Translation of Request for an Advisory Opinion from the Oslo tingrett
Case E-16/10; Registered at the EFTA Court under E-16/10-1
Original language: Norwegian

OSLO DISTRICT COURT

Doc 32

EFTA Court
Registry
1, rue du Fort Thüngen
L-1499 Luxembourg

Your reference	Our reference	Date
	10-041388TVI-OTIR/02	12.10.2010

REQUEST FOR AN ADVISORY OPINION

Pursuant to Section 51a of the [Norwegian] Courts of Justice Act and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) the Oslo tingrett (Oslo District Court) requests an Advisory Opinion from the EFTA Court in the case 10-041388TVI-OTIR/02.

Plaintiff: Philip Morris Norway AS
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Represented by: Advocate Jan Magne Juuhl-Langseth
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P.O. Box 2444 Solli, 0201 Oslo

Defendant: The state, represented by the Ministry of Health and Care Services

Represented by: The Office of the Attorney General (Civil Affairs)
by advocate Ketil Bøe Moen
P.O. Box 8012 Dep, 0030 Oslo

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1 Questions to the EFTA Court

The question before the Oslo tingrett relates to whether the prohibition against visible display of tobacco products at retail outlets is compatible with EEA law. The prohibition was introduced by law on 3 April 2009 and came into force on 1 January 2010.

Philip Morris Norway AS (hereinafter "the Plaintiff") has filed a legal action against the state, represented by the Ministry of Health and Care Services (hereinafter "the Defendant"), alleging that the display prohibition implies an unlawful restriction pursuant to Article 11 of the EEA Agreement. The Defendant has affirmed that the prohibition is compatible with EEA law.

The Oslo tingrett decided on 25 June 2010 to submit questions on interpretation to the EFTA Court. There is relevant case-law from the EFTA Court and the Court of Justice of the European Union (hereinafter "the ECJ") in respect of traditional marketing. However, the Oslo tingrett believes it is necessary with additional guidance from the EFTA Court relating to the lawfulness of a general prohibition against the visible display of tobacco products. The Oslo tingrett requires an Advisory Opinion both on the interpretation of the notion of restriction laid down in Article 11 of the EEA Agreement and its application to a display prohibition and on the criteria to determine whether a potential restriction would be suitable and necessary having regard to public health, see Article 13 of the EEA Agreement.

In responding to the questions below it must be held that the legal framework is not directly discriminating, that is to say, it is applied equally to all the products covered therein irrespective of the origin of the products. The parties disagree, nonetheless, on whether the legal framework *indirectly* implies a discrimination, see point 4 below.

After receiving the parties' views the Oslo tingrett has decided to refer the following request for an Advisory Opinion:

> In connection with the decision on whether Articles 11 and 13 of the EEA Agreement prevent a rule prohibiting the visible display of tobacco products at retail outlets as laid down in Section 5 of the [Norwegian] Act relating to Prevention of the Harmful Effects of Tobacco, the Oslo tingrett requires answers to the following questions:
>
> 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?**
>
> 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?**

A closer description of the prohibition against the visible display of tobacco products etc. is given under point 2. Relevant EEA legal sources in addition to some sources from the World Health Organization are outlined under point 3. The main points in the arguments of the parties are described under point 4.

2 On the prohibition against the visible display of tobacco products

2.1 Sale and marketing of tobacco products in Norway

Tobacco products can lawfully be sold in Norway through different types of retail outlets, including supermarkets, kiosks and service stations. The number of such points of sale is estimated to be somewhere between 15.000 and 18.000. Several measures have been introduced seeking to reduce the use of tobacco products, including high excise duties on sale of tobacco, a general prohibition on advertising for tobacco products and a prohibition against the sale of tobacco products to children under the age of 18. As mentioned this case is about a prohibition against the visible display of tobacco products which was introduced as a supplemental health preventive measure with effect as of 1 January 2010.

The market for cigarettes in Norway is characterised by the big international tobacco companies. The Plaintiff is a subsidiary company of the world's biggest tobacco producer and the company sells known brands including Marlboro. Associated companies have production in a series of countries, also within the EU.

There is no production of tobacco in Norway.

2.2 The legal situation before the introduction of the display prohibition

Norway has had a total prohibition against advertising of tobacco products since 1975. The prohibition was previously established in Section 2 of the Act of 9 March 1973 No 14 relating to the Prevention of the Harmful Effects of Tobacco (hereinafter "the Tobacco Act"), being as of 2009 placed under Section 4 of the same Act. Section 4 first and second paragraphs of the Tobacco Act reads:

> *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.*

This general advertising prohibition applies to all forms of marketing in all kinds of media, including newspapers, radio, television and posters. The prohibition covers both direct and indirect product advertising, hereunder the depiction of a trademark or logo which is mainly associated with tobacco products. Furthermore, advertising at retail outlets has been prohibited, including posters and similar objects at the cash register or in other places in the shop's premises with a depiction of the trademark, logo and/or characteristics of the product. The same applies to the depiction of tobacco products with trade mark and/or logo on the internet.

