

**BORGARTING COURT OF JUSTICE**

# VERDICT

**Ruled:** 15.02.2018

**Case No.:** 18-004746ASK-BORG/04

# Judges:

|  |  |
| --- | --- |
| High Court judge | Fanny Platou Amble |
| Appeal | Torkjel Nesheim |
| High Court judge | Thomas Chr. Poulsen |

Appellant Swedish Match AB Attorney Morten Goller

Respondent The State at the Ministry of Health and Care

Attorney Magnus Schei

**No restrictions on access to public rendering**

The case concerns a temporary injunction against the implementation of new rules on standardised packaging of snuff sold in Norway.

Prohibition of standardised packaging appears from the amendment to the Tobacco Damage Act section 30, adopted 10 February 2017 and entered into force from 1st of July of the same year. It follows from transitional rules that tobacco products which were on sale at the time of entry into force can be sold without standardised packaging until 1st of July 2018. The order applies to cigarettes, rolling tobacco and snuff. The new rules on packaging are stated in the regulation of the 22nd of June 2017 no. 942, Chapters IV to VIII, and, in practice, include prohibitions on the use of colours and the manufacturer's figurative trademarks and designs.

Swedish Match AB is a Swedish company that develops, manufactures and sells various tobacco products, including the so-called Swedish (Scandinavian) snuff. The company is Scandinavia's largest snuff producer. In the petition to the Government of the Ministry of Health and Care, it was argued that the injunction on standardised packaging of snuff constitutes an illegal trade restriction under Article 11 EEA, because the restriction is neither suitable nor necessary for the protection of public health, cf. EEA Agreement, Article 13. It was further stated that it was necessary to avoid a material injury or disadvantage (Section 34-1, first paragraph, letter b) of the Constitution, that the injunction was not put into effect until there was a legitimate judgment on the legality of it.

Swedish Match AB has so far not brought a lawsuit to test whether the injunction is legal. Oslo County Court ruled on the 6th of November, 2017 with this verdict:

* 1. The request is not accepted.
  2. In case of costs, Swedish Match AB pays to the State at the Ministry of Health and Care 799 895 - seven hundred ninety-nine thousand eight hundred and ninety-five - kroner within 2 – two – weeks from the announcement of the verdict.

In the ruling, the County Court writes the following about the background for the case:

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

…

The new Tobacco Directive does not directly prescribe requirements for standardised tobacco packs, but Article 24 (2) states that the Directive does not prevent Member States from introducing such legislation, subject to certain conditions.

…

On the 17th of March 2015, the Ministry of Health and Care sent a proposal for amendments to the Tobacco Injury Act with a view to introducing requirements for standardised tobacco packs. The requirement for standard packaging comes in addition to the requirements that follow from the regulation on labelling of tobacco products, including the health warning in section 11.

In the consultation note, a report was published by the Norwegian Institute of Public Health from 2014 "Health risks using snuff", and the following summary of the findings of the report was given (page 5, item 1.1):

"Due to the increase in the use of snuff among young people, measures to limit the use of snuff have gained a bigger place in the tobacco prevention work. In 2014, the Norwegian Institute of Public Health conducted a summary of health risks using snuff. The report concludes that snuff is carcinogenic, it gives a worse prognosis of cancer disease, increased mortality after myocardial infarction and stroke, increased risk of diabetes 2 and the use of snuff in pregnancy is very harmful to the foetus. The Norwegian Institute of Public Health shows in the report that the increase in snuff consumption in Norway has tripled over the last five years and that the increase is greatest among the youngest. The Institute further states that the sharp increase in snuff use among young people can be characterised as an epidemic and that there is no indication that the increase will stop. The Institute believes that there are concerns about the number of cases of cancer caused by snuff use, taking into account today's many young snuff users, and for the number of pregnant women who are using snuff during pregnancy, an area where one can expect to increase in the coming years.

On the 10th of June 2016 the Ministry of Health and Care forwarded, in Prop. 142 L (2015-2016) Amendments to the Tobacco Injury Act (Implementation of Directive 2014/40/EU and Standardised Tobacco Packs), Amendments to the Tobacco Damage Act. In the statement, item 1.4.2, a corresponding summary of the report of the Norwegian Institute of Public Health as mentioned above was given, which stated, among other things, that there are "good indications that snuff increases the risk of pancreatic cancer, oesophageal cancer and cancer in the oral cavity" (page 12).

In addition to forwarding proposals for legislative amendments to implement the new tobacco directive, the proposal also contained proposals to introduce standardised tobacco packaging and a legal authority to lay down further requirements for the standardisation of all tobacco products. The bill found that the proposed legal aid to enforce standard packaging would include both tobacco packaging, tobacco products and associated equipment as well as tobacco surrogates (such as herb cigarettes, herb snuff and e-cigarettes) but that the ministry did not plan to require standard packaging of tobacco surrogates now.

Regarding the justification for applying standard packing of snuff, this was discussed in Bill 3.7.2.

"However, in the case of snuff, it is not appropriate to make exceptions to the requirement for standardised packages. A number of snuff products with untraditional designs have been on the market in recent years, which has contributed to the product's increased appeal to the youth. The Ministry therefore considers that it is particularly important to standardise these products. Although smoke-free tobacco, and especially snuff, is not as harmful as smoking tobacco, the ministry will emphasise that the use of smoke-free tobacco also poses a risk of serious health damage, cf. more detailed information in section 4.2 above. If

The health authorities would argue that only smoking tobacco should be covered, this could be perceived by young people as a signal that there is no health risk for the use of smoke-free tobacco. Such a signal will be particularly unfortunate in view of the sharp increase in snuff usage among young people in the last decade.

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

One of the purposes of the proposal for standardised tobacco packs is to contribute to the denormalization of tobacco products and tobacco use in society. The SIRUS Report 2/2014 reviewed the Norwegian newspaper's coverage of snuff in the period 2002-2011. The report points out, among other things, the following:

"The content of the reports indicates that the newspapers depict a development towards normalisation of snuff in the Norwegian society. Even though several of the listings have neutral or negative values, they can still be considered to play a role in the marketing of snuff in a country like Norway, which has a ban on tobacco advertising."

The Ministry believes that this supports the need for the proposed regulation to include snuff as well.

Furthermore, the increase in snuff use among young women has led to an increasing problem of snuff use during pregnancy. Serious health consequences for the foetus is among the findings presented by the National Institute of Public Health in its health risk assessment from 2014, cf. more detailed information in section 4.2 above.

Although snuff is less hazardous to smoking than tobacco smoke, the ministry thinks that the health risk of snuff in terms of young people should not be compared primarily to health risk of smoking, but by not using any kind of tobacco.

The dissemination of tobacco product information and the risk of health damage to smokers should take place through channels other than the introduction of differentiated regulation of snuff and smoked tobacco in standardised tobacco packages."

In Rec. 101 L (2016-2017) Recommendation of the Health and Care Committee on Amendments to the Tobacco Injury Act (Implementation of Directive 2014/40/EU and Standardised Tobacco Packs) Section 1.2.3 outlined the purpose of introducing requirements for standard packaging:

"The overall purpose of the proposal for standardised tobacco packs are to reduce the proportion of children and young people who start tobacco with a view to protecting them from the harmful effects of tobacco use. More specifically, the purpose of the measure to make tobacco products is less attractive by limiting the packaging's advertising effect, increasing the effect of the mandatory health warnings, and minimising the risk that the package design gives a misleading impression of the health risk associated with tobacco use. It is also assumed that

The measure will contribute to a moderate reduction in tobacco consumption among adults, as well as to denormalize tobacco products and tobacco use in society."

After a verbal discussion over five days, the County Court found that Swedish Match AB had not shown that the injunction on the standardised packaging of snuff was contrary to Article 11 of the EEA Agreement, cf. It was therefore not necessary for the court to decide whether the other conditions for disqualification in section 34-1 of the Dispute Act were fulfilled. The Cancer Society acted as a part-help for the benefit of the state, cf. section 15-7 of the Danish Courts Act.

**Swedish Match AB** has appealed against the order of Borgarting Court of Appeal. The appeal concerns the assessment of evidence and the use of law. The company has essentially made the same as for the city delegation, cf. the reproduction in the order. A number of new documentation has been presented, mainly about snuff and health risks. Further process papers have been submitted, last on 6 February 2018. The basis of appeal for the Court of Appeal can be summarised as follows:

It is undisputed that the injunction on standardised packaging of snuff constitutes a restriction under Article 11 of the EEA Agreement. The question is whether the injunction can be justified by relevant general considerations. The state invokes the concern of public health, and especially the desire to protect children and young people from snuff. The purpose is relevant under Article 13 of the EEA Agreement, but the order is neither suitable nor necessary for fulfilling the legal purpose.

The injunction is based on the wrong fact regarding the health risk of using snuff. There is no cover for government claims on cancer risk and a "snuff epidemic" among young people. Already in 2001, the EU removed the requirement that snuff boxes should be labelled with a warning of cancer risk. Epidemiological studies and actual experiences related to public health in Sweden show that snuff consumption is associated with very low health risk, and not greater than for many other foods, such as dairy products and coffee. In a new publication in The Lancet following the city's ruling, the Global Burden of Disease 2016 reported for the first-time deaths caused by snuff on a global scale, and the number is zero. By comparison, other forms of smoke-free tobacco cause 48,000 deaths per year and cigarettes 6 million deaths per year.

The decision to introduce standardised snuff packaging was not anchored in precautionary terms, nor can it be anchored in such respect. There is extensive and long-term research into health effects using snuff, both in terms of risk appetite and injury. The product has been on the market for decades.

The Court's assessment of the importance of the injunction for public health is inadequate. Among other things, it is overlooked that the legislature has not considered the importance of snuff as a harm-limiting alternative to cigarettes. By spreading false information about health risks of snuff and with the introduction of the injunction, the use of snuff as an alternative to cigarettes is prevented, with have an adverse effect on

public health. The expert witness Hammond deliberately gave an incorrect statement in the court of matters related to this.

The Drugs Board has wrongly emphasised the ban on snuff in the EU and pending legal processes about this, and misunderstood Article 24 (2) of the Tobacco Directive 2014/40/EU. The court does not distinguish between snuff and cigarettes as regards the justification of standard packaging, despite the fact that the health risk of the two products cannot be compared. This leads to erroneous assessments when the court uncritically uses lawsuits relating to cigarettes in assessing whether standardised snuff packages are suitable and necessary to protect public health. Norway is the only country that has imposed such an injunction, and no other country has proposed it.

The court has also drawn incorrect conclusions on the requirement of proof and the state's margin of discretion in the proportionality assessment.

The state's differential treatment of e-cigarettes and snuff is incompatible with the condition during the aptitude test that states must pursue the stated goal in a consistent and coherent manner. Based on the research available, it is incomprehensible that injury reduction is used as an argument for lifting the ban on e-cigarettes, while rejecting it as baseless for snuff. The County Court interprets suitability incorrectly and also uses it wrong in the decision.

There are key weaknesses also in the case of the County Court's assessment of the necessity of the injunction. It cannot be concluded from cigarette cases where the massive health risk is undisputed that the state should be given equivalent room for action in assessing whether an injunction on standardised snuff packaging is necessary. The state has not fulfilled its burden of proof for the purpose of protecting public health cannot be achieved with less interventive measures, including those proposed by the appellant party, including age limits, setting of limit values ​​for unwanted substances in snuff and smoother, more targeted packaging requirements. Furthermore, the government's regulation of e-cigarettes shows that the level of protection is not as high as it is claimed.

In view of this, it is probable that the injunction for standardised packaging of snuff is contrary to the EEA Agreement, cf. Section 34-2, first paragraph, of the Dispute Act.

Also, a protection basis has been proven. Deferred implementation of the injunction is necessary in order to avoid material injury or disadvantage for the appellant party, cf. section 34-1, first paragraph, letter b, of the Dispute Act.

The most serious consequence for the appellant party is the effect of the injunction as "denormalization measures" by the fact that, on the wrong grounds, it is true that snuff is similar to cigarettes. The order thereby supports misunderstandings about the effects of snuff, misunderstandings as the appealing

party will be prevented from correcting because of the ban on advertising in the Tobacco Injury Act section 22. Various health warnings for cigarettes and snuff will not counteract the unsustainable stigmatisation of snuff as a product with such a high health hazard that it must be packaged in the same way as cigarettes. The state introduces a restriction for the purpose of denormalizing and destroying the sale of a legal product. The denormalization effect leads to an immediate and baseless stigma of snuff, taking into account current research on health risks when using the product. This must alone mean that the requirement for protection basis must be considered fulfilled as the measure will cause Swedish Match a material injury and disadvantage, which in part will be irreparable and nevertheless difficult to quantify.

The question of the injunction will result in irreparable damage resulting from unsustainable stigmatisation of snuff as a product, closely related to the issue of health risks associated with snuff, i.e. the reasons that justify the main requirement and which may be highlighted through the appeal procedure. It is therefore difficult to consider the question of protection basis isolated before the main requirement is dealt with, which implies that the question of protection basis should persist until verbal negotiations have been conducted.

The possibility of claiming compensation does not mean that there is no need for reprisals. In view of the unsustainable stigmatisation that the injunction will lead to, it is misleading to reduce the question of whether there is a risk of injury in the form of "temporary sales reduction" as the state does. In light of the denormalizing effect the state seeks to achieve with the injunction, compensation will clearly not be sufficient to safeguard Swedish Match's interests in the matter. There are no indications for the government's assumptions of sales development if Swedish Match is winning in the main. Selling of snuff in original packaging means no "marketing" of the product, and the products are not aimed at children and adolescents. Furthermore, it is undisputed that the condition "injury or disadvantage" includes both financial and non-material damage. There is no indication that an option for claiming compensation will be sufficient to prevent measures from being considered necessary. It will hollow out the prosecution institute and be contrary to the overall assessment. The Supreme Court has given an instruction to be taken. Such an interpretation is also difficult to reconcile with EEA the law's efficiency principle.

Furthermore, the injunction is causing consequences to the production, due to the special requirements for packaging of snuff to the Norwegian market. Also, the labels on these boxes must be changed.

Thirdly, the injunction over time could affect the sale of the appellant's products. By prohibiting the company from using its figurative trademarks and designs, consumers can no longer distinguish the company's products from its competitors. Similar packaging will lead to increased processing time in stores when customers are shipped and, in the long term, a narrower product range. Low-cost products with a lower quality and more unwanted additives will have a facilitated entry into the market. This will not only harm the appealing party, but may also increase the risk of health injuries.

Prohibition is clearly proportional, cf. section 34-1, second paragraph, of the Dispute Act. There is no obvious discrepancy between the interests involved. It is misleading to argue that basic public health considerations here are held up against purely financial interests. The essence of the case is just about the health considerations which the state makes in order to defend the order, are sustainable. If the state becomes aware that the injunction is based on the precautionary principle, the state must demonstrate that the injunction is based on a thorough and research-based assessment of health risks. When it comes to health risks when using snuff for pregnant women, it is the nicotine that poses the risk. This risk cannot justify standardised snuff packages, when the state also allows for the sale of e-cigarettes.

The rules on standardised packaging have been prepared by the government for several years and there is no need for rapid implementation. In any case, the disadvantages of the state at postponement are not disproportionate, measured against the high costs and, in part, irreparable reputation consequences imposed by the appellant upon the implementation. The disadvantage the state imposes upon postponement of the new rules is not in "obvious discrepancy" to Swedish Match's interests in the measure to make a decision. The appealing party's choice of procedural traces is irrelevant and prohibition was withdrawn as soon as the rules were adopted.

Verbal negotiations are required to have the case properly informed, cf. section 29-15 second paragraph of the Disputes Act. There should be five court days reserved.

Swedish Match AB has forwarded this claim:

1. The State at the Ministry of Health and Care is forbidden to implement or apply the injunction on standardised snuff packaging as specified in the Tobacco Damage Act section 30 and the regulation on the amendment of the regulation on the content and labelling of tobacco products of 22nd of June 2017 no. 942 Chapters IV and VIII to Swedish Match AB until there is a valid judgment on the legality of the injunction.
2. Swedish Match AB is charged with the costs incurred by the County Court and the Court of Appeal.

**The state of the Ministry of Health and Care** has generally applied the same to the Court of Appeal as for the County Court, cf. the references referred to in the order and subsequent prosecution, by 5th of February 2018. The basis of appeal for the Court of Appeal can be summarised as follows:

The County Court's ruling is correct in the result and mainly in the grounds. Additionally, there is no protection basis, and dismissal as required will be disproportionate.

The Appeals Court also suggests that the Public Health Institute (FHI) and the Ministry deliberately leave the population on health risks at snuff and have hidden motives for

the injunction of standardised packaging of snuff. The allegations are groundless and difficult to reconcile with the international regulatory approach. Snuff is forbidden in the EU, also in the Third Tobacco Directive 2014/40/EU. Appealing Party has pending litigation in the European Court of Justice regarding the legality of this prohibition. The tobacco industry's attack on secondary legislation in Article 24 (2) of the Directive to introduce standardised tobacco packaging has been rejected by the European Court of Justice (C-547/14 Philip Morris). WHO's Tobacco Convention from 2003 recommends that states introduce standardised packaging for all tobacco, including snuff. A number of countries have already introduced this.

International research supports that the use of snuff imposes a risk of serious health issues. The ban on advertising has led to the fact that the tobacco industry has invested significantly in developing packaging design for snuff, especially aimed at women and young people. In recent years there has been a strong increase in snuff use among young people. The prohibition on standard packaging can be justified in the "preventive" principle. It is certain in the EU that the states have a margin of discretion in the field of health, and the ruling is not affected by law enforcement in this regard.

There is no basis for the appellant's assertion that the district court is actually and lawfully mixing snuff and cigarettes. The court makes an independent health risk assessment for snuff. Regarding the question of whether there is reason to assume that standard packaging reduces consumption and is necessary to achieve the chosen level of protection, it is relevant and correct to refer to the case law of other tobacco products.

As for the suitability test, the appeal brings little new to light. The assessments of this in the ruling are essentially correct. However, it is irrelevant to assess whether a decision has been made under the wrong basis by the city council, see pages 23-31. The crucial thing under EEA law is whether the measure based on an objective assessment of the current knowledge can be justified in Article 13.

When it comes to health risks using snuff, the use of the term "epidemic" in the FHI report does not have any independent significance. The point is that daily use of snuff among young men was more than fivefold from the turn of the century, and for young women more than doubled in the period 2005-2013. The reason for the snuff in the Global Burden of Disease in 2016 was insufficient data and evidence. It is difficult to quantify cancer risk in snuff, but there are good indications that increased use of snuff probably leads to increasing public risk for snuff and TSNA-related cancers. Using snuff also increases the risk of other serious health outcomes, including serious health effects on the foetus during pregnancy and increased mortality are used in people who have had heart attack and stroke. Since snuff is addictive, use may lead to recruitment to more dangerous nicotine products such as cigarettes.

As regards the appellant's claim that standardised snuff packs will adversely affect public health by limiting the use of snuff as harm-limiting alternative to cigarettes - for those who will quit smoking and those who are starting - no new evidence has been obtained for the Court of Appeal, nor does it impair the assessment by the County Court. There are no actual reasons for these claims. The risk of double use and the fact that snuff becomes a gateway for smoking is not taken into account. The attack in the appeal of Professor Hammond is unjustified. You must read his statements in context. There is extensive research material to support that standardised packaging of tobacco products as an effective means of reducing consumption.

Nor in the case of the authorities' differential treatment of snuff and e-cigarettes with regard to packaging requirements, there is anything noteworthy new in the case in the court of appeal. The respondent essentially agrees with the County Court Judge's assessment that the difference treatment is not inconsistent but substantiated, and thus does not void the lawfulness of the injunction.

The state maintains that the requirement for standardised snuff boxes is necessary to ensure the high level of protection that the state has chosen for the specific objectives that the measure seeks to achieve and adopts the City Committee's assessments in the ruling. It also includes the assessment of alternative minor interventions.

However, no accused party has shown that there is a protection basis. Swedish Match's interests in the case are of purely economic value, and there is a long way to go to ensure that the protection basis is applicable.

The denormalization effect, highlighted as the most serious consequence of the injunction, has already been in progress for many tobacco products in the form of increasingly stringent restrictions on sales. The injunction involves no unsustainable stigma of snuff. The authorities have stated in several places that there are various forms and degrees of health risk associated with snuff and cigarettes. The requirement for standard packaging of both products will clarify this difference because the required health warnings on the packages - which are very different for snuff and cigarettes - are becoming more eye-catching. That it would mean material and irreparable harm to equal treatment of tobacco products with different health risks is also contrary to the construction of the Tobacco Damage Directive (2014/40/EU). Different levels of health hazards do not preclude strict, common regulatory measures for all tobacco products, for example in Article 13.

The Appellant Party has not proved that the injunction will result in irreversible damage to the Appellant Party as soon as it is executed. Standardised packaging is intended to reduce the advertising pressure given by the packets, but there is no indication that a temporary ban gives an irreversible effect. On the contrary, the large increase in snuff and snuff consumption after the millennium, especially among young men and women, suggests that the increased resource-

use from the tobacco industry in the marketing of snuff, among other things in the form of package design especially aimed at young people, has had an impact. Refer to Prop. 142 L (2015-2016) pages 49 and 65, and to the FHI Report page 9 and 41. There is no reason to believe that there will be no similar development in the future if Swedish Match were to succeed in the main case and again be able to design the snuff boxes in an attractive way for children and adolescents.

Appealing party's need for measure is not large, and measure is therefore not necessary. The interests of the appellant parties are after all to be considered solely of an economic nature, and these interests have been safeguarded through the possibility of a subsequent claim against the state, which has been fully sought. In addition, the prosecution was brought at a time when it was about one year until the regulation came into force. One could thus have been given a verdict in the main case if a serving had been taken out.

Regarding the costs associated with the stated need for production adaptations, this interest is solely of an economic nature and adequately safeguarded through the possibility of claiming compensation. In any case, there is no "material" injury or disadvantage for the company. To this end, the cost of production conversion will be known at the time of a claim for compensation, while the manufacturers have been granted a transitional period until 1st of July 2018 for existing products. Any loss of future sales does not meet the requirement for protection basis. This is nothing but the so-called irreparable stigmatisation.

In any event, disqualification is disproportionate, section 34-1 second paragraph of the Conflict Act. In this case, central health considerations concern the applicant's financial interests. It takes a lot for the proportionality assessment to suggest that the prohibition is given. One can draw one parallel to the European Court's judgments on health considerations against economic interests, for example, in C-547/14 Philip Morris section 156, and for the proportionality assessment in offensive cases, for example, T-70-99 Alpharma where an injunction was denied and it was stressed that irreversible health injuries clearly had to weigh heavier than financial interests.

In the weighing of section 34-1, second paragraph of the Dispute Act, the Court of Appeal may base the assessor's assessment of health risks associated with the use of snuff. The risk of various serious health outcomes in pregnant women is under no circumstance contradicted by Swedish Match, and in itself is the material reason. This is especially true when you know that snuff usage among young women has increased from about 2% to approx. 14% between 2005 and 2013, while snuff is highly addictive.

Through the transitional rules, manufacturers have been given ample time to adapt to the injunction. That appealing party has not yet withdrawn a sentence, also suggests that dismissal is not proportionate. Such unnecessary delay of the introduction of an instrument for public health is not a safeguarding interest in the prosecution institution.

At the same time, postponed implementation will cause children, adolescents, pregnant women and other vulnerable groups to be exposed to the advertising effects of the snuff packages as long as the disorder is at risk, resulting in increased snuff usage and health damage.

In any case, there is no real need for relegation beