard to the obligation to demonstrate the necessity of the measure, the Plaintiff emphasises that the burden of justifying the restriction falls on the Defendant, in particular where other alternatives are available.[27] In this context, the Plaintiff highlights that proper enforcement of age restrictions is a less

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[26] The Plaintiff refers to Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 87, the Opinion of Advocate General Kokott in Case C-198/08 *Commission* v *Austria* [2010] ECR I-0000, points 61, 62 and 64, and Case C-216/98 *Commission* v *Greece* [2000] ECR I-8921, paragraphs 30-33.

[27] Reference is made to *Rosengren*, cited above, paragraphs 50 and 55-57.

restrictive measure for the purposes of preventing youth consumption.[28] However, in its view, as shown by research undertaken by Norwegian government agencies, the Defendant does not sufficiently enforce age restrictions.

47. In addition, the Plaintiff asserts that the Defendant has failed to adopt a retail licensing system. In such a system, a retail shop would have to obtain a licence to sell tobacco products. Any violations of the licence's conditions would result in its revocation. The Plaintiff contends that such a system would be less restrictive than the visual display ban in the present case.

The extremity of the Norwegian law and the WHO Framework Convention

48. The Plaintiff argues that even if a visual display ban were to be considered justified, the contested measure is needlessly extreme as it bans any use of brands or packages at points of sale. Thus, the ban goes further than similar bans in other countries such as Finland and the United Kingdom.

49. Here, the Plaintiff refers to the position taken by the Finnish Parliament. When considering whether to adopt a similar ban on visual display of tobacco products, the Finnish Parliament concluded that such a ban would be unnecessarily strict as it would restrain entrepreneurs' freedom of expression in marketing their products and restrict the right of holders of trademarks to exploit their property rights in their business operations. Those considerations resulted in a measure that authorises the use of colour catalogues including images of packs and trademarks at point of sale.

50. With regard to the WHO Framework Convention of 2003 ("WHO Convention"),[29] the Plaintiff observes that the Convention does not relieve the Defendant of its obligations under Articles 11 and 13 EEA. Furthermore, in its view, the Convention prescribes, in general, no obligation to adopt laws contrary to a state's constitutional order, and, in particular, no obligation to enact a visual display ban on tobacco products. Consequently, no measure that includes a visual display prohibition may be regarded as required to satisfy the advertising ban established in Article 13 of the WHO Convention. Although a visual display prohibition was discussed amongst parties to the Convention, these discussions only resulted in the adoption of non-binding guidelines for the implementation of Article 13 of the WHO Convention. Thus, no obligation exists to enact a visual display ban. If an EU State implements measures in its jurisdiction based on those guidelines, according to the Plaintiff, that state must justify its measures as

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[28] The Plaintiff refers to Case E-9/00 *ESA* v *Norway*, cited above, paragraph 56.

[29] WHO Framework Convention on Tobacco Control of 21 May 2003.

suitable and show that benefits derived from those measures cannot be met by less restrictive measures.[30]

51. The Plaintiff proposes that the Court should answer the second question as follows:

> *Articles 11 and 13 EEA must be interpreted so as to preclude a general prohibition against the visible display of tobacco products such as that at issue in the main proceedings, unless the referring court, having assessed all the supporting evidence, finds the prohibition justified in light of the objective of reducing consumption of tobacco products.*
>
> *It is for the national authorities to submit substantial and specific evidence to show that:*
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> - *the prohibition is suitable for attaining that objective, i.e. that the prohibition will reduce consumption of tobacco products and that the benefits of the prohibition are not offset by its unintended consequences; and*
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> - *the prohibition does not go beyond what is necessary to attain that objective and that the actual benefits of the measure (if any) cannot be attained by less restrictive alternatives, such as a retail licensing scheme, proper enforcement of a ban on underage tobacco sales, or limitations on the size and/or placement of retail displays.*

The Defendant

Elements of the Defendant's tobacco policy

52. The Defendant observes that for several decades it has pursued a consistent and strict tobacco policy and is considered among the leading nations in forming policy measures with the purpose of reducing tobacco consumption. The reason for such a policy is the fact that the use of tobacco represents one of the biggest health risks in the world, with approximately 15% of all deaths in Europe being

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[30] The Plaintiff refers to Case C-197/08 *Commission* v *France* [2010] ECR I-0000, paragraph 45. Further reference is made to Case C-221/08 *Commission* v *Ireland* [2010] ECR I-0000 and Case C-198/08 *Commission* v *Austria*, cited above.

caused by active smoking.[31] These adverse effects of tobacco use make it the largest avoidable cause of premature deaths worldwide.[32]

53. The Defendant emphasises that its comprehensive and diversified policy has been implemented through legislative measures to reduce tobacco use. These include a ban on advertising tobacco products, an age threshold of 18 years for the purchase of tobacco and mandatory labelling on tobacco products. The latest measure was introduced following public hearings and research undertaken by and as summarized by SIRUS on the anticipated effects of the proposed visual display ban.[33]

54. The Defendant submits that the visual display ban is an integral part of the Defendant's tobacco policy. The main objective of the ban is to limit the advertising effect of the display of tobacco products and to contribute to a reduction in tobacco use and tobacco-related health problems. Thus, the purpose of the prohibition is to reduce the number of smokers in the population in general and amongst children and young people in particular. In addition, the prohibition may make it easier for people who are trying to quit or have quit smoking tobacco to overcome their addiction.

55. The Defendant points out that the ban will not only have a direct effect on tobacco use, but also an indirect effect by changing the attitude of the general public towards tobacco products. The placement of dangerous products alongside non-risk products in retail stores can give misleading messages where customers might believe that tobacco products are not dangerous. Thus, the signal effect, which the visual display ban will ultimately generate, will denormalise the use of tobacco over time amongst the general public.

Advertising of tobacco within the EU/EEA and the WHO

Current legislation and encouragement by the EU legislature

56. The Defendant observes that the advertising of tobacco products is regulated under EU and EEA law. Although legislative instruments neither

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[31] The Defendant refers to various sources with regard to deaths related to tobacco use, including RAND Europe, *Assessing the Impacts of Revising the Tobacco Products Directive*, September 2010, and WHO, *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009). These reports were submitted to the Court as Annexes 2 and 3 to the Defendant's written pleadings.

[32] Reference is made to WHO, *Report on the Global Tobacco Epidemic* (2008) and Council Recommendation 2003/54/EC, OJ 2003 L 22, p. 31, included as Annex 4 to the Defendant's written pleadings submitted to the Court.

[33] SIRUS (Statens Institutt for Rusmiddelforskning) is according to the Defendant a research institute that is wholly independent from the Government as concerns research matters, albeit formally organized under the Ministry of Health. In addition, the Defendant refers to Lund & Rise, *Kunnskapsgrunnlaget for forslaget om et forbud mot synlig oppsitilling av tobakksvarer* (2008), submitted to the Court as Annex 6 to the Defendant's written pleadings.

require nor prohibit visual display bans, the repeated encouragement from EU institutions to Member States is of particular interest.

57. The Defendant points out that most forms of traditional marketing of tobacco products are banned in the EU and EEA. According to EU and EEA secondary legislation, tobacco products cannot be advertised on television or by using audiovisual services or in written publications and radio.[34] It is important to emphasise that the prohibitions prescribed in EU and EEA legislative instruments are minimum requirements. Therefore, Member States are competent to introduce stricter regulations provided that EU law in general is respected. In fact, both the Council and the Commission have applauded Member States for introducing more stringent regulations than those prescribed by EU law.[35]

58. In addition, when commenting on issues pertaining to the prevention of smoking, the Council has acknowledged the need for comprehensive prohibitions and called upon Member States to implement stricter regulations than those prescribed in various directives.[36] These declarations of the Commission and the Council coincide with the EU's active participation in the work of the WHO.[37] The Defendant argues that the recommendations of the Council, in particular, should be understood as encouragement to prohibit, *inter alia*, the advertising resulting from the visibility of tobacco products in retail outlets.[38]

59. The Defendant points out that the Commission has initiated a consultation on the revision of the existing legislative instruments concerning tobacco products.[39] That consultation describes three options available with regard to access to tobacco products: (1) no change (Member States remain competent in limiting the access); (2) controlled supply and access (age verification, access to vending machines restricted and tobacco display at points of sale restricted); and

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[34] The Defendant refers to Article 13 of Council Directive 1989/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298, p. 23; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003 L 152, p. 16, and Articles 5, 7 and 8 of Directive 2001/37/EC of the European Parliament and the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ 2001 L 194, p. 26.

[35] Reference is made to European Commission, *Report on the implementation of the EU Tobacco Advertising Directive* COM(2008) 330 final, pp. 5-6, and European Commission, *Green Paper Towards a Europe free from smoke: policy options at EU level*, COM(2007) 27 final, p. 3.

[36] Reference is made to Council Recommendation 2003/54/EC of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control, OJ 2003 L 22, p. 31.

[37] Reference is made to recitals 7 and 17 in the preamble to Council Recommendation 2003/54/EC, cited above.

[38] Recommendation 2(a)-(f) in Council Recommendation 2003/54/EC, cited above.

[39] The Defendant refers to European Commission, DG SANCO 2010, *Possible revision of the Tobacco Product Directive 2001/37/EC*, Public Consultation Document, available at: http://ec.europa.eu/health/tobacco/docs/tobacco_consultation_en.pdf.

(3) ban (cross-border sales via the Internet banned, vending machines banned, vending machines banned and displays in retail stores banned). Moreover, the consultation acknowledges that Member States are competent to decide what option to take, including whether or not to adopt a display ban.

Visual display bans in other countries

60. The Defendant emphasises that other countries have implemented a ban on the visible display of tobacco products. Iceland, Ireland, Finland and the United Kingdom have all introduced visual display bans. These prohibitions share the common approach of considering the visible display of tobacco products as advertisement. Therefore, the display ban is considered to be a natural and integral part of the advertising ban that previously existed in those countries.

61. According to the Defendant, any reference made by the Plaintiff to the fact that other states have not implemented a visual display ban should be considered irrelevant in the present case, as arguments based on such a reference have no bearing on the legality of the display ban. As discussed earlier, the competence to implement a visual display ban lies, according to EU law, with individual Member States. In addition, references made by the Plaintiff to Sweden and Denmark are, from the Defendant's perspective, inaccurate as it is unaware of any work being undertaken by those countries to introduce a visual display ban.

WHO Framework Convention

62. The Defendant stresses that the WHO is a vital player in the effort to reduce the harm caused to the general public as a result of tobacco consumption. The WHO Convention is a cornerstone in that effort. Although the Convention only entered into force in 2005, the majority of states have become parties to it. As of January 2011, there are 172 States Parties to the Convention, including two EFTA States, Iceland and Norway, and 26 Member States of the EU.

63. The Defendant points out that Article 13(2) of the WHO Convention includes an obligation to implement a comprehensive ban of all tobacco advertising, promotion and sponsorship. The concept of advertising is defined broadly in Article 1(c) of the Convention; it is understood as covering any form of communication, recommendation or action with the aim, effect or likely effect of promoting directly or indirectly a tobacco product. Various Guidelines accompany the Convention; some are non-binding, whereas others carry more weight as they represent the parties' own understanding of the obligations imposed and implementation required under the Convention. The Defendant argues that the Guidelines for the implementation of Article 13 to the WHO Convention are of this latter category.

64. The Defendant argues that the work undertaken under the auspices of the WHO, including the formulation of Article 13 and the Guidelines that further clarify the content of the Article, underlines the fact that an advertising ban must

have a broad scope to be effective. The Guidelines address the display of tobacco products at points of sale and prescribe the adoption of a total ban at points of sale. According to the Guidelines, such a ban falls under Article 13 of the Convention and within the scope of the obligation to implement a comprehensive ban on the visible display of tobacco products.

The first question

65. The Defendant draws attention to the fact that the aim of the ban on the visual display of tobacco products is to limit the advertising effect stemming from the visibility of cigarette packages and other tobacco products. Therefore, the display ban does not relate to tobacco products as such but addresses one specific form of advertising. This leads to the conclusion that the current case falls outside the scope of the principle concerning product requirements established in *Cassis de Dijon*.[40] Instead, the case must be assessed under case-law dealing with "national provisions restricting or prohibiting certain selling arrangements", in particular *Keck and Mithouard*.[41] This approach has been followed both by the Court[42] and the ECJ[43] in numerous cases.

66. The Defendant bases its arguments on two main points. First, the Defendant emphasises that the visual display ban applies to all relevant trading operations irrespective of the nationality of the parties involved. Therefore, no discrimination can be found in the contested ban. Given that there is no *de jure* discrimination, the question remains whether *de facto* discrimination can be found. The Defendant argues that no such discrimination can be found in the present case.[44] Second, the Defendant holds that selling arrangements may possibly also be subject to a test of prevention of market access. The contested measure is, however, in the Defendant's view clearly not designed to prevent market access. Should the Plaintiff be successful in submitting that non-discriminatory selling arrangement are subject to a market hindrance test, which the Defendant rejects, it is in an alternative and subsidiary line of reasoning held that such a possible test would have a considerable narrower scope than the Plaintiff asserts. It should in any event be limited to situations where the possibility of using tobacco products would be greatly restricted.

67. The Defendant observes that it is not for the Court to assess the facts of the case or assess if national law is compatible with EEA law. Therefore, it falls to

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[40] *Rewe-Zentral*, cited above.

[41] *Keck and Mithouard*, cited above, paragraph 16.

[42] Reference is made to Case E-5/96 *Ullensaker kommune* [1997] EFTA Ct. Rep., p. 32, paragraphs 23-27; Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep., p. 56, paragraph 45; Case E-9/00 *ESA* v *Norway*, cited above, paragraph 50; and *Pedicel*, cited above, paragraphs 45-46.

[43] Reference is made, for example, to *Leclerc-Siplec*, paragraph 21; *De Agostini and TV-Shop*, paragraph 40; *Commission* v *Italy*, paragraph 36; and *Ker-Optika*, paragraphs 51-52, all cited above.

[44] The Defendant refers to *Keck and Mithouard*, cited above, paragraph 17.

the national court to determine whether the visual display ban constitutes a restriction contrary to Article 11 EEA.[45] If the Court does not follow this line of argument, the Defendant contends that as there has been limited submission of evidence in the present case the Court should confine itself to providing guidance on the relevant arguments and criteria.

Lack of discrimination

68. The Defendant asserts that, according to case-law, the relevant test is whether some form of indirect discrimination can be found.[46] Discrimination is a fundamental element to the prohibition established by Article 11 EEA. If neither *de jure* nor *de facto* discrimination can be found, a selling arrangement cannot be considered to constitute a measure having equivalent effect to a quantitative restriction for the purposes of Article 11 EEA.

69. The Defendant argues that if the visual display ban is found to constitute a selling arrangement, there is a presumption that as such it falls outside the scope of Article 11 EEA. In addition, the Defendant asserts that it falls to the Plaintiff to provide proof that the visual display ban contains discriminatory elements contrary to Article 11 EEA.[47]

70. The Defendant holds that in many cases the ECJ leaves this assessment to the natonal court, in line with the general principles for division of competence between the Community courts and national courts.[48] In some cases the Courts have nevertheless had the factual basis to draw the conclusion that there are indeed no discriminatory elements present.[49] The Defendant further holds that the ECJ has more readily acknowledged the possibility of discriminatory elements if there is a restrictive selling regulation that only applies to one out of several competing products or only to a particular sales method that is more significant for imported products. However, according to the Defendant, these cases can be distinguished from the display ban at issue in the present case as the ban applies to all products competing with each other and to all sales channels in an equal manner.

71. The Defendant accepts that judgments can be found where it has been held that, under certain conditions, strict marketing regulations may imply disadvantages to imported products and notes that the Plaintiff bases its

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[45] Reference is made to Case E-1/10 *Periscopus*, judgment of 10 December 2010, not yet reported, paragraph 28, Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraphs 21-24, and Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja* [2008] ECR I-6747, paragraph 77.

[46] Reference is made, *inter alia*, to *Keck and Mithouard* .

