JUDGMENT OF THE COURT

12 September 2011[*]

(Free movement of goods – Prohibition on the visual display of tobacco products – Articles 11 and 13 EEA – Measures having equivalent effect to quantitative restrictions – Selling arrangements – Protection of public health – Proportionality)

In Case E-16/10,

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,

regarding the interpretation of Articles 11 and 13 of the Agreement on the European Economic Area (EEA), in particular, whether a rule prohibiting the visible display of tobacco products in retail outlets, such as the one established by Norwegian law, constitutes an unlawful restriction pursuant to Article 11 of the EEA Agreement, and, should such a restriction be found to exist, the criteria which are decisive in order to determine if the said display ban is proportionate for the purposes of Article 13 of the EEA Agreement,

THE COURT,

composed of Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Per Christiansen, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

[*] Language of the request: Norwegian.

- Philip Morris Norway AS ("the Plaintiff"), represented by Peter Dyrberg, advokat, Jan Magne Juuhl-Langseth, advokat, and Michel Petite, avocat,
- the Norwegian State ("the Defendant"), represented by Ketil Bøe Moen, advokat, and Ida Thue, advokat, Office of the Attorney General (Civil Affairs),
- the Finnish Government, represented by Mervi Pere, Legal Counsellor, Ministry for Foreign Affairs, acting as Agent,
- the Icelandic Government, represented by Íris Lind Sæmundsdóttir, Legal Officer, Ministry for Foreign Affairs, acting as Agent,
- the Portuguese Government, 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,
- the Romanian Government, represented by Emilian Carlogea, Director of the Directorate for Trade Policy, Ministry of Economy, Trade and Business Environment, acting as Agent,
- the United Kingdom Government, represented by Stefan Ossowski, Treasury Solicitor, Treasury Solicitor's Office, European Division, acting as Agent, and Ian Rogers, barrister,
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Florence Simonetti, Senior Officer, and Fiona Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents,
- the European Commission ("the Commission"), represented by Peter Oliver, Legal Advisor, and Günter Wilms, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Peter Dyrberg, the Defendant, represented by Ketil Bøe Moen and Ida Thue, the Finnish Government, represented by Mervi Pere, the United Kingdom Government, represented by Ian Rogers, ESA, represented by Xavier Lewis, and the Commission, represented by Peter Oliver and Günther Wilms, at the hearing on 8 June 2011,

gives the following

Judgment

I Facts and Procedure

1 By a letter dated 12 October 2010, registered at the Court on 19 October 2010, Oslo District Court, made a request for an Advisory Opinion in a case pending

before it between Philip Morris Norway AS and the Norwegian State, represented by the Ministry of Health and Care Services.

2 A total prohibition on the advertising of tobacco products has been in force in Norway since the introduction of such a ban in 1973. That ban, which is based on the Act 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), is wide in scope as it covers all forms of marketing of tobacco products in all kinds of media.

3 The Plaintiff is a subsidiary company of one of the world's largest tobacco producers and imports tobacco products to Norway. According to information provided by the Plaintiff and the Defendant to the Court at the hearing, there was production of tobacco in Norway until 2008. This production covered cigarettes, roll-your-own and cigars. All roll-your-own brands were Norwegian brands and trademarks, some of which were not to be found outside Norway. As to cigarettes, the parties appear to agree that local production accounted for a considerable share of the market.

4 In April 2009, following the requisite parliamentary procedure, the Defendant adopted additional legislation which amended the existing legal framework. The new law extended the advertising prohibition to the visible display of tobacco products and smoking devices. The visual display ban allows for one exemption, that is, it does not apply to dedicated tobacco boutiques.

5 The Plaintiff filed a lawsuit before Oslo District Court against the Defendant in order to have the visual display ban set aside because of its incompatibility with the EEA Agreement. The Plaintiff argued that the new legislation, which introduced the visual display ban on tobacco products, established a restriction which was unlawful pursuant to Article 11 EEA. The Defendant denied this, arguing, in contrast, that the new legislation was compatible with the EEA Agreement.

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

7 The following questions were 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?*

2. *Assuming that 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?*

II Legal background

EEA law

8 Article 11 of the EEA Agreement reads:

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

9 Article 13 of the EEA Agreement reads:

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

National law

10 In Norwegian law, the total prohibition on the advertising of tobacco products is established in Section 4 of the Act of 9 March 1973 No 14 relating to the Prevention of the Harmful Effects of Tobacco. The section 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.*

11 The Act of 3 April 2009 No 18, amending the 1973 Act, extended the advertising prohibition. The new legislation, which took effect on 1 January 2010, introduced a ban on the visible display of tobacco products into Section 5 of the 1973 Act. The Section reads:

> *§ 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 1973 Act defines concepts relevant to the display prohibition as follows:

§ 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.