The Plaintiff does not dispute and the court's request for an Advisory Opinion does not concern the lawfulness [under national law] of the general advertising prohibition. Before the passing of an amendment to the Tobacco Act on 3 April 2009 which introduced the display prohibition, a regulation provided for an exception to the ban allowing for the advertising effects deriving from the actual display of the tobacco products in the premises of the retail outlet.

Relevant EU directives on the prohibition of advertising, including Directive 2003/33/EC, are incorporated into the EEA Agreement and transposed into Norwegian law. Furthermore, Norway has ratified the WHO Framework Convention on Tobacco Control. Further explanations are given under point 3.

2.3 On the display ban in force since 1 January 2010

By Act of 3 April 2009 the advertising prohibition was extended to the visible display of tobacco products and smoking devices with effect as of 1 January 2010. Section 5 of the Tobacco Act as amended by the said Act establishes that:

> *§ 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.*

Relevant definitions are given in Section 2 of the Act:

> *§ 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.*

The prohibition against the visible display of tobacco products and smoking devices covers all forms of tobacco products irrespectively of the country of origin of the product. Furthermore, the prohibition applies to all kinds of visible display of both the tobacco products and the smoking devices, and of imitations of such products and of token cards used for acquiring tobacco products and smoking devices from vending machines, see Section 5 first paragraph. It is allowed to provide neutral information regarding price, tobacco products and smoking devices which are for sale at the premises, for instance verbally or by having a list at the cash register which only contains the name and price of the products, see the third paragraph of the

same provision. In the same manner as before the introduction of the display ban the said list cannot give an indication of trademarks or logos.

Each retail outlet can decide how the tobacco products in practice shall be concealed. There is for instance a possibility of placing the tobacco products beneath the counter, in closed cupboards or behind curtains or other forms of devices which prevent the tobacco products from being viewed by the customers. The law does not prohibit self service but the retail outlet must ensure that the products are concealed when the customers do not collect them. In practice self service is unusual for smoking tobacco, save for tax free sales. It is however used to a certain extent in connection with sales of moist snuff tobacco (hereinafter "snus") which the customer can take out from an accustomed refrigerator.

The display prohibition implies that the product assortment shall be visually concealed except for when the tobacco products are handed out to the customers. The parties disagree on the understanding of the foregoing. The Plaintiff interprets the regulations as meaning that the customer cannot demand to see the product assortment before making the purchase decision. In addition, the Plaintiff observes that there is an increasing use of vending machines where by definition the product assortment cannot be seen. The Defendant, on the other hand, argues that the display ban affects the general display of the products but that such measure does not prevent the seller from providing guidance to the customer before making a purchase decision.This implies that customers on request must be able to see specific products they are considering to buy, for example particular cigarette packages. Furthermore, the Defendant assumes that customers, if they so wish, are able to see the product assortment as such. The tobacco products shall thereafter be concealed again to hinder that especially children and young people as well as persons trying to quit smoking are exposed to the physical product assortment.
The display ban applies in theory to all forms of retail outlets. An exception has nevertheless been made for dedicated tobacco boutiques, see Section 5 third paragraph of the Tobacco Act. These are businesses which mainly sell precisely "tobacco products and smoking devices", see Section 2 third paragraph. At such points of sale it is therefore allowed to display tobacco products and smoking devices inside the premises of the shop. In the preparatory works to the said Act an important element of the rationale for this exception is that such retail outlets are primarily used by customers who, already before they enter the premises, have an intention to purchase tobacco products. The exception is meant to have a limited reach and the retail shops in question will, for example, be dedicated tobacco boutiques within the definition given in the Act only if the product assortment, other than tobacco products and smoking devices, is extremely small; see Proposition to the Odelsting No 18 (2008–2009) pages 16–17. Even for dedicated boutiques which fall under the exception of Section 5 third paragraph, there is a ban against window exhibitions and against other forms of display of tobacco products which are visible from outside the shop. Furthermore, it is emphasised in the preparatory works that, in the same manner as before the introduction of the general display ban, there are limitations related to the size and design of the devices for product placement.

There are relatively few dedicated tobacco boutiques in Norway. There is no precise overview but the parties have estimated the total number to be between five and ten.