[47] Reference is made to *De Agostini and TV-Shop*, cited above, paragraph 44.

[48] Reference is made to Case C-20/03 *Burmanjer* [2005] ECR I-4133 and Case C-441/04 *A-punkt Schmuckhandels* [2006] ECR I-2093.

[49] Reference is made to Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, paragraph 42, and *Nille*, cited above, paragraph 27 .

arguments primarily on these cases. However, in the Defendant's view, although the strictness of measure is a relevant factor in determining whether in fact there is discrimination, it does not of itself bring the selling arrangement within the scope of Article 11 EEA. Discrimination can only be found if the strict national measure does not affect foreign and domestic products in the same manner.[50]

72. The Defendant points out that practices or customs within a particular state can play a role in the assessment of discrimination, in particular where these elements are linked to the consumption of the product in question. This issue has been relevant in cases dealing with alcoholic beverages, where it was held that a total ban on all forms of advertising could be liable to impede access to the market by products from other Member States.[51] The Defendant is not aware of any such practices or customs in the Norwegian tobacco market. In addition, in its view, the tobacco market is different to the market for alcoholic beverages, not least because alcoholic beverages are produced in almost all Member States whereas tobacco is not. Therefore, it is impossible for a visual display ban on tobacco products to favour domestic products as there is no production of tobacco in Norway.

73. The Defendant argues, therefore, that the basic premise of the Plaintiff's case, namely, that discrimination can be found despite the objective fact of no comparable domestic products, is unsound. Instead, the opposite principle applies, namely, that the lack of comparable products leads to the conclusion that there is no discrimination.[52] At the same time, the Defendant concedes that the absence of Norwegian tobacco production does not as such exclude the possibility that there may be discriminatory elements where similar domestic products can be found.[53] However, in its view, there are no similar domestic products treated more favourably in the present case.

74. With regard to the significance of trademarks, the Defendant agrees with the Plaintiff that tobacco packaging, including trademarks of tobacco brands, form an important part of the tobacco producers' communication with customers. That said, the Defendant argues that there is no indication that a display ban will primarily lead to less intensive competition between brands and not to a lower total sale of tobacco products. As for the Plaintiff's argument concerning the effect on new products, the Defendant asserts that such an argument disregards the need for an element of discrimination between foreign and domestic products.

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[50] Reference is made to *Keck and Mithouard*, paragraph 16, and *De Agostini and TV-Shop*, paragraphs 43-44, both cited above.

[51] Reference is made to *Gourmet International* and *Pedicel*, paragraph 46, both cited above.

[52] Case C-383/01 *Danske Bilimportører* [2003] ECR I-6065, paragraph 42.

[53] Case C-391/92 *Commission* v *Greece*, paragraphs 16-17, and *Morellato*, paragraph 18, both cited above.

It observes that both existing and new products may be imported from other states.[54]

Market access not prevented

75. The Defendant observes that in cases on selling arrangements the crucial issue is whether or not these arrangements entail *de jure* or *de facto* discrimination. It concedes, however, that in exceptional circumstances, where market access is prevented, selling arrangements which do not discriminate may potentially infringe Article 11 EEA.[55]

76. With regard to non-discriminatory selling arrangements and market access, the Defendant emphasises two points. First, the ECJ has understood the concept of market access restrictively. Thus, this exception to the requirement for discrimination is limited to situations where market access *de jure* or *de facto* is more or less closed and, as a result, limited to very few cases.[56] Second, this exception has never been used directly by the ECJ. On the contrary, it has held that national selling arrangements that are likely to limit the total volume of sales and, consequently, reduce the volume of sales of goods from other Member States do not bring the measure within the scope of Article 34 TFEU, if non-discriminatory in law and in fact. Therefore, according to the Defendant, this exception is only relevant in extraordinary cases of *de jure* or *de facto* market closure.[57]

77. The Defendant objects to the Plaintiff's argument suggesting that the test applied should not take account of prevention of market access but should be substituted by a different test focusing on market hindrance. The Defendant rejects that view and contends that the Plaintiff's assertions are based on a misinterpretation of the judgments in *Commission* v *Italy* and *Mickelsson and Roos*.[58] With regard to the former judgment, the Defendant argues that this case supports the notion that in the context of selling arrangements prevention of market access and not market hindrance, as contended by the Plaintiff, is the test which must be used. With respect to the latter case, the Defendant argues that the case is not relevant because it did not deal with selling arrangements, but prohibitions on the use of personal watercrafts.

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[54] Reference is made to *Gourmet International*, paragraph 21, and *Pedicel*, paragraph 46, both cited above.

[55] *Keck and Mithouard*, cited above, paragraph 17.

[56] Reference is made to *Gourmet International*, paragraph 18, *Karner*, paragraph 51, and *Ullensaker kommune*, paragraph 23, all cited above.

[57] Reference is made, for example, to *Leclerc-Siplec*, cited above, paragraph 20, *Karner* cited above, paragraph 42, and *A-punkt Schmuckhandels*, cited above, paragraphs 23-24.

[58] The Defendant refers to *Commission* v *Italy*, cited above, paragraphs 33-36, and criticises in particular how paragraph 37 is understood by the Plaintiff. In addition, the Defendant refers to *Mickelsson and Roos*, cited above.

No hindrance to market access

78. In the event that the Court holds non-discriminatory selling arrangements hindering market access to fall within the prohibition established by Article 11 EEA, the Defendant argues, in the alternative, that the display ban does not lead to such market hindrance.

79. The Defendant submits that the test of market hindrance results from *Commission* v *Italy* and *Mickelsson and Roos*. However, in its view, these cases demonstrate that a high threshold exists for market hindrance, similar to that applied in the test for prevention of market access. Therefore, market hindrance only exists where consumers have practically no interest in buying the relevant product and the measure in question prevents a demand from existing in the market.[59] Furthermore, the Defendant continues, non-discriminatory measures are only considered to hinder access to the market for the purposes of Article 11 EEA, if they prevent or greatly restrict the use of the product in question.[60] It follows, therefore, that lesser measures fall outside the scope of Article 11 EEA.

80. Taking account of established case-law, the Defendant argues that the threshold inherent in the market hindrance test is very high. It submits that the display ban does not imply any hindrance of market access.

81. The Defendant proposes that the Court should answer the first question as follows:

> *A ban on the display of tobacco products in retail outlets such as the one laid down in Section 5 of the Norwegian Tobacco Control Act does not constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods under Article 11 EEA.*

The second question

82. As, in the Defendant's view, the first question should be answered in the negative, it contends that the Court should hold that it is unnecessary to provide an answer to the second question.

83. If, however, the Court considers it necessary to answer the second question in substantive terms, the Defendant argues that the display ban is justified on grounds of public health and must be regarded as proportionate. The Defendant stresses that public health has been considered by the ECJ and the Court to be a legitimate objective of the highest order. This entails that it is for individual states to determine the level of protection and how that level is to be achieved,

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[59] Reference is made to *Commission* v *Italy*, cited above, paragraphs 52, 53 and 57.

[60] The Defendant refers to *Mickelsson and Roos*, cited above, paragraphs 25, 26 and 28.

while the measure chosen must at the same time be proportionate to the aim pursued.[61]

84. The Defendant emphasises the two-fold importance of the EU and WHO recommendations mentioned previously. First, the recommendations provide arguments and research substantiating the fact that advertising is effective in increasing tobacco sales, that the display of tobacco products entails advertising, that bans on advertising must be comprehensive and that the ban will contribute to the reduction of tobacco used by adolescents and adults. Second, the recommendations present legal arguments that make it difficult to see how a display ban could be disproportionate. In addition, the documents support the view that a comprehensive ban is crucial within the context of tobacco advertising.

85. According to the Defendant, it is clear from the questions posed by Oslo District Court, which seeks guidance regarding relevant criteria, that it is not for the EFTA Court to assess the facts of the case or whether national law is compatible with EEA law. Therefore, the Court should only give general guidance on the elements which are to be taken into account.[62] Accordingly, the Defendant has furnished the Court with comments on the relevant public health objectives, on the proportionality test in general, and on the relevant tests of suitability and necessity of the display ban more specifically.