13 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The first question

14 By its first question, the national court seeks to determine whether a general prohibition on the visible display of tobacco products entails a measure having equivalent effect to a quantitative restriction on the free movement of goods precluded pursuant to Article 11 of the EEA Agreement. In this regard, the national court emphasises that the legal framework under scrutiny does not entail direct discrimination since the framework applies equally to all products subjected thereto. However, the national court indicates that the parties disagree on whether the legal framework entails indirect discrimination.

Observations submitted to the Court

15 The Plaintiff argues that the ban on the visible display of tobacco products constitutes "a measure having equivalent effect to a quantitative restriction" on the free movement of goods. There are two strands to this argument. First, the Plaintiff contends that the ban is inherently discriminatory and, second, that it hinders market access. On these grounds, it argues, the visual display ban is incompatible with Article 11 of the EEA Agreement.

16 According to the Plaintiff, a visual display ban constitutes, in the same way as a total advertising ban, a *per se* restriction on the free movement of goods which is precluded pursuant to Article 11 EEA. It concedes that case-law acknowledges an exception to this principle, in particular where national legislation restricts certain selling arrangements but, at the same time, applies to all relevant traders and affects the marketing of domestic and imported products in the same manner. That is, however, not the situation in the present case. Here, according to the Plaintiff, a visual display ban is liable to favour domestic products over imported ones because consumers tend to be more familiar with the former.

17 In the Plaintiff's view, the absence of tobacco production in Norway does not undermine the fact that a total visual display ban constitutes a *per se* restriction on the free movement of goods. On the contrary, in cases where there is no domestic production the discrimination is more serious because only imported products are affected. In any event, the absence of tobacco production in Norway has no bearing on the applicability of Article 11 EEA, as follows from ECJ case-law, most notably Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 17. Therefore, a visual display ban is inherently discriminatory, and the absence of domestic production is either irrelevant or supports the finding of discrimination.

18 The Plaintiff argues that the visual display ban hinders market access and constitutes, as such, a restriction on the free movement of goods within the meaning of Article 11 EEA. With reference to Cases C-110/05 *Commission* v *Italy* [2009] ECR I-519 and C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, the Plaintiff asserts that any rule that (i) has the aim or effect of discriminating against imported goods; (ii) prescribes additional requirements for imported goods; or (iii) hinders access of imported goods to the market of an EEA State must be considered as a restriction within the meaning of Article 11 EEA. In its view, all of these requirements are satisfied by the legal regime establishing the visual display ban on tobacco products.

19 On the question of how the visual display ban hinders access to the tobacco market, the Plaintiff submits that since the implementation of a total advertising ban the visual display of tobacco products has been the only way for importers to communicate their products to consumers. A visual display ban closes this last channel of communication. This applies, in particular, to new products that are not familiar to domestic consumers. Therefore, while the advertising ban makes

marketing difficult, a visual display ban makes all communication to the consumer impossible, especially concerning new tobacco products.

20 Finally, the Plaintiff contends that the World Health Organization Framework Convention of 2003 ("WHO Framework Convention"), to which the Defendant refers, cannot relieve the Defendant of its obligations pursuant to Articles 11 and 13 EEA. Likewise, nor can any guidelines adopted under the auspices of the WHO be used to that effect, in particular as those guidelines are simply non-binding rules concerning the implementation of various articles of the Framework Convention.

21 The Defendant submits that the visual display ban forms part of a consistent tobacco policy whose purpose is to limit the advertising effect of the visual display of tobacco products and to contribute to a reduction in tobacco consumption and tobacco-related health problems. The Defendant argues that the purpose of the visual display ban is to reduce the number of smokers in general and amongst children and young people in particular. Thus, the ban will have a direct effect on tobacco use by limiting the exposure of tobacco products. In addition, the indirect effect of changing the attitude of the general public through generating a signal effect as no more will tobacco products, whose danger is beyond question, be presented alongside non-risk products in retail stores. The long term effect will be to denormalise the consumption of tobacco amongst the general public.

22 The Defendant argues that while advertising of tobacco products is regulated by EU and EEA law, the visual display of tobacco products is not. As the prohibition established in EU secondary legislation does not cover the visual display of tobacco products, EEA States enjoy competence to introduce stricter rules. In this regard, according to the Defendant, account must be taken of repeated encouragement from the EU to Member States to implement, within their field of competence, regulations concerning tobacco products more stringent than those prescribed by EU law.