The exception for dedicated tobacco boutiques does not include websites even if these solely or mainly sell tobacco products, irrespective of the establishment of a form of age control to access the particular website. The parties disagree on whether the prohibition against the

depiction of trademarks, etc., on the internet follows from the display ban or from the ordinary advertising ban which was already in force before the adoption of the display ban.

The Norwegian Directorate of Health is responsible for supervising the compliance with the display ban provided by the Tobacco Act, see Section 14 of the Act. In infringement cases the Norwegian Directorate of Health can issue remedial orders and even coercive fines if remedy to the infringement is not given within a fixed dead line, see Section 16.

2.4 Background to and purpose of the display ban

The main purpose with the adoption of the prohibition against the visible display of tobacco products is described in the following manner in Proposition to the Odelsting No 18 (2008–2009):

From point 1.1 (p. 5):

> *The aim with the prohibition is to limit the advertising effect of the display of such products, to contribute to reduced tobacco use and fewer health problems.*

From point 1.3 (p. 7):

The purpose with the Ministry's proposal introducing a prohibition against the visible display of tobacco products and smoking devices at retail outlets is to reduce the amount of smokers and snus users in the population in general and amongst children and young people especially. The ban shall contribute to protect children and youngsters against the harmful health effects of tobacco use. A reduction in the number of children and young people who begin to smoke and/or use snus will in the future lead to a reduction in the share of adult smokers and snus users. In addition, a prohibition against the visible display could contribute to making it easier for those persons trying to quit or who have quit smoking tobacco.
The goal is thus to reduce the use of tobacco amongst the general population and especially amongst the young. The use of tobacco, and particularly smoking, constitutes a big and well known health risk.

The Oslo tingrett has not yet formed an opinion regarding the state's assessments as they appear from the legislative process, something which will have to be done in connection with the proportionality test after receipt of the Advisory Opinion from the EFTA Court. It is nonetheless fitting to also refer to other parts of the legislative process, particularly to the abovementioned Proposition to the Odelsting, since the legislator's argumentation for the display ban is found therein. The Plaintiff does, however, disagree with several of the assessments included in the Proposition, see the comments under points 2.4 and 4.1.

An invitation for comments and submissions on the proposal to adopt a display ban was sent out in March 2007. The Ministry of Health and Care Services procured by assignment dated 1 November 2007 a information update from the state research institution SIRUS – the Norwegian Institute for Alcohol and Drug Research; see directly below. In December 2007 the Ministry notified the draft amendments to the Tobacco Act to the EFTA Surveillance Authority pursuant to Directive 98/34/EC. The Surveillance Authority did not make any comments to the notification.

Under point 1.2 of the Proposition to the Odelsting (p. 6) the following is stated regarding the background of the ban:

> *The health risks of smoking are well known. Amongst the [risk] factors which can be prevented, smoking is the one that has the biggest influence on the health state of the individual. The "Report 2006:04, How deadly is smoking?" from the Norwegian Institute of Public Health shows that there are annually approximately 6,700 deaths caused by smoking related diseases in Norway. Additionally, approximately 350–550 persons die every year from passive smoking. The same report reveals that smoking is the cause of 26 percent of the deaths amongst women in the age group between 40 and 70 years old. The corresponding number for men is 40 percent. It is estimated that every other person who smokes steadily over a long period of time dies too early as a consequence of a smoke related illness. The Norwegian Knowledge Centre for the Health Services writes in "Report No 11-2004, Smoking prevention measures amongst children and young people", that smoking is one of the most important risk and cause factors of heart and cardiovascular diseases, lung and respiratory diseases and several types of cancer.*

Regarding children and young people's exposure to advertising and other impressions created by tobacco products and tobacco use, see *inter alia* the reference made at point 1.2 (pp. 6–7) of the Proposition:

> *The Norwegian Knowledge Centre for the Health Services concludes in Report No 11-2004, Smoking prevention measures amongst children and young people that there is a correlation between an early exposure to the tobacco industry's marketing in the form of advertising and future smoking among young people in the ages of 8 to 17 years old. Studies have also shown that young people are influenced by how common smoking is, and that young people who overestimate how many people smoke have a greater risk of beginning smoking too. Accessibility to points of sale for tobacco products, the conspicuous placement of tobacco products at the cash registers and sale of tobacco products together with other common every day products can contribute to an impression in children and youngsters that tobacco use is more extended and less dangerous than it is in reality.*

The parties disagree on the relevance of this documentation, see point 4 below. The Plaintiff has observed that advertising of tobacco products has been forbidden in Norway for several decades and argues that research relating to advertising in media and other channels, which is already prohibited in Norway, has no transferable value to a display ban. The Defendant is of the opinion, however, that the documentation also has significance for assessing the advertising effect of a visible display of tobacco products.

In the more detailed analysis of the effect of the display ban proposal in the Proposition, the Ministry of Health and Care Services mentions, among other things, that it is difficult to isolate the effect of one of several measures to reduce tobacco use. It is pointed out that the display ban is intended to be included as an element in a bigger package of measures which jointly shall contribute to a reduction in the use of tobacco.

Regarding the expected effect of a display ban a further reference is made in the Proposition to particularly the aforementioned information update from SIRUS. In the assignment letter dated 1 November 2007 the Ministry stated among other things that:

The Ministry acknowledges that there is limited documentation on the effects of a visible display ban, but we consider such a ban as a prolongation of the advertising prohibition. There is therefore a need for updated information on the effects of advertising and advertising bans on smoking behaviour.

The mission statement to SIRUS was the following:

The Ministry requests on that background that SIRUS makes it a priority to accomplish the following assignment within 1 March 2008:

1. An updated information summary of the effects of advertising and advertising bans, hereunder the impact of advertising on the total consumption.

2. Identify prospective effect evaluations of the prohibition against the visible display of tobacco products.

SIRUS indicated in the report the shortness of the time limit for the assignment. The Ministry gives a summary of the report from SIRUS under point 1.2 (p. 6) of the Proposition:

The Norwegian Institute for Alcohol and Drug Research (SIRUS) indicates in the report Knowledge Basis for the proposal of a prohibition against the visible display of tobacco products *(SIRUS publications No 1/2008) that the tobacco industry has invested considerable resources in developing package designs which shall communicate a message to current consumers and potential customers, and that the packet as an advertising medium has acquired a greater significance after the introduction of the ban against tobacco advertising. SIRUS concludes in the report that there is reason to assume that tobacco products displays work as a purchase influencing factor along the same dimensions as ordinary advertising. It is however difficult to estimate whether the strength of the purchase influencing factor is greater or weaker than in ordinary advertising and to what degree the health warnings on packets have an impact on the advertising effect.*

The parties disagree on whether the SIRUS report is relevant and correct, see point 4 below.

In addition, the Ministry refers to Iceland where a display ban was introduced in 2001. The Ministry points out under point 2.3 in the Proposition that it is difficult to draw irrefutable conclusions on the effect of the display ban in Iceland, among other reasons because other circumstances may also have affected tobacco habits during the same period. When the Proposition was drafted, only Iceland within the EEA had a display ban. A prohibition was also adopted in Ireland but it first entered into force on 1 July 2009.

As a whole, the expected effect of the proposal is summarized under point 2.3 (p. 13) of the Proposition as follows:

The Ministry relying on the information summary from SIRUS presumes that available information relating to advertising and the effects of advertising has transferable value to the visible display of tobacco products. In the opinion of the Ministry visible display constitutes a not insignificant purchase influencing factor and a prohibition against the visible display will be a suitable tool to prevent such effects. In the Ministry's view there

is reason to assume that a removal of the purchase influencing factor will contribute to a reduction in the use of tobacco among children and young people as well as the general population. Furthermore, there is reason to believe that it may take time before we can see the effect of a ban against the visible display of tobacco products and that dramatic changes will therefore not take place in the short term.

The parliamentary majority subscribed to the Ministry's assessments reviewed above; see Recommendation to the Odelsting No 49 (2008–2009), point 2. Here the majority stated among other things:

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

The parties, as mentioned before, disagree on the effect of the display ban referred to above.

3 Relevant sources from EEA law and WHO law

The relevant provisions of the main text of the EEA Agreement seem to be Articles 11 and 13, which state:

Article 11

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

Article 13

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.

In respect of relevant secondary legislation within the EEA, several directives have been adopted which involve an obligation for EEA States to introduce a prohibition against tobacco advertising on both television as well as in radio and printed publications. The relevant directives seem to be the Television Directive (Directive 89/552[1]/EEC with amendments), the Tobacco Products Directive (Directive 2001/37[2]/EC) and the Tobacco Advertising Directive

[1] Corrected from "885" in the Norwegian original.
[2] Corrected from "27" in the Norwegian original.

(Directive 2003/33/EC). The directives are incorporated into the EEA Agreement and transposed into Norwegian law.

The visible display of tobacco products does not appear to be directly regulated in secondary legislation.