Legitimate objectives

86. The visual display ban seeks to achieve a legitimate objective, namely, to reduce tobacco use and the severe health problems caused by tobacco use. Such use constitutes a fundamental risk to human life. The Defendant expects that there will be an immediate effect of the display ban, but also that there can be a further longer term effect in that the display ban may contribute to change the general attitude towards tobacco products by generating a signal that tobacco products are not normal products in the same way as other products available at retail outlets. Such signal effect is noted in the preparatory works formulated prior to the implementation of the visual display ban and is accepted internationally.[63]

Proportionality test

87. The Defendant contends that the principle of proportionality incorporates the notions of suitability and necessity. Consequently, the issues which must be addressed are whether the measure in question actually is suitable to ensure the

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[61] The Defendant cites *Ker-Optika*, paragraph 58, and *Pedicel*, paragraph 56, both cited above.

[62] *Pedicel*, cited above, paragraph 57.

[63] Reference is made to WHO Global Tobacco Epidemic Report 2009, p. 52, and the legislative proposal for the Tobacco Advertising Directive, COM(2001) 283 final, p. 9.

public health objectives pursued and whether or not other means can be considered equally effective but less restrictive of EEA trade.

88. The Defendant observes that while the parties appear to agree on the basic elements of proportionality as set out above, they seem to disagree on the EEA law requirements governing the presentation of proof necessary to demonstrate the proportionality of legislative measures. This disagreement results from the fact that, although it follows from established case-law that it is incumbent on the national authorities to demonstrate that a restriction is suitable and necessary, the burden of proof can vary depending on the sector and case concerned. This should also, in the Defendant's view, be seen in relation to the intensity of judicial review where caution should be exercised in a case like the present one.

89. According to the Defendant, case-law of the ECJ and the Court addressing restrictions on alcohol advertising suggests a cautious approach to judicial review is warranted.[64] Thus, the obligation to adduce evidence must not be applied in a way that renders it difficult to adopt new measures aimed at reducing tobacco consumption. The effect of tobacco control measures typically appears gradually and over time. Thus, in its view, documentation requirements should not be strict and future effects that cannot be accurately foreseen should be scrutinised from a proportionality perspective only when appearing manifestly incorrect.[65]

90. Therefore, the Defendant emphasises that "hard" evidence cannot be required of the state but simply that the measure is likely to make an effective contribution to attaining the relevant aim.[66] In addition, although conceding that relevant documentation must be furnished, the Defendant asserts that the ECJ has rejected the notion that national authorities must be able to produce a particular study supporting the proportionality of a restrictive measure prior to its adoption.[67]

Suitability test

91. The Defendant argues that the display ban is suitable if it constitutes an adequate measure to reduce tobacco use in the groups targeted by the legislation. Therefore, in its view, the test of suitability is a question of evidence, or, in other

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64 Reference is made to *Aragonesa de Publicidad Exterior*, paragraph 16, and *Pedicel*, paragraph 61, both cited above.

65 Reference is made to Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 38.

66 Joined Opinion of Advocate General Fennelly in Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419 and Case C-74/99 *Imperial Tobacco* [2000] ECR I-8599, points 159-160; Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paragraph 129; Opinion of Advocate General Tizzano in Case C-262/02 *Commission* v *France* [2004] ECR I-6569, point 81; and Case E-1/06 *ESA* v *Norway*, cited above, paragraph 51.

67 Reference is made to Joined Cases C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* [2010] ECR I-0000, paragraphs 70-72.

words, is it reasonable to assume that the display ban will have some kind of effect?

92. The Defendant contends that the obligation to adduce evidence should be understood in a way that does not hinder the adoption of legitimate public health measures. The state enjoys a wide margin of discretion, which includes a margin of discretion in determining the measures which are likely to achieve concrete effect.[68] In addition, case-law indicates that a partial effect on one or more target groups suffices.[69] Therefore, according to the Defendant, the ECJ appears to have rejected the suitability of a measure only in cases where its effect is considered purely theoretical.[70]

93. The Defendant notes that in assessing suitability the ECJ and the Court considered in some cases whether the national measure forms a part of a consistent and coherent policy. On its view, it is unnecessary to pursue this point in the present case as, in factual terms, the visual display ban forms a part of a consistent and coherent policy on tobacco use.

94. As the suitability test in the present case turns on questions of evidence, the Defendant argues that the Court should refrain from analysing this question in detail. Instead, a reference to the test set out above should provide sufficient guidance for the national court. The Defendant nevertheless describes existing research and knowledge-based assessments that according to the Defendant shows that a display ban will be effective and therefore fulfill the suitability test.[71]

Necessity test

95. The Defendant argues that if a national restriction is based on a legitimate public interest objective and is considered suitable to achieve its aim, the final test according to EEA law is whether the measure is also necessary in the sense that the same objectives cannot be achieved equally effectively with less restrictive means.

96. The basic elements of the necessity test have already been set out by the Court and the ECJ in earlier cases. However, according to the Defendant, these

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[68] Reference is made to Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 43, and the Opinion of Advocate General Saggio in that case, point 32, and *Ahokainen and Leppik*, cited above, paragraph 32.

[69] The Defendant refers to *Ahokainen and Leppik*, cited above, paragraph 39, and the Opinion of Advocate General Maduro in that case, point 24.

[70] The Defendant refers to Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraphs 35-36.

[71] The Defendant refers to, in particular, the WHO document *Global Health Risks. Mortality and burden of disease attributable to selected major risks* (2009); RAND Europe, *Assessing the Impacts of Revising the Tobacco Product Directive* (2010); and Lund et al, *Updated report on the knowledge base concerning the prohibition on the display of tobacco products* (SIRUS 2010). The reports or relevant sections thereof were submitted to the Court as Annexes 2, 3 and 10 to the Defendant's written pleadings.

basic elements and their specific application will vary depending on the particularities of the case in question. The same applies in relation to the intensity and level of the judicial review involved. In any event, if it appears that less restrictive means exist, in the Defendant's view, it is for the national court to make the substantive assessment.[72]

97. The Defendant emphasises two points regarding the burden of proof. First, the burden of proof does not imply that national authorities must provide positive proof that no other conceivable measure could be equally effective. In addition, when considering the availability of other conceivable measures, a state's need to achieve its legitimate objectives through general and simple rules is relevant.[73] Second, where the national authorities have shown that a measure in the sector of public health is suitable, it will be justified unless it is apparent that the public health objective can be secured equially effective with less restrictive measures.[74]

98. The Defendant notes that the obligation to adduce proof typically shifts between the parties to a dispute.[75] However, the Defendant rejects the arguments advanced on that point by the Plaintiff resulting from its interpretation of the Norwegian Supreme Court judgment in *Pedicel*.[76] As the Defendant understands it, the Plaintiff appears to submit that in *Pedicel* the Supreme Court of Norway held the burden of proof on necessity to lie with the private party. However, on the Defendant's interpretation, the reasoning of the Supreme Court emphasises that where a state determines the level of protection and has demonstrated that the measure is suitable and *prima facie* necessary, the other party must show that an alternative measure would nevertheless be equally effective when that measure only differs from the impugned measure in that it is less comprehensive.[77]

99. The Defendant rejects the Plaintiff's assertion that the objective of the display ban could be equally well attained through less restrictive means, including a licensing system for tobacco retailers and stricter enforcement of the age threshold for the purchase of tobacco. The Defendant asserts that other equally efficient measures do not exist; the alternative measures referred to by the Plaintiff would neither close the gap left by the tobacco advertising ban nor contribute to denormalise tobacco use. According to the Defendant, it is

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[72] The Defendant refers to *Pedicel*, cited above, paragraphs 57 and 61.

[73] *Commission* v *Italy*, cited above, paragraphs 66-67.

[74] *Pedicel*, cited above, paragraph 61.

[75] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, point 89.

[76] Judgment of 24 June 2009, HR 2009-1319-A, Rt. 2009, p. 839.

[77] The Defendant refers to the Judgment of the Norwegian Supreme Court in *Pedicel* in order to underscore its position on the difference between adducing proof and the burden of proof. See the Judgment of 24 June 2009, HR 2009-1319-A, Rt. 2009, p. 839, paragraphs 51-53 and 62.

particularly crucial to close the final gap in the ban on tobacco advertising. For this reason alone, the display ban must be considered necessary.