23 In addition, the Defendant argues that the work of the WHO is of importance, in particular, the WHO Framework Convention, whose purpose is to reduce the harm caused to the general public as a result of tobacco consumption. The Defendant observes that a majority of states are parties to this convention, including 26 Member States of the EU and two EEA/EFTA countries, Norway and Iceland. According to Article 13(2) of the WHO Framework Convention, its parties must implement a comprehensive ban of all tobacco advertising, promotion and sponsorship. Furthermore, the Defendant notes, the parties to the abovementioned Convention have adopted Guidelines for the implementation of various articles, including Article 13. In its view, these Guidelines are binding as they represent the parties' own understanding of obligations included in the WHO Framework Convention.

24 As to the first question itself, the Defendant argues that the aim of the visual display ban is not to restrict trade between EEA States but to limit the advertising

effect generated from the visibility of tobacco products. Therefore, the present case falls outside the scope of the principle established by Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, and, instead, within the ambit of the principle established in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, concerning "selling arrangements".

25 The Defendant submits three main arguments with regard to the first question. First, due to the fact that the visual display ban constitutes a selling arrangement that applies to all trading operations regardless of the nationality of traders, there can be no discrimination in law or in fact. Second, the visual display ban is not constructed to prevent market access of imported or domestic products. In this regard, the Defendant notes that no domestic products exist as there is no tobacco production in Norway. Regardless of that fact, even if the ban were to impede market access in any way, it would only fall within the realm of Article 11 EEA if discrimination could be established. Third, in the event that the Court were to conclude that a non-discriminatory selling arrangement falls within the scope of Article 11 EEA, there has, at any rate, been no market hindrance. In this regard, according to the Defendant, a very high threshold must be applied, that is, the visual display ban has to prevent or greatly restrict the use of the product in question.

26 The Finnish Government points out that legislation establishing a visual display ban has been adopted by the Finnish Parliament. The new legal regime will take effect in 2012. In its view, in accordance with principles established in case-law, a visual display ban is to be considered a selling arrangement. Thus, the issue of discrimination is relevant, in particular whether *de jure* or *de facto* discrimination can be proven. Here, the Government stresses that it is for the national court to carry out the substantive assessment, especially with regard to *de facto* discrimination.

27 In addition, the Finnish Government emphasises that, in its view, any references by the Plaintiff to case-law dealing with prohibitions concerning alcohol advertisements are not relevant to the present case. It contends that tobacco products are not similar to alcoholic beverages – a fact which is mirrored in the different nature of the tobacco market in comparison to the market for alcoholic beverages. Finally, any arguments made by the Plaintiff concerning the market hindrance of imported products to the benefit of domestic ones must be rejected. In this regard, the Government observes, first, that domestic products are not to be found on the market and, second, that the display ban will affect the market access of new domestic products in a similar manner to the market access of imported products.

28 The Icelandic Government states that a general visual display ban has been in force in Iceland since 2001 covering tobacco and tobacco trademarks. An exemption exists for special tobacco shops. The Icelandic Government takes the view that the visual display ban on tobacco products is compatible with EEA law and submits that the ban does not go further than necessary in order to attain the objective pursued.

29 The Portuguese Government takes the view that a visual display ban restricts the free movement of goods and that, in conjunction with an advertising ban, creates an insurmountable obstacle for manufacturers to introduce and market new products. It argues that the visual display ban will also distort competition, the need for which is important, as has been acknowledged in recent case-law of the ECJ concerning minimum price requirements for tobacco products, cf. Cases C-198/08 *Commission* v *Austria*, judgment of 4 March 2010, not yet reported, paragraph 30, and C-221/08 *Commission* v *Ireland*, judgment of 4 March 2010, not yet reported, paragraph 41.

30 The Portuguese Government further submits that a total visual display ban is inherently discriminatory to the detriment of imported goods. Even if the ban were not deemed discriminatory, it hinders market access of tobacco products imported from other EEA States. Such a distortion will affect the market and limit any transactions to local customs and habits already present. Therefore, if a visual display ban is permitted, this will set a precedent allowing EEA States to freeze the market and preclude the introduction of new brands and products.

31 The Romanian Government acknowledges that EEA States can at their discretion implement measures protecting public health on the basis of the precautionary principle. In its view, however, states implementing such measures must bear the burden of proof concerning the necessity thereof. In addition, scientific evidence is needed to substantiate the existence of a causal link between the visual display of tobacco products and consumption amongst the general public. Moreover, the state concerned must take account of any possible alternative measures less restrictive of trade.

32 The United Kingdom Government argues that the visual display ban does not constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA, but is to be considered as a selling arrangement as defined in case-law. The stated purpose of the measure, namely, to reduce the sales volume of tobacco products, cannot justify the conclusion that the ban falls within the scope of Article 11 EEA. As regards discrimination, according to the Government, it is impossible to establish any *de jure* or *de facto* discrimination between domestic and imported products for two reasons. First, the visual display ban applies to all traders and tobacco products irrespective of the country from which they originate. Second, no domestic tobacco products can be found because tobacco products are not manufactured in Norway. On this latter point, the Government argues that, even if domestic tobacco products existed, the visual display ban would apply to these products in the same way as it does to imported ones.