The Oslo tingrett presumes that the EFTA Court will also take into consideration the WHO Framework Convention on Tobacco Control of 21 May 2003 which entered into force in 2005 after 40 states including Norway had ratified it. The EU has also acceded to the Convention as an organisation and the Convention has also been ratified by most of the Member States of the EU. One of the Convention's measures to prevent the harmful effects of tobacco is the parties' obligation to introduce a general advertising ban, see Article 13(2):

> *2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. (…)*

The minimum obligations pursuant to the Convention are established in Article 13(4). It has not been determined in law whether a display ban constitutes a part of these minimum obligations. The parties are encouraged in Article 13(5) to go beyond what the minimum obligations imply. The parties to the Convention have adopted more detailed guidelines regarding the implementation of the Convention's Article 13 on the prohibition of tobacco advertising, and here a ban against the display of tobacco products is referred to in the following manner:

> ***Retail sale and display***
>
> *Display of tobacco products at points of sale in itself constitutes advertising and promotion. Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display.*
>
> *To ensure that points of sale of tobacco products do not have any promotional elements, Parties should introduce a total ban on any display and on the visibility of tobacco products at points of sale, including fixed retail outlets and street vendors. Only the textual listing of products and their prices, without any promotional elements, would be allowed. As for all aspects of Article 13 of the Convention, the ban should also apply in ferries, airplanes, ports and airports.*

The Oslo tingrett presumes that the starting point must be that the obligations flowing from the Framework Convention are legally binding for the State, but the obligations which only follow from the guidelines are non-binding recommendations.

4 Overview of the parties' pleadings

4.1 The Plaintiff, Philip Morris Norway AS, essentially argues that:

The Plaintiff supports the health goals which underlie the tobacco regulation: to reduce tobacco consumption. The disputed display ban is however neither suitable nor necessary to reach these goals and entails an all too far-reaching intervention on trade and competition.

The Norwegian prohibition on advertising has been in force since 1975 and is one of the most restrictive in the world. The lawfulness of this prohibition is not challenged by the Plaintiff. The new display ban must, however, be appraised in light of the total prohibition on advertising. The new ban removes the only remaining form of communication between the producer and the consumer.

The prohibition is a restrictive and disproportionate limitation to trade and the Plaintiff's business because it strongly restricts the Plaintiff's and other producers' possibilities to exercise trademark based competition. This trade limitation is introduced in a market which in volume terms shows a clear overall sinking trend. To maintain trademark based competition is therefore becoming more and more important in a shrinking market. The display ban restricts to a considerable degree the remaining possibilities of communicating brand identity and the basic characteristics of the Plaintiff's products. Just like the market has dwindled in volume for several years, the Plaintiff acknowledges that the market over time will have an additional pronounced decline in terms of volume. At the same time the Plaintiff wishes to be able to maintain the ability to compete to attain the biggest possible market share in this shrinking market. The possibility to view the product at retail outlets is therefore far more important for the trademark competition and for the possibility to introduce new products in this market than in relation to other consumer goods. It is hence cause for particular concern that the prohibition leads to trademark based competition being more or less impossible.

The display ban restricts trade between Member States in contravention of Article 11 of the EEA Agreement because it in practice precludes market access of new products from other EEA states for the benefit of brands which already are established locally (see Case C-405/98 *Gourmet*). Additionally, it has the effect that it "*hinders access of products originating in other Member States to the market of a Member State*" as the ECJ found in Case C-142/05 *Mickelsson and Roos*.

The ECJ also attaches weight to the significance of competition in the tobacco business in more recent rulings. See for instance Case C-197/08 *Commission* v *France*, paragraph 47 where the court emphasises the following considerations as especially important: "*in particular that of ensuring that competition between the different categories of manufactured tobacco belonging to the same group is not distorted*". The disputed restrictions were set aside in that judgment because it was impossible to ascertain whether they impaired the competitive advantages for one brand in relation to another.

In that judgment as well as in two parallel rulings pronounced on 4 March 2010 the ECJ concluded that the maintenance of competition in the markets for tobacco products is an important purpose under community law. In the aforementioned rulings the court rejected the minimum pricing legislation in Ireland, France and Austria because these laws were capable of undermining competition between tobacco producers, see paragraph 37 of the ruling. It is important to note that the ECJ has accepted Member States' health related considerations for such legislation, and these health related considerations are far more convincing when it comes to minimum pricing than in the case of the display ban which is the subject of the present case, but nonetheless the ECJ declared this legislation as contrary to EU law because there existed less restrictive means which could attain the same results.