100. In addition, the Defendant observes that some of the measures referred to by the Plaintiff, e.g. mass media campaigns, are supplements but not alternatives to the display ban. All the measures implemented by the Defendant form part of an existing tobacco policy. The need for a comprehensive and diversified tobacco control policy is of the utmost importance in countering the adverse effect of tobacco use on public health. Therefore, in its view, it is not a question of choosing between age control and a display ban, but whether age control and the display ban together are more effective than age control alone. Hence, the joint effect of several measures will lead to greater protection for public health.

101. The Defendant contends that measures similar to the display ban, only less comprehensive, must be assumed to be less effective. This applies to regulations relating to the maximum space for displaying tobacco products or limited visibility of such products. The Defendant argues that a total ban on displaying tobacco products is more effective than any such partial bans. In addition, it queries whether some of the alternative measures, e.g. a licensing system for retail sellers, would, in fact, be less restrictive to the tobacco trade than the current visual display ban.

102. Therefore, the Defendant submits that the display ban must be considered necessary and that other less restrictive measures would not be as effective in achieving the legitimate objective of protecting public health. In any event, it continues, it is for the national court to apply the necessity test, including the assessment of whether it is apparent *de facto* and *de jure* that the protection of public health against the harmful effects of tobacco use can be secured equally effectively by measures having less effect on intra-EEA trade.

103. The Defendant proposes that the Court should answer the second question as follows:

> *Assuming that the national court concludes that the display ban falls under the scope of Article 11 EEA, it is justified on grounds of public health unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the EEA Contracting Party concerned, the protection of public health against the harmful effects of tobacco use can be secured equally effectively by measures having less effect on intra-EEA trade.*

The Finnish Government

104. The Finnish Government points out that a visual display ban was adopted by the Finnish Parliament in 2010 and will take effect in 2012. The main goal of the Finnish legislation is to strengthen existing statutory provisions enacted in 1976 for the purposes of reducing smoking and related health detriments and to

provide for more efficient measures to reduce the opportunities for children and young people to start smoking.

105. The Finnish Government observes that prohibition of the visible display of tobacco products constitutes one of the most important elements of the new legislation. Although advertising of tobacco products and other sales promotion activities have been banned for over three decades, the new prohibition is necessary because the visible display of tobacco products has become a significant method of marketing. In addition, the way in which products are displayed is of particular concern. These products are, as a rule, placed at the cash desk of retail stores where products intended for children and adolescents are stored. Placing products attractive to these groups alongside tobacco products brings such tobacco products to their attention and increases the risk that they will start smoking.

The first question

106. In the Finnish Government's view, a general prohibition on the visible display of tobacco products cannot be considered a measure having equivalent effect to a quantitative restriction on the free movement of goods within the meaning of Article 11 EEA.

107. The Finnish Government argues that, according to settled case-law, all trading rules enacted by Member States capable of hindering directly or indirectly intra-Community trade are to be considered measures having equivalent effect to quantitative restrictions.[78] However, national provisions that restrict or prohibit certain selling arrangements are not considered a hindrance if those provisions apply to all relevant traders operating within the national territory and affect the marketing of domestic and imported products in the same manner.

108. The Finnish Government is of the opinion that the contested display ban should be characterised as selling arrangements. Therefore, the application of the display ban does not constitute a hindrance to the free movement of goods because the ban applies to all relevant traders operating in Norway and the ban affects in the same manner, in law and in fact, the marketing and selling of the tobacco products.[79] In any event, the substantive assessment whether the ban affects the marketing and selling of tobacco products *de jure* and *de facto* in the same manner should be undertaken by the national court. That applies in particular to the latter point.

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[78] The Finnish Government refers to *Dassonville*, cited above, paragraph 5.

[79] Reference is made to *Keck and Mithouard*, cited above, paragraphs 16-17, *Commission* v *Italy*, cited above, paragraph 36, and Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* [2009] ECR I-3717, paragraph 17.

109. The Finnish Government notes that the Plaintiff's case is based on its interpretation of *Gourmet*, in particular the point made in that case that an extensive prohibition on the advertising of alcoholic beverages is liable to impede access to the market for products from other Member States more than it impedes access of domestic products. The Government takes the view that the principle established in that case is not applicable in the present case because, unlike alcoholic beverages, tobacco products cannot, in general, be considered as products whose consumption is linked to traditional social practices and to local habits and customs.

110. The Finnish Government does not accept the arguments advanced by the Plaintiff to the effect that the visual display ban impedes the market access of new products from other EEA States to the benefit of brands that are already established. Noting that no tobacco products are produced in Norway, it argues, first, that, as a consequence, consumers cannot be more familiar with any domestic products.[80] Second, the display ban affects the market access of new domestic products in a similar manner to the market access of new products from other Member States. Similarly, it rejects the argument that the display ban implies the prevention of market access and argues that the case-law referred to by the Plaintiff is not relevant.[81]

111. Accordingly, the Finnish Government proposes that the Court should answer the first question as follows:

> *A general prohibition against the visible display of tobacco products does not constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods within the meaning of Article 11 of the EEA Agreement.*

The second question

112. As the Finnish Government has concluded that the answer to the first question must be that the contested measure does not have equivalent effect to a quantitative restriction for the purposes of Article 11 EEA, it considers it unnecessary to answer the second question.

113. If, however, the Court concludes that a general prohibition on the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods, the Finnish Government considers that the restriction is justifiable on grounds of protection of health and life of humans in accordance with Article 13 EEA.

114. According to the Finnish Government, the contested visual display ban has as its objective to reduce tobacco use amongst the population in general and

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[80] Reference is made to *De Agostini and TV-Shop*, cited above

[81] Reference is made to *Mickelsson and Roos*, cited above.

amongst young people in particular. It is, therefore, based on the public health exception established in Article 13 EEA. Although public health is a legitimate objective according to established case-law, for such objective to justify an obstacle to trade between EEA States it must fulfil a number of requirements. Thus, the measure must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In addition, the measure must be appropriate for the attainment of the objective pursued and may not go further than is necessary.

115. The Finnish Government advances three points within the context of the public health concerns recognised in Article 13 EEA. First, the Government is of the view that the public health grounds on which the Norwegian authorities rely have not been diverted from their purpose.[82] Second, the Government contends that the visual display ban has been used neither to discriminate against products from other Member States nor to protect national products. Therefore, the ban is an appropriate measure for securing the attainment of the public health objective pursued.

116. On this point, in particular, the Finnish Government observes that the ban is designed to limit visibility of tobacco products in retail outlets with the purpose of effectively decreasing the risk that children and adolescents will start smoking. In this context, therefore, when assessing whether the ban is an appropriate measure for securing the attainment of the public health objective, according to the Government, it is important to take account of the fact that the WHO Convention and documents relating to its implementation authorise and recommend states to implement a visual display ban. This approach is based on and supported by scientific evidence. In any event, taking account of the fact that the ban is not the only measure adopted to reduce smoking, it is almost impossible to prove the individual effect of the ban with regard to the reduction of smoking. Therefore, it cannot be a prerequisite for the adoption of the ban that scientific documentation be submitted showing with certainty that the ban will work. Third, the Government argues that it falls to the national court to determine whether the ban goes beyond in law or in fact what is necessary in order to attain the objective pursued.

117. With regard to other measures that could serve as alternatives to the ban, the Finnish Government argues that although these measures might reduce the use of tobacco amongst the general public, they cannot be considered as alternatives to a visual display ban. Instead, they should be recognised as parallel measures that may be introduced in order to achieve the degree of protection sought. In addition, certain less restrictive measures have proven to be ineffective in practice, as the experience of other countries demonstrates.

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[82] The Finnish Government refers to *Gourmet International*, cited above, paragraph 32, and the case-law cited therein.

118. In the light of this analysis, the Finnish Government contends primarily that it is unnecessary to answer the second question, and, in the alternative, proposes that the Court should answer the question as follows:

> *A general prohibition against the visible display of tobacco products is justified on grounds of protection of health and life of humans under Article 13 of the EEA Agreement unless it is apparent that, in the circumstances of law and fact which characterise the situation in the EEA State concerned, the objective of the prohibition can be ensured by measures having less effect on the free movement of goods.*

The Icelandic Government

119. The Icelandic Government points out that a visual display ban was implemented in Iceland in 2001. Under the ban, tobacco and tobacco trademarks must be placed in such manner that they are not visible to the customer. However, that display ban was affected by a Supreme Court ruling of 2006[83] which concluded that the visual display ban on tobacco infringed a person's right to pursue an occupation of his own choosing and a person's right to freedom of opinion and belief as prescribed in the Icelandic Constitution. Consequently, an amendment to the law establishing the visual display ban was adopted authorising special tobacco shops to have tobacco products visible to customers.

120. The Icelandic Government supports the arguments advanced by the Defendant in the present case. Therefore, it takes the view that the visual display ban on tobacco products is compatible with EEA law and that it does not go further than necessary in order to attain the objective pursued.

The Portuguese Government

The first question

121. The Portuguese Government is of the opinion that the display ban restricts the free movement of goods. It argues further that, in conjunction with the general advertising ban, the visual display ban will create an insurmountable obstacle for any manufacturer of tobacco products to introduce a new product successfully.

122. The Portuguese Government emphasises the need for competition in the tobacco market, noting that the ECJ recently struck down minimum price requirements implemented in Ireland, France and Austria, all of which were based on public health grounds, because those measures were capable of undermining competition.[84] The Government observes further that the European

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[83] Judgment of 6 April 2006, Supreme Court of Iceland, Case No 220/2005, H 2006 1689.

[84] Reference is made to Case C-197/08 *Commission* v *France*, Case C-198/08 *Commission* v *Austria*, paragraph 30, and *Commission* v *Ireland*, paragraph 41, all cited above.

Commission has acknowledged the importance of brand communication within the context of competition and introduction of new brands.[85]

123. The Portuguese Government argues that a total ban on all brand communication restricts the free movement of goods and is inherently discriminatory.[86] In addition to a general advertising ban, a ban on the visual display of tobacco products seriously affects the free movement of goods.

124. According to the Portuguese Government, even if a restriction is not discriminatory, it nevertheless infringes the principle of free movement of goods if it hinders market access.[87] In its view, the visual display ban hinders market access due to the fact that no product originating from another state can be introduced to Norway as it cannot be advertised or even displayed at points of sale. In such an environment, the market will undoubtedly be limited in accordance with local customs and habits already present. Finally, according to the Government, if the Court adopts the view advanced by the Defendant in this case, this will set a precedent allowing Member States to freeze the market in any product by precluding market entry to new brands.

The second question

125. The Portuguese Government argues that Article 13 EEA should be interpreted restrictively as it constitutes a derogation from the basic rule which provides for the free movement of goods.[88] Therefore, a state which implements a measure restricting trade must prove that it is both appropriate for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it.[89] In addition, a state must show that the measure is necessary, proportionate and that its aims could not be met by measures less restrictive of intra-EEA trade.[90] Finally, the reasons that are invoked by a state as justification for a particular measure must be substantiated by evidence or analysis of the appropriateness and proportionality of the measure adopted.[91]

126. The Portuguese Government takes the view that although reducing smoking constitutes a legitimate objective, no evidence can be found that supports the notion that a visual display ban reduces smoking. The lack of such evidence is

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85 The Portuguese Government refers to Case COMP/M.2779 – *Imperial Tobacco/Reemtsma*, paragraph 54, and Case COMP/M.4581 – *Imperial Tobacco/Altadis*.

86 The Portuguese Government refers to the Opinion of Advocate General Jacobs in *Leclerc-Siplec* and to *Gourmet International*, paragraph 21, both cited above.

87 Reference is made to *Mickelsson and Roos* and *Commission* v *Italy*, paragraph 59, both cited above.

88 *Pedicel*, cited above, paragraph 53, Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep., p. 17, paragraph 56, and *Ullensaker kommune*, cited above, paragraph 33.

89 Reference is made to *Commission* v *Italy*, cited above, paragraph 59.

90 Reference is made to *De Agostini and TV-Shop*, cited above, paragraph 47.

91 Reference is made to *Commission* v *Belgium*, cited above, paragraph 36.

important when it comes to deciding whether the ban is proportionate. In its view, the criteria relevant for determining whether a ban is proportionate are: (i) whether a state has demonstrated that the ban reduces smoking prevalence; (ii) whether the state has considered the effects of bans implemented in other countries; (iii) whether the state has considered potential adverse effects of the ban on competition and illicit trade; and (iv) whether the state has demonstrated that no alternative less restrictive means of achieving its objective of reducing smoking are available.

127. The Portuguese Government asserts that a visual display ban will have an adverse affect. It will drive consumers to the illicit market; a phenomenon which has already become troublesome in Europe. Illicit tobacco products are cheaper than legitimate products and can lead to an increase in consumption that will undermine efforts to keep children and adolescents from smoking. In addition, the Government notes, a display ban might severely restrict brand competition in favour of price competition. That distortion of competition could lead to lower prices and increased consumption in the long run.

128. Finally, the Portuguese Government stresses that a total visual ban infringes the right to freedom of expression, as it restricts the possibility to exploit a trademark as a characteristic of products offered for sale or otherwise disseminated in business activity. Moreover, a total visual ban will interfere with the freedom to engage in commercial activity.

129. In the light of the above analysis, the Portuguese Government proposes that the Court should answer the questions as follows:

1. *Legislation which establishes a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods is precluded by Article 11 EEA, because it affects market access of imported goods.*

2. *Although agreeing with the goal of reducing smoking, it is considered that such restriction is not justifiable by public health reasons, in the terms of Article 13 EEA, as it is not adequately supported that this restriction is the most appropriate and proportionate measure for securing the attainment of the objectives pursued.*

The Romanian Government

130. The Romanian Government emphasises the importance that a causal link be established between the consumption of tobacco products and how tobacco products are displayed. Any such causal link must be proven by scientific research. Despite the fact that some products are detrimental to public health, the Government argues that states should adopt a proper approach to trade.

131. The Romanian Government acknowledges that measures protecting public health can be introduced on the basis of the precautionary principle. However, in its view, it is inherent in that principle that when Member States introduce measures protecting health, the burden of proving the necessity of such measures rests with those states.

132. The Romanian Government emphasises that in assessing the justification for the contested measure advanced by the Defendant consideration must be given to possible alternative measures having less effect on trade. Therefore, in its view, Norway should evaluate the possibility to implement other less restrictive measures aimed at reducing tobacco consumption. On its analysis, the current regime will enhance the power of producers already present on the Norwegian market at the cost of producers trying to enter the same market and introduce their products to consumers.

The United Kingdom

The first question

133. The United Kingdom takes the view that the prohibition of tobacco displays does not constitute a measure having equivalent effect to a quantitative restriction on the free movement on goods. The contested measure is concerned with how tobacco is sold. Therefore, it constitutes a selling arrangement as that concept has been defined in the relevant case-law.[92] The fact that a selling arrangement is designed to reduce or does reduce sales volumes and, as a consequence, the volume of imports does not suffice to bring the measure within the scope of Article 11 EEA.

134. The United Kingdom submits that the Plaintiff cannot show that the visual display ban discriminates *de jure* or *de facto* between the marketing of domestic tobacco products and the marketing of imported tobacco products. First, the visual display ban applies to all relevant traders operating in Norway and affects the marketing of tobacco products in the same manner, regardless of their origin. Therefore, the prohibition does not constitute discrimination in law. Second, as stated in the reference by Oslo District Court, no tobacco is produced in Norway. All tobacco products sold in Norway are manufactured in other states. This leads to the conclusion that it is impossible to show that the contested measure will impact domestic products in a different manner to imported products. Thus, the prohibition does not constitute discrimination in fact.

135. The United Kingdom submits further that even if tobacco products were produced in Norway, any alleged difficulty resulting from the display prohibition would apply to all products regardless of their origin. In its view, any reference to case-law relating to advertising restrictions on alcoholic beverages, where consumption patterns are linked to social practices and local habits, should be

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92 The United Kingdom refers to *Keck and Mithouard*, cited above.

assessed critically due to the fact that differences exist between the tobacco market and the alcohol market in that regard.[93] The United Kingdom argues that social practices and local habits are not relevant to the consumption of tobacco products.

136. The United Kingdom emphasises that the visual display ban regulates the behaviour of all retail outlets and applies to all tobacco products. Therefore, as Article 11 EEA does not apply to legislation which restricts distribution by prohibiting advertising and affects all traders in the distribution sector in the same manner,[94] the visual display ban does not come within the scope of Article 11 EEA.

137. Moreover, the United Kingdom argues that Article 11 EEA does not apply to national legislation (i) which makes no distinction according to the origin of the goods to which it applies; (ii) whose purpose is not to regulate trade in goods with other Member States; and (iii) whose restrictive effects on the movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States.[95] The United Kingdom argues that the contested visual display ban fulfils these criteria.

The second question

138. The United Kingdom supports the position of the Defendant, namely, that it suffices, having regard to all available sources, that there are reasonable grounds to assume that the prohibition of tobacco displays will further its objectives. In addition, the United Kingdom concurs with the Defendant's submission that it falls to the national court to decide on the suitability of the visual display ban.

139. With regard to the correct approach to be taken in assessing the suitability and necessity of tobacco control measures sought to be justified on public health grounds under Article 13 EEA, the United Kingdom submits that a state's discretion is broad and the Court should not interfere unless the measure can be considered manifestly unreasonable or manifestly inappropriate taking into account the objective pursued. Therefore, it is for the state to determine what level of protection is to be achieved.[96] It follows from this principle that neither the ECJ nor the Court should enquire whether the benefits to human health deriving from the contested measure outweigh any detriments.

140. The United Kingdom points out that it has consistently been held that the health and life of humans are among the foremost interests to be protected when

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93 Reference is made to *Gourmet International*, cited above, paragraph 21.

94 Reference is made to *Leclerc-Siplec* and *Keck and Mithouard*, both cited above.

95 The United Kingdom refers to Case C-372/92 *Peralta* [1994] ECR I-3453, paragraph 23.

96 Case C-262/02 *Commission* v *France*, paragraph 24, and *Pedicel*, both cited above.

justifying exceptions to the free movement of goods.[97] However, in its view, the national legislature and the Union legislature must be allowed a broad discretion in the area of public health, entailing political, economic and social choices and based on complex assessments. Therefore, the legality of a measure adopted in the sphere of public health can only be affected if the measure is considered manifestly inappropriate. As a result, the Court should not interfere with the assessment of the national legislature unless the visual display ban is considered manifestly inappropriate.[98]

141. In any event, the United Kingdom points out that guidance on the approach to be taken can be found in *Aragonesa*. In that case, it was held, first, that alcohol advertising acted as an encouragement to consumption and rules restricting advertising of alcoholic beverages in order to combat alcoholism reflected public health concerns, and second, in the absence of common or harmonised rules governing advertising of alcoholic beverages, that it was at the Member States' discretion to decide on the degree of protection as long as the limits set by treaty and the principle of proportionality were observed.[99] The United Kingdom notes that in that case the ECJ held the national measure not to appear manifestly unreasonable.[100]

142. With regard to Article 13 EEA, in particular where the benefits of a measure cannot be precisely estimated, the United Kingdom argues that differences of opinion on the effects of a measure do not imply that the legislature exceeds its margin of discretion in preferring one view to another. That difference of opinion does not mean that the legislature did not have reasonable grounds to act as it did.[101] In that regard, the crucial issue is not the existence of conflicting evidence but whether sufficient evidence exists on the basis of which it can be said that the legislature has reasonable grounds to act.[102]

143. With regard to the argument that less restrictive measures could attain the same objective, the United Kingdom observes that the options referred to by the Plaintiff are considered by the Defendant to be less effective in protecting children, denormalising the use of tobacco and assisting adults to give up

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97 Reference is made to *Deutscher Apothekerverband*, cited above.

98 Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraphs 47-48.

99 *Aragonesa de Publicidad Exterior*, cited above, paragraphs 14-18.

100 Reference is also made to Case C-262/02 *Commission* v *France*, cited above, paragraphs 30-39, Case C-429/02 *Bacardi* [2004] ECR I-6613, paragraphs 36-40, and the Opinion of Advocate General Tizzano in the latter case, points 78-80, on the application of the proportionality principle in public health cases. In addition, the United Kingdom refers to the Opinion of Advocate General Geelhoed in *British American Tobacco*, cited above, point 230, and his Joined Opinion in Case C-434/02 *Arnold André* [2004] ECR I-11825 and *Swedish Match*, cited above, points 111-112.

101 The United Kingdom refers to the Opinion of Advocate General Fennelly in Case C-376/98 *Germany* v *Parliament and Council*, cited above, point 160.

102 Ibid., point 162.

smoking.[103] In that connection, the United Kingdom emphasises that the burden of proof cannot be considered so extensive that it would require a state to prove in a positive way that no other conceivable measure could enable its legitimate objective to be attained under the same conditions.[104]

144. The United Kingdom acknowledges that it is inevitable that the freedom of market participants may be affected detrimentally following the implementation of a visual display ban on tobacco products. However, in its view, the protection of public health is a matter of public interest that the national legislature must be able to protect in full. That public interest is of such importance that for the purposes of the legislature's assessment other factors, such as the freedom of market participants, must be subsidiary.[105]

145. For the reasons set out above, the United Kingdom proposes that the questions referred by the Oslo District Court should be answered as follows:

1. *Article 11 of the EEA Agreement should not be understood to mean that a general prohibition against the visible display of tobacco products constitutes a measure having equivalent effect to a quantitative restriction on the free movement of goods.*

2. *The criterion to be applied in the case of a challenge to the legality of a prohibition on display of tobacco products is whether it was manifestly inappropriate for the national legislature to conclude that the prohibition of tobacco displays could achieve the public health objectives of reducing tobacco use by the public in general and especially amongst young people.*

The EFTA Surveillance Authority

The first question

146. The EFTA Surveillance Authority ("ESA") refers to case-law of the ECJ which indicates that all trading rules implemented by Member States capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered measures having equivalent effect to quantitative restrictions for the purposes of Article 11 EEA.[106] It notes, however, that the ECJ revisited this rule and clarified its scope of application.[107] The ECJ held that selling

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[103] The United Kingdom refers to the Opinion of Advocate General Geelhoed in *Swedish Match*, cited above, point 55.

[104] Reference is made to *Commission* v *Italy*, cited above, paragraphs 66-67.

[105] Reference is made to the Opinion of Advocate General Geelhoed in *British American Tobacco*, cited above, point 229.

[106] ESA refers to *Dassonville*, paragraph 5, *Commission* v *Italy*, paragraph 33, and *Ker-Optika*, paragraph 47, all cited above.

[107] ESA refers to *Keck and Mithouard*, cited above, paragraphs 16-17.

arrangements are not to be regarded as hindering directly or indirectly, actually or potentially, trade between Member States if the provisions relating to these arrangements apply to all relevant traders operating in the national territory and affect in the same manner *de jure* and *de facto* the marketing of domestic and imported products. Accordingly, selling arrangements do not fall under the scope of Article 34 TFEU which corresponds to Article 11 EEA.

147. ESA asserts that this clarification by the ECJ results in a three-stage test, namely: (1) whether the legislation in question constitutes a "selling arrangement"; (2) whether the national provision applies to all relevant traders operating within the national territory; and (3) whether the measures affect in the same manner *de jure* and *de facto* the marketing of domestic products and imported products.

148. With regard to the first point, ESA argues that the visual display of tobacco products should be seen as constituting a form of advertising and promotion. Therefore, the display of tobacco products is a fundamental means of promoting tobacco. Any advertising ban affecting the promotion of a tobacco product constitutes, as established by case-law, a selling arrangement.[108] The matter would be different if the packaging or labelling of imported products had to be altered.[109] In that case, the contested measure could not be considered a selling arrangement. However, that is not the situation in the present case. The contested ban does not require tobacco products to be repackaged or modified in any way. The products are simply to be hidden from visual display.

149. On the second point, ESA submits that the ban applies to all retail outlets that do not sell exclusively tobacco products, in total some 15,000-18,000 outlets. The only exception to the visual display ban is for boutique tobacco outlets. However, as their number is very limited, ESA submits that the visual display ban should be considered to apply, in practice, to all traders within the relevant territory.

150. On the third point, ESA submits that the issue can be divided in two parts. First, it must be assessed whether the contested measure affects *in law* the marketing of domestic products and those from other Member States in the same manner. Second, an assessment needs to take place whether the contested measure affects *in fact* the marketing of domestic products and those from other Member States in the same manner.

151. ESA is of the opinion that the first part concerning the contested measure's effect *in law* can only be answered in the affirmative. As the display ban applies to all tobacco products irrespective of their origin, the contested measure affects *in law* the marketing of domestic products and those from other states in the

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[108] Reference is made to *De Agostini and TV-Shop* and *Gourmet International*, both cited above.

[109] Reference is made to *Keck and Mithouard*, cited above, paragraph 37, and Case C-12/00 *Commission* v *Spain* [2003] ECR I-459, paragraph 76.

same manner. However, the second part is more complicated and needs to be examined from three different perspectives, namely: (1) whether the absence of domestic production is decisive; (2) whether the display ban is an outright advertising ban to the advantage of domestic products; and (3) whether any restriction of access for imported products to the Norwegian market is sufficient for the display ban to be characterised as a measure having equivalent effect to a quantitative restriction on free movement on goods.

152. ESA addresses those issues in turn. On the first issue, ESA argues that the fact that there is no domestic production is not determinative of whether the Norwegian measure is contrary to Article 11 EEA.[110] On the second issue, ESA is of the opinion, taking into account the information provided in the order for reference, that the visual display ban does not seem likely to entail a difference in treatment between domestic products and products imported from other EEA states.[111] On the third issue, ESA submits that the Court of Justice has never considered that a selling arrangement falls under Article 11 EEA / Article 34 TFEU merely because it is likely to restrict the access of imported products to the market regardless of whether it also affects domestically produced goods. The Court has always assessed whether the measure was likely to impede access to the market of goods originating in other Member States more than it impeded access of domestic products.[112]

The second question

153. ESA argues that even if the contested visual display ban is considered to fall within the scope of Article 11 EEA, it may be justified on grounds of public health in accordance with Article 13 EEA.

154. ESA emphasises that, under established case-law, states have been successful in arguing that restrictions on advertising particular products considered harmful to public health may be justified on public health grounds. It points out that is for the EEA States to decide the appropriate level of human health protection.[113]

155. ESA observes that the contested measure forms a part of a consistent policy to reduce tobacco consumption. The visual display ban is a part of a regime that has been in place since 1975. In its view, in the light of the total advertising ban

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[110] Reference is made to Case C-391/92 *Commission* v *Greece*, paragraphs 17-18, and *Morellato*, paragraph 37, both cited above.

[111] ESA refers to *Leclerc-Siplec* and *Gourmet International*, both cited above, and the Opinion of Advocate General Jacobs in the latter case, points 35-36.

[112] Reference is made to *Leclerc-Siplec*; *De Agostini and TV-Shop*; *Gourmet International*; and *Morellato*, all cited above.

[113] Reference is made to Case 152/78 *Commission* v *France* [1980] ECR 2299, *Aragonesa de Publicidad Exterior*, cited above, and Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 40.

that predated the contested measure, it was only logical to introduce a visual display ban in order to address the last important marketing element, i.e. the visible display of tobacco. In the same way, the exception for boutique tobacco stores is justifiable having regard to the fact that the customers of such retail stores have already decided to purchase tobacco before entering.

156. On the question of whether or not less restrictive measures exist, ESA refers to the main purpose of the visual display ban, namely, to prevent customers of a particular retail outlet being faced with tobacco products, a situation that might incite such customers to make an impulse purchase of tobacco. In ESA's view, the alternative and allegedly less restrictive measures referred to by the Plaintiff would not achieve the same level of protection, as these alternatives are mainly aimed at discouraging young people from smoking. Assuming that the aim of the measure is legitimate, ESA cannot see what other less restrictive measures might be applied.

157. In light of those considerations, ESA proposes that the questions referred by the Oslo District Court should be answered as follows:

> *Article 11 EEA does not preclude national measures such as a prohibition on the display of tobacco products which constitutes a selling arrangement which does not lead to discriminatory treatment between domestic products and products imported from other Contracting States. In any event, if such measures were to be considered to be measures having an equivalent effect, they would fall within the public health exception.*

The European Commission

The first question

158. According to the European Commission ("the Commission"), a ban on the display of a product can be regarded as an advertising ban in a more radical form. Therefore, case-law dealing with advertising restrictions is of direct relevance in the present case. Moreover, the Commission argues that a display ban must be regarded, in the same way as an advertising restriction, as a selling arrangement. Therefore, if no *de jure* or *de facto* discrimination can be found, it falls outside the scope of Article 34 TFEU and Article 11 EEA.[114]

159. However, according to case-law, an advertising ban could entail *de facto* discrimination against imports or, in fact, constitute such discrimination.[115] Therefore, in the Commission's view, if there were any production of tobacco products in Norway, the contested ban would fall under Article 11 EEA. However, taking account of the fact that no tobacco is produced in Norway, the

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[114] The Commission refers to *Keck and Mithouard*, cited above, paragraph 16.

[115] Reference is made to *De Agostini and TV-Shop*, paragraphs 42-44, and *Gourmet International*, paragraph 21, both cited above.

contested ban cannot be regarded as discriminating against imports.[116] For those reasons, the Commission argues that the contested prohibition on the visible display of tobacco products does not constitute a measure having equivalent effect within the meaning of Article 11 EEA.

160. On the other hand, the Commission acknowledges that, despite the fact that no domestic tobacco is produced, a display ban is highly restrictive because it can stifle competition between brands and make it difficult for new products to enter the market. Therefore, it regards it as arguable, on the basis of *Commission* v *Italy*,[117] that such a ban might constitute a measure having equivalent effect as it hinders market access. However, in the light of the answer it proposes to the second question, the Commission does not see the need to venture into this territory which would entail an analysis of facts specific to tobacco products.

The second question

161. The Commission observes that the ECJ has acknowledged that restrictions on advertising products harmful to human health may be justified on public health grounds as they serve to reduce consumption.[118]

162. The Commission argues that the display ban is both necessary and proportionate due to the fact that the same level of protection cannot be achieved by less restrictive means. It was for Norway to decide that it was necessary to limit the visibility of tobacco products in addition to the general advertising ban already in place. In the Commission's view, the effect of the display ban in protecting children and adolescents and supporting those who are attempting to stop consuming tobacco cannot be achieved by other less restrictive means.

163. Finally, the Commission submits that the exception for dedicated tobacco boutiques does not prevent the contested legislation from being justified on public health grounds. The display of tobacco products in those specialised boutiques cannot be expected to encourage customers to purchase goods they would otherwise not buy. That presumption is based on the fact that individuals who enter such a boutique have decided to buy or are very likely to buy tobacco products regardless of whether tobacco is displayed.

164. In the light of those observations, the Commission proposes that the questions should be answered as follows:

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[116] Reference is made to Case C-391/92 *Commission* v *Greece*, cited above, and Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 10.

[117] The Commission refers to *Commission* v *Italy*, cited above. Reference is also made to *Rewe-Zentral* and *Keck and Mithouard*, both cited above.

[118] The Commission refers to Case 152/78 *Commission* v *France* and *Aragonesa de Publicidad Exterior*, both cited above.

1. *A general prohibition on the visible display of tobacco products does not constitute a measure of equivalent effect within the meaning of Article 11 EEA where no such products are produced within the territory of the Contracting Party concerned.*

2. *However, if a general prohibition on the visible display of tobacco products does constitute a measure of equivalent effect within the meaning of Article 11 EEA, it is justified on public health grounds under Article 13 EEA.*

Thorgeir Örlygsson

Judge-Rapporteur