33 The United Kingdom Government emphasises the different nature of different markets. Such premise applies, in particular, in relation to the market for alcoholic beverages and the market for tobacco products. Thus, in the Government's view, any reference to case-law dealing with alcoholic beverages should be assessed critically by the Court. Finally, it argues that Article 11 EEA does not apply to national legislation which satisfies three specific requirements.

Namely, national laws (i) which make no distinction between products based on their origin, (ii) which do not regulate trade in goods between EEA States, and (iii) whose restrictive effects are too uncertain and indirect to be considered a hindrance to trade between EEA States do not fall within the scope of Article 11 EEA. According to the Government, the visual display ban fulfils these requirements.

34 ESA submits that, although there is no disagreement on the case-law of the ECJ which is relevant, note must be taken of those judgments which entail further clarification of the substantive content of Article 34 of the Treaty on the Functioning of the European Union (TFEU). Therefore, the clarifications included in *Keck and Mithouard* are of importance, not least because of the three-stage test prescribed there, namely, (i) whether the legislation in question constitutes a "selling arrangement"; (ii) whether the national provision applies to all relevant traders operating within the national territory; and (iii) whether the measures affect in the same manner *de jure* and *de facto* the marketing of domestic and imported products.

35 With regard to the first two elements of the test, ESA argues that the visual display ban fulfils the criteria established by case-law. It is clear that a visual display is a means of advertising and promoting tobacco products. Any measure which entails that a tobacco product cannot be displayed is, by definition, a selling arrangement. In addition, it follows from the reference made by the national court that the display ban is applicable to all traders within the relevant territory. As regards the final element of the test, ESA submits that, having regard to the approach taken in *Keck and Mithouard*, the question whether there is discrimination *de jure* or *de facto* can only be answered in the negative.

36 The European Commission argues that the visual display ban can be considered as a more radical form of an advertising ban. As a result, case-law on advertising restrictions, including that concerning "selling arrangements", is relevant to the issue at hand. In determining whether the visual display ban falls within the scope of Article 11 EEA the decisive factor is whether *de jure* or *de facto* discrimination can be found. Consequently, given the fact that no tobacco production exists in Norway, the visual display of tobacco products cannot be considered to constitute a measure having equivalent effect to a quantitative restriction for the purposes of Article 11 EEA.

37 However, the Commission acknowledges the restrictive nature of the visual display ban and the adverse effect which the ban will have on competition between brands already established on the Norwegian market and the ability of traders to penetrate the market with new products. In this context, the Commission concedes, with reference to *Commission* v *Italy*, cited above, that even in the absence of domestic production, a visual display ban might constitute a measure having equivalent effect to a quantitative restriction on imports precluded pursuant to Article 11 EEA. However, in the light of the view it takes on the second question, it argues that the Court need not undertake a substantive examination of that point in the context of the first question.

Findings of the Court

38 In light of the question posed by the referring court and the observations submitted, the Court finds it appropriate to examine first whether and to what extent Article 11 EEA applies to national rules such as the provisions of the Norwegian Act relating to the Prevention of the Harmful Effects of Tobacco.

39 Article 11 EEA prohibits any measure having an effect equivalent to quantitative restrictions on imports. According to settled case-law, this prohibition applies to all trading rules enacted by EEA States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Economic Area, as such rules are to be considered as measures having an effect equivalent to quantitative restrictions (see Case E-4/04 *Pedicel A/S* v *Sosial- og helsedirektoratet*, [2005] EFTA Ct. Rep. 1, paragraph 45 and the case-law cited, and, for comparison, Cases C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 33, and C-108/09, *Ker-Optika*, judgment of 2 December 2010, not yet reported, paragraph 47).

40 In this regard, Article 11 EEA must be understood as an obligation to comply with the EEA principles of non-discrimination and mutual recognition of products lawfully manufactured and marketed in other EEA States, as well as the principle of ensuring free access of EEA products to national markets (see, for comparison, *Commission* v *Italy*, cited above, paragraph 34, and the case-law cited, and *Ker-Optika*, cited above, paragraph 48).

41 Accordingly, national measures adopted by an EEA State which have the object or effect of treating products coming from other EEA States less favourably than domestic products are to be regarded as measures having an effect equivalent to quantitative restrictions and thereby caught by Article 11 EEA. The same applies to rules that lay down requirements to be met by imported goods, even if those rules apply to all products alike. Any other measure which hinders access of products originating in one EEA State to the market of another also qualifies as having an equivalent effect for the purposes of Article 11 EEA (see, for comparison, *Commission* v *Italy*, paragraphs 35 and 37, and *Ker-Optika*, cited above, paragraphs 49 to 50).