The European Commission has in recent merger cases generally considered the trademark as the most important means of communication towards the consumer, see cases M.2779 IMPERIAL/REEMTSMA and M.4581 IMPERIAL/ALTADIS. The latter case was decided by the Commission as recently as in 2007 and it is stated among other things there that: *Given the advertising bans and restrictions imposed on promoting of tobacco products, the brand is the key communicator with the final customer. In the absence of traditional marketing, and considering the regulated nature of the tobacco distribution together with a very low degree of technical innovations of the products, the access to IP (brand) and know-how (mainly related to blend composition) are most important factors for the ability to compete effectively on the these markets.* Similar wording was used by the Commission in the case of BAT's acquisition of Skandinavisk Tobakskompagni as recently as 2009 (case M.5086). Here, the Commission particularly commented on these questions in light of the market situation that reigned in Norway at the time.
The restriction to trade, market access and competition is neither well-founded nor proportionate. The state justifies the prohibition based on a theory that it will reduce tobacco consumption, but experience from other jurisdictions shows that there is no such effect. The Plaintiff has submitted documentation which establishes that the display ban has not reduced tobacco consumption in any of the countries where such prohibitions have been recently introduced (Iceland, Canada, Australia, Ireland and Thailand). The experiences from these countries give "*no empirical support for the proposition that a display ban is likely to cause a reduction in smoking prevalence*" (Padilla, J. *The effectiveness of display bans: the case of Iceland*, LECG, p. 5. The Report, commissioned by Philip Morris, was published in October 2009.)

A number of other studies from Iceland, Canada, Thailand, Ireland and Australia also show that the display prohibition has no influence on tobacco consumption amongst young people or adults. In the documentation presented to the Oslo tingrett as part of the preliminary case handling procedure it follows among other things that: "*[T]he Icelandic display ban had no statistically significant effect on smoking prevalence. This is true for both age groups for which data was available: (1) individuals aged 15 to 79 years and (2) individuals aged 15 to 24 years.*" (LECG, p. 5.) "*The analysis of the proportion of young smokers in Canada shows that the ban has not led to any reduction in the proportion of young smokers over and above what is to be expected relative to the trend in the individual province and in Canada in*

general." (Gorm Grønnevet: *Trends in smoking habits as a consequence of a ban on visible display of tobacco products*, of 16 April 2007, p. 12.) "*Data from Australia does not appear to be available, and therefore no empirical analysis of this has been carried out. Two surveys involving schoolchildren in Australia show, however, that the proportion of young smokers is very similar to that in Canada and that the reduction in the proportion of young smokers began three years before the ban on displays of tobacco products was introduced in Victoria. Therefore, these reports do not support the idea that a ban on displays of tobacco products produces a reduction in the proportion of young smokers either*." (Gorm Grønnevet: *Trends in smoking habits as a consequence of a ban on visible display of tobacco products*, dated 16 April 2007, p. 3.)

In both Denmark and Sweden the introduction of a display prohibition has been considered, but not adopted because of the lack of documentation of the effects of this type of ban.

In the absence of documentary proof which can sustain and ascertain the probability of the effects of the ban in a tenable manner, the authorities cannot seek to justify the display ban by referring to a desire to "denormalise" tobacco products. A "denormalisation" measure is without purpose if the measure has no effect. On the contrary there is reason to believe that weakened trademarks combined with a measure forbidding customers the access to information regarding new products and innovation will increase price competition. This will in turn contribute to increased consumption of low priced cigarettes and counterfeit products. In this relation it is important to underline that it is generally accepted that price reductions increase tobacco consumption, especially amongst young people.

Alternative and less restrictive measures, which are far less damaging for the free exchange of goods and competition between tobacco brands, should therefore be used. This can for example be the introduction of a license obligation for tobacco dealers (where the dealers lose their license if they sell tobacco products to minors), stricter enforcement of the age limits for purchasing tobacco, introduction of a prohibition against straw man trade (that is, adults who buy tobacco products for minors), campaigns in mass media, as well as introducing different forms of regulation relating to the maximum enabled space for displaying tobacco products, limited visibility etc. Furthermore it is noted that the display ban is clearly disproportionate because it implies that even adult smokers will not be able to be informed about the available assortment at the sales outlet. These less restrictive means were hardly mentioned by the Defendant in the preparatory works leading up to the ban.

The Defendant claims it is impossible to prove which types of measures, separated from other measures, will be effective. This is in reality a concession that there is no proof that the display ban has any effect at all if it is added to the very comprehensive regulations of the tobacco market that already exist.

The Defendant attaches particular importance to the SIRUS report in support of its own standpoints. This is a dubious basis. Firstly, the report was drawn up in a very short time (this is also mentioned in the report). Secondly, the Ministry of Health and Care Services had

ordered it after the political decision to adopt the prohibition had actually been taken. Thirdly, the Plaintiff argues that the conclusion was anticipated as the Ministry already in the mandate to SIRUS had determined that the display ban was nothing more than a "prolongation" of the advertising ban and that SIRUS was therefore to comment on whether advertising bans are effective. But the question is obviously whether a display ban at retail outlets has any additional effect on tobacco consumption. And the SIRUS report does not deal with this question.

The SIRUS report makes a comparison between consumption in countries where advertising is allowed. These studies have no transferable value to Norway where advertising has been forbidden for more than 30 years. In any case, there is no need to consider research on advertising which has no direct relevance when there are actual experiences with a display ban in countries which have introduced this type of regulation. This experience shows that the display ban has no effect on tobacco consumption.

The Plaintiff queries at the end whether the rule established in Norwegian case law (the Supreme Court in case HR-2009-1319-A, Rt. 2009, p. 839) which states that the burden of proof regarding the lack of proportionality lies with the private party in cases where alternative and less restrictive measure are "quantitative". This terminology is completely unknown in and incompatible with EU and EEA law. This terminology and the idea that the burden of proof for proportionality shall lie with the private party creates considerable uncertainty regarding how the implementation of the proportionality test is to be carried out. An assumption of the effectiveness of the display ban implies at the same time an assumption of the necessity of the prohibition, with the consequence that it is up to the private party in the case to prove the opposite. This is contrary to EEA law.

4.2 The Defendant, the state, represented by the Ministry of Health and Care Services, essentially argues that:

4.2.1 On question 1 – the appraisal of a restriction

The Defendant alleges that the display ban, which constitutes a limitation on a specific form of marketing, does not constitute an import restriction in the terms of Article 11 of the EEA Agreement, see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* and subsequent case law.

The display ban is neutral regarding the origin of the goods, and there is hence no *direct discrimination* based on nationality. The Defendant adduces that there is no *indirect* discrimination either. This is anyhow a factual consideration which will have to be undertaken by the national court.

The Plaintiff has particularly made reference to the joint effect of the ordinary advertising prohibition with the display ban. However, also in relation to restrictions on marketing which

are comprehensive it is required that there is a greater impact on foreign goods than on national ones before concluding that there is a restriction. Such benefits for national players can for instance be due to specific social traditions, habits and customs (Case C-405/98 *Gourmet*, paragraph 21 on alcoholic beverages), or by the fact that only national players have access to other forms of marketing (Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini*, paragraph 43). The Defendant cannot see that the display ban or circumstances pertaining to the tobacco market imply such factual drawbacks for products originating in other countries. There is no production of tobacco in Norway and therefore there is also no tradition indicating a preference for national products.

The display prohibition can make it more difficult to establish new tobacco products in Norway. Nevertheless, the Defendant cannot see why this would affect foreign players specifically.

Nor does the display ban imply that access to the market is *prevented*. Such eventuality concerns in the Defendant's opinion only regulations which wholly or to a great extent exclude access to the market; see for example *Keck and Mithouard*, paragraph 17 with the requirement "prevent … access to the market", together with subsequent case law. Reduced sales are not sufficient when the regulation is non-discriminatory. Reference is also made here to Case C-110/05 *Commission* v *Italy*, paragraphs 36–37 which confirm these criteria, and to Case C-142/05 *Mickelsson and Roos*, paragraph 28 where it is stated that there is an import restriction only if the use of the good is forbidden or greatly restricted.

An important objective of the display ban is to reduce the sales of tobacco. However it cannot be expected that the prohibition will entail such a substantial reduction that access to the market will virtually be closed. This applies also for any new products even though the establishment of such new products will be more difficult with a display ban than without. In that respect it is mentioned that the customer can be guided when purchasing tobacco products, for instance by receiving neutral information on the products, hereunder new products, and by being able to view the product assortment on request, see point 2.3 above. Also these are factual considerations which the national court has to carry out.

The Defendant cannot see that rulings given by the ECJ on indirect taxation policy and price determination based on the interpretation of a different directive has any particular relevance for the evaluation of the display ban.

4.2.2 On question 2 regarding suitability and necessity

The display ban is based on the objective of reducing tobacco use in the population in general and amongst young people especially. It is assumed that the prohibition may particularly have an effect on children and young people, in addition to adults who wish to quit smoking, see point 2.4 above.

The Defendant argues that the display ban is suitable for attaining the health related motivation. The purpose of the display prohibition is that it may both have a direct effect on sales and a more lasting effect by influencing attitudes and weakening the social acceptance of tobacco use. Such signalling effects must also be relevant. It must be sufficient in principle that the ban will have effect on consumption in the short or somewhat longer run. It cannot be a prerequisite, as the Plaintiff indicates, having to present scientific documentation which with certainty shows that the display ban will work. It must be sufficient that, relying on all available sources, there are reasonable grounds to assume that the display prohibition will have effect; see similar argumentation as part of the basis for the Tobacco Advertising Directive, COM (2001) 283 point 7.4. Too strict documentation requirements would indeed have hindered the adoption of any new measure on account of public health.

It must be for the national court to decide on the suitability of the display ban. There are, however, a number of sources which sustain this suitability. It is firstly observed that a display ban has been recently adopted in *inter alia* Ireland (in force 1 July 2009), in Great Britain (in force in 2011) and in Finland (in force in 2012). Furthermore, the parties to the WHO Framework Convention on Tobacco Control, including the EU and most of the EU States, have adopted guidelines recommending the adoption of display bans as the visible display of tobacco products constitutes "a key means of promoting tobacco products and tobacco use", see point 3 above. In the EU, the Council has in Recommendation 2003/54/EC recommended that Member States remove the advertising effect which the visibility of tobacco products represents. Recently, the European Commission opened a public consultation by circulating a document on "Possible revision of the Tobacco Products Directive 2001/37/EC" (DG SANCO 2010) where one of the proposals is to introduce a display ban in all of the EU countries as an alternative to leaving it up to every EU Member State to choose as today.

The aforementioned States and organisations naturally builds on the premise that there is a substantive basis for establishing that a display ban is suitable to reduce tobacco use. There is considerable research which shows that bans against traditional tobacco advertising are effective, both in respect of advertising in media and for example advertising presented at the retail outlet. The visible exhibition of tobacco products with logo, trademarks, etc, represents an important marketing element, perhaps particularly so when traditional advertising is forbidden. It appears therefore as a logical consequence that bans against this form of more indirect advertising must also be expected to have an effect; see for instance the SIRUS report mentioned under point 2.4 above. The Defendant disagrees with the Plaintiff's criticism of the SIRUS report, and notes *inter alia* that at the time it was commissioned it had not yet been decided which proposal the Ministry was to present, and that the report actually considers the effects of the display ban in addition to the effects of bans against ordinary advertising. Most of the studies and experiences available so far, relating specifically to display bans, indicate that the prohibition works. It cannot be relevant whether single studies – especially those financed by the tobacco industry – reach another conclusion.

The display ban represents an element in a consistent policy to reduce tobacco use and the prohibition affects all visible displays in an equal manner. The only exception is the one

relating to dedicated tobacco boutiques. The exception is clearly limited and is based on the fact that most of those who enter such shops already have decided to purchase tobacco, see point 2.3 above.

The Defendant further alleges that the display ban is *necessary* since the same level of protection cannot be reached with less restrictive means. The state must be able to establish the level of protection to be afforded to public health, see for example *Pedicel*, paragraph 55 and the case law referred to therein. This particular discretionary freedom must also be reflected in the consideration of alternative means so that the display ban will only be unlawful if it is clear that less restrictive measures are equally effective in attaining the goal of reduced tobacco use in the population in general and amongst youngsters especially, see for instance *Pedicel*, paragraph 61. The description the Plaintiff gives of Norwegian law regarding the burden of proof (Supreme Court ruling in the Pedicel case, Rt. 2009 p. 839), is imprecise and not pertinent when considering the necessity of the display ban. The Defendant cannot see that the Supreme Court relies on principles that depart from EEA law.

The final decision on necessity must be taken by the national court.

In the Defendant's view alternative measures which are less restrictive but which at the same time will attain the objectives equally effectively have not been brought forward. As alternative measures the Plaintiff particularly highlights a stricter age control for purchasing tobacco products and the introduction of an authorisation system for the sale of tobacco. Such measures will only affect one part of the groups aimed at, those under 18 years old, but not the rest of the population; for instance adults who have quit or are trying to quit smoking. Moreover the alternative measures will not have the attitude creating effect that the display ban is meant to have, inter alia by seeking to denormalise the use of tobacco and that may have an effect over a longer period of time. Regulation which limits the visibility of tobacco products must moreover be an alternative which must be expected to have a weaker effect than a more absolute ban on the visible display.
The Defendant also maintains that other measures are not necessarily *alternatives* to the display ban. A proposition to introduce an authorisation system for sale of tobacco, which will reduce the number of retail outlets considerably, is for instance currently under consideration in Norway as a *supplement* and not as an alternative to the advertising ban (including the display prohibition). Besides it is difficult to see that such an authorisation system will be less restrictive to the tobacco trade than the display ban.

The Oslo tingrett

Elisabeth Wittemann
Judge