42 The Court notes that the visual display ban at issue in the case at hand is not designed to regulate trade in goods between EEA States. However, the ban is by its nature capable of having a restrictive effect on the marketing of tobacco products on the market in question, especially with regard to market penetration of new products.

43 It follows from the case-law cited above that national provisions which apply to products from other EEA States and restrict or prohibit certain selling arrangements must be viewed as generally hindering directly or indirectly, actually or potentially, trade between EEA States.

44 However, provisions concerning selling arrangements do not constitute a restriction if they apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other EEA States in the same manner, both in law and in fact. If that is the case, the application of such rules to the sale of products from other EEA States is not by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products (see, for comparison, *Keck and Mithouard*, cited above, paragraphs 16 and 17, and *Commission* v *Italy*, cited above, paragraph 36).

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

46 Next, it has to be examined whether the national legislation at issue meets the two conditions stated in paragraph 44 above. In other words, it has to be analysed whether the provisions apply to all relevant traders operating within the relevant national territory and whether they affect in the same manner, in law and in fact, the selling of domestic products and the selling of goods from other EEA States.

47 It is not disputed between the parties that no discrimination in law exists in this case since the visual display ban applies to all traders operating in the relevant market and affects all products in the same manner. The parties' disagreement, as described in the reference from the national court, is limited to whether the visual display ban discriminates in fact. In that regard, the Plaintiff submits that, although there is no tobacco production in Norway, there are brands on the Norwegian market which were produced domestically until 2008 but are presently produced abroad and imported to Norway. According to the Plaintiff, these products are less affected by the visual display ban established by the national provisions at issue and, as a result, enjoy in relation to other tobacco products a more favourable position on the relevant market.

48 As the ECJ stated in *Commission* v *Greece*, cited above, paragraph 17, the question whether there is domestic production is not decisive when it comes to determining the effects of a restrictive measure. It cannot be excluded that production in Norway will resume at a later time. Bearing that in mind and taking account of the factual situation in the case at hand, it cannot be ruled out that some imported tobacco products, in particular those that were manufactured in Norway until 2008, enjoy a more favourable position on the Norwegian market than other products due to local habits and customs linked to tobacco consumption (compare *Pedicel*, cited above, paragraph 46).

49 The information available does not enable the Court to establish with certainty whether the national provisions at issue prohibiting the display of tobacco products affect the marketing of products from other EEA States to a greater

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

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

51 It follows from the above that the answer to the first question must be that a visual display ban on tobacco products, imposed by national legislation of an EEA State, such as the one at issue, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products from other EEA States to a greater degree than that of imported products that were, until recently, produced in Norway.

IV The second question

52 The second question from the national court concerns the criteria which are decisive, assuming a restriction contrary to Article 11 EEA is found to exist, for determining whether a visual display ban, whose purpose is to reduce tobacco consumption amongst the public in general and amongst young people in particular, is suitable and necessary on grounds of public health as provided for in Article 13 EEA.

Observations submitted to the Court

53 The Plaintiff asserts that the Court should provide the referring court with guidance with regard to the justification and the proportionality assessment that is required under Article 13 EEA. It takes that position on account of the fact that national courts, left with the task of making the assessment required by Article 13 EEA, have come to diverging results. In its view, that situation has undermined a fundamental objective of the EEA Agreement, namely, the uniform application of its principles. Hence, the Court should provide detailed guidance for the national court.

54 The Plaintiff argues that an assessment concerning the proportionality of the measures taken by the Norwegian authorities should include the concepts of suitability and necessity. Further, as Article 13 EEA derogates from the principle of free movement of goods, this calls for a strict interpretation when making the proportionality assessment. Therefore, in the Plaintiff's view, it is for the Defendant to show and provide proof supported by scientific evidence that the visual display ban is justified and that the result cannot be attained with less restrictive means.

55 According to the Plaintiff, as regards the matters on which the Defendant must adduce proof, two issues are of particular importance. First, it must be shown that tobacco products actually create a risk to public health and, second, that the visual display ban reduces that risk. The Plaintiff contends that, while there is no disagreement amongst the parties that consumption of tobacco products has a negative effect on public health, the parties disagree whether a visual display ban reduces consumption of tobacco products and whether the effects, which the Defendant seeks to achieve, can be attained with other less restrictive means. The Plaintiff argues that scientific evidence, including case studies from countries that have implemented a visual display ban, does not support the Defendant's position on the effectiveness of a ban.

56 Moreover, the Plaintiff argues that the visual display ban fulfils neither the requirements for suitability nor necessity. With regard to the first issue, the Plaintiff asserts that the ban is not suitable for reducing tobacco consumption. Despite being blocked from view, tobacco products remain available at points of sale. Thus, the visual display ban provides only for greater inconvenience. With regard to the second issue, the Plaintiff submits that the Defendant is under an obligation to consider other less restrictive means that would be equally effective in securing the objective pursued. That has not been done; in contrast, government documents demonstrate that the Defendant has not enforced other control measures.

57 The Defendant argues that, should the Court decide to provide a substantive answer to the second question, the visual display ban must be regarded as justified and proportionate within the meaning of Article 13 EEA as it has been implemented to protect public health. That objective has been considered a legitimate objective of the highest order. In that regard, the Defendant stresses that it is for the individual states to determine the level of protection and in what manner that level is to be achieved, provided always that the state's approach is proportionate to the objective pursued.

58 Having regard to the aforementioned approach, the Defendant submits that, although Oslo District Court seeks guidance on the appropriate criteria, it is not for the Court to assess the facts of the case or whether national law is compatible with EEA law. Therefore, any guidance should be in the form of a general discussion identifying the elements which are important for consideration by Oslo District Court.

59 The Defendant argues that the elements of necessity and suitability are inherent in a proportionality assessment made for the purposes of Article 13 EEA. However, on the proportionality test in general, the Defendant stresses that, although the burden of proof is unquestionably incumbent upon the state, the intensity of such burden varies depending on the subject-matter at hand. Case-law suggests not only that a cautious approach must be taken regarding judicial review but that the obligation to adduce evidence must not be applied in a way that renders it difficult to adopt new measures for the purposes of reducing tobacco consumption. The approach taken by the Plaintiff concerning documentation requirements would, in effect, if adopted by the Court, make it impossible to adopt any measures with the purpose of reducing tobacco consumption. In contrast, the Defendant argues that document requirements should not be understood as meaning that studies must be submitted supporting the proportionality of a particular measure in advance of its introduction and, moreover, that in relation to future effects that cannot be accurately foreseen a proportionality review should be undertaken only where the disputed measures appear to be manifestly incorrect.

60 With regard to the suitability and necessity tests, the Defendant argues that the contested measure passes both of these. The visual display ban is suitable as it constitutes an adequate measure to reduce tobacco consumption. In this respect, the Defendant has a wide margin of discretion in determining the measures that are most likely to achieve concrete results. In this case, the Defendant has based its assessment on various EU and WHO documents which not only provide extensive arguments substantiating factual points relating to the visual display ban, but also represent legal arguments in support of the ban's suitability. In fact, this element of the case concerns questions of evidence which, in the Defendant's view, points to the conclusion that the Court should refrain from a detailed analysis and simply provide guidance to the national court.

61 On the necessity test, the Defendant submits that the visual display ban is based on a legitimate public interest objective and that the ban is necessary as the legitimate objective cannot be achieved effectively with less restrictive means.

62 The Defendant submits that the reasoning adopted in *Commission* v *Italy*, cited above, should be followed, namely, that a state, which implements measures that affect the free movement of goods for a particular purpose, is not obliged to prove positively that no other conceivable measure could enable that objective to be attained. It stresses that EEA States cannot be denied the possibility of attaining an objective by implementing general and simple rules. In addition, it submits, in accordance with the reasoning adopted by the Court in *Pedicel*, cited above, that where it has been concluded that a disputed measure protecting public health is justified, such measure must be considered lawful, unless it is apparent in law and fact that the protection of public health can be secured by less restrictive measures.

63 The Defendant submits that equally efficient measures for the attainment of the public health objective concerned do not exist in the present case. None of the

alternatives referred to by the Plaintiff would have the same effect as the visual display ban, namely, to close the final gap in the ban on tobacco advertising. Moreover, the Defendant argues that some of these alternatives would, in effect, have a more restrictive effect on trade than the visual display ban. Furthermore, the Plaintiff's argument that, instead of introducing a visual display ban, measures currently in place should be enforced more strictly must also be rejected. Only the joint effect of several measures, one of which is the visual display ban, will lead to greater protection of public health and denormalise the general public's attitude towards tobacco use.

64 If the Court finds it necessary to answer the second question, the Finnish Government argues that the restriction on the visible display of tobacco products is justifiable on grounds of public health in accordance with Article 13 EEA. In its view, three points are of particular importance within the context of Article 13 EEA. First, the public health grounds on which the visual display ban is based have not been invoked to discriminate against imported goods with a view to protecting national products. Second, the visual display ban is, in the opinion of the Finnish Government, an appropriate measure to protect public health. Third, it is for the national court to determine, having regard to all the circumstances of law and fact, whether the disputed measure goes beyond what is necessary in order to attain the protection of public health. Finally, according to the Government, the less restrictive measures referred to by the Plaintiff should not be considered as alternatives to a visual display ban but as parallel measures that could be introduced to achieve a particular level of protection.

65 The Portuguese Government argues that as Article 13 EEA entails a derogation from Article 11 EEA it should be interpreted restrictively. As a result, a state introducing a restrictive measure must prove that it is appropriate to attain the objective pursued and does not go beyond what is necessary to reach that objective. Evidence or analysis should be submitted in order to substantiate the reasons cited as justification for the restrictive measures in question. Although the objective of protecting public health is considered a legitimate objective, no scientific evidence has been presented to support the argument that a visual display ban reduces tobacco use. Such evidence or, indeed, the absence thereof is crucial when it comes to deciding whether the contested measure is proportionate. Four elements are particularly relevant: (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; (iv) whether the state has demonstrated that no alternative less restrictive measures of achieving its objective of reducing smoking are available. In addition, according to the Government, a visual display ban will have negative effects on intra-EEA trade as it will drive consumers to the illicit market. As a result, consumption may increase and undermine efforts to combat tobacco use. On a final point, the Government contends that a visual display ban will infringe the fundamental right to freedom of expression and the freedom to engage in commercial activity.

66 Similarly, the Romanian Government acknowledges the legitimacy of the public health objective. However, at the same time, it emphasises that proof must be submitted by the Defendant in order to establish a causal link between the visual display of tobacco products and tobacco use. Furthermore, it argues that the visual display ban will have a detrimental effect on producers of tobacco products. Producers not currently operating on the Norwegian market will be unable to enter the market through marketing their products. Therefore, in its view, less restrictive measures should be implemented, not least because of the discriminatory effect which the visual display ban has on producers depending on whether or not they were already present on the Norwegian market when the visual display ban entered into force.

67 The United Kingdom Government makes two points with regard to Article 13 EEA. First, it suffices that there are reasonable grounds, having regard to all available sources, to assume that the prohibition of a tobacco products display will further the objective sought. Second, it falls within the jurisdiction of the national court to assess and determine the suitability of the contested measure.

68 The United Kingdom Government submits that any assessment of suitability and necessity of the disputed measure should accord the Defendant considerable discretion in determining the level of protection and that the Court should not interfere in that regard unless the measure could be considered manifestly unreasonable or inappropriate taking into account the objective pursued. In this context, any guidance provided by the Court should take account of the reasoning adopted in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151 which dealt with national rules on alcohol advertising. The Government refers specifically to key propositions developed in that case; first, that advertising acted as an encouragement to consumption and, second, that, in the absence of common rules governing alcohol advertisements, it was for a Member State to decide on the degree of protection afforded to public health and how that degree of protection would be achieved.

69 Although EEA States enjoy wide discretion when deciding on the level of protection, such decisions are subject to judicial scrutiny with regard to their appropriateness and necessity in light of the objective pursued. However, the mere fact that differences of opinion exist as to the benefits which will result from a particular measure, does not lead to the conclusion that the state in question has exceeded its margin of discretion. In addition, differences of opinion on whether other measures may be considered less restrictive cannot be decisive in determining the scope of the discretion accorded to the Defendant. In the present case, the Plaintiff has referred to certain measures which it regards as less restrictive whereas the Defendant has not only argued precisely the opposite but also added that those measures are not as effective in attaining the objective pursued. According to the Government, case-law dictates that the burden of proof cannot be considered so extensive that the Defendant must prove that no other measure could enable its legitimate objective to be attained under the same conditions.

70 Conceding that the freedom of market participants will be negatively affected by a visual display ban, the United Kingdom Government argues that the Defendant has a discretion to determine on grounds of public interest how and in what manner public health should be protected. Only if it is shown that the disputed measure could not achieve the public health objectives pursued due to its manifest inappropriateness, should the measure be considered not to fall within the derogation established by Article 13 EEA. As this cannot be shown and having regard to the fact that the Defendant considered a wide range of material prior to adoption of the legislation, in the view of the Government, it must be concluded that the measure is not manifestly inappropriate.

71 ESA submits that if the contested measure is considered a restriction which is precluded pursuant to Article 11 EEA, it can be justified on the basis of Article 13 EEA. Consistent case-law may be found which acknowledges that restrictions on advertising relating to products harmful to human health may be justified. Furthermore, it falls to the jurisdiction of the EEA States to determine the level of protection accorded to human health.

72 In the area of human health EEA States should enjoy a wide margin of discretion. Accordingly, in the present case, it is not enough for the Plaintiff to allege that no evidence can be produced to support the argument that a visual display ban influences tobacco consumption. Instead, it suffices to show, as the Defendant has done, that there are reasonable grounds to assume that the display ban will have an effect on consumption.

73 Moreover, ESA stresses that the contested measure is only one element of a broader policy to reduce tobacco consumption. In the present case, it appears that the visual display ban is a consistent and logical addition to the advertising ban currently in force in Norway. As regards less restrictive measures, ESA cannot see what other measures could be applied.

74 The Commission submits that the ECJ has in its case-law, in particular in Case 152/78 *Commission* v *France* [1980] ECR 2299 and *Aragonesa*, cited above, acknowledged that restrictions on the advertising of products harmful to health have been considered justified on public health grounds as they aim to reduce consumption.

75 Further, the visual display ban must be considered not only necessary but also proportionate because the same level of protection cannot be achieved by less restrictive means. In this regard, the EEA States enjoy a wide discretion under the exception for public policy. Consequently, it was for the Defendant to decide that it was necessary to limit the visibility of tobacco products.

76 In the Commission’s view, the exception to the visual display ban, which applies to dedicated tobacco boutiques, makes no difference as to whether the measure in question is justified. It considers that the display of tobacco products in those boutiques is unlikely to encourage customers to purchase tobacco as they are

seriously considering or have already committed themselves to such a purchase before entering the premises in question.

Findings of the Court

77 According to settled case-law, the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the EEA Agreement, to decide what degree of protection they wish to assure (see *Pedicel*, cited above, paragraph 52, and, for comparison, Case C-421/09 *Humanplasma*, judgment of 9 December 2010, not yet reported, paragraph 32, and the case-law cited). Legislation which aims at controlling the consumption of tobacco with a view to preventing the harmful effects caused to the health of humans by tobacco products clearly reflects, in the view of the Court, health concerns recognised by Article 13 EEA.

78 It is for the national court to identify the aims which the legislation at issue is actually intended to pursue (see Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 43). The Court notes, however, that the parties to the present proceedings do not appear to dispute that consumption of tobacco products has a negative effect on public health and that the aim of the national ban on the visual display of tobacco products is to reduce such consumption.

79 However, the parties to the present case disagree as to the effects the ban may have on the consumption of tobacco products and whether the same effects can be attained with other less restrictive means.

80 In accordance with the case-law set out in paragraph 77 of this judgment, an assessment of whether the principle of proportionality has been observed in the field of public health must take account of the fact that an EEA State has the power to determine the degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved. As EEA States are allowed a certain margin of discretion in this regard, protection may vary from one EEA State to another. Consequently, the fact that one EEA State imposes less strict rules than another does not mean that the latter's rules are disproportionate (see, for comparison, Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 51).

81 Nevertheless, national rules or practices which restrict a fundamental freedom under the EEA Agreement, such as the free movement of goods, or are capable of doing so, can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it (see, inter alia, *Pedicel*, cited above, paragraph 55, and, for comparison, *Humanplasma*, cited above, paragraph 34, and the case-law cited).

82 However, where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, an EEA State may take the measures that reduce, as far as possible,

a public health risk (see, for comparison, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 30).

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

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

85 To the extent the legislation at issue is deemed suitable, it must be assessed whether the measures at issue go beyond what is necessary to meet the aims pursued. It follows from case-law that since Article 13 EEA constitutes an exception to the free movement of goods within the EEA it must be strictly interpreted. Therefore, it is for the national authorities to demonstrate that their rules are necessary in order to achieve the declared purpose and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-EEA trade (see, for comparison, *Humanplasma*, cited above, paragraph 38, and the case-law cited).

86 As regards the further assessment of whether measures less restrictive than the visual display ban could ensure a similar result, it is appropriate to leave this to the national court to decide on the basis of all the matters of law and fact before it. Review of proportionality and of the effectiveness of the measures taken relies on findings of fact which the referring court is in a better position than the Court to make (see *Pedicel*, cited above, paragraph 55, and the case-law cited, and Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, paragraph 38).

87 In this regard, it should be recalled that in proceedings under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, which is based on a clear separation of functions between the Court and the national courts, it is for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences that they have for the judgment which it is required to deliver.

88 In accordance with the above, the answer to the second question must be that it is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products.

V Costs

89 The costs incurred by the Finnish Government, the Icelandic Government, the Portuguese Government, the Romanian Government, the United Kingdom Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Oslo tingrett, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo tingrett hereby gives the following Advisory Opinion:

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

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

Carl Baudenbacher Thorgeir Örlygsson Per Christiansen

Delivered in open court in Luxembourg on 12 September 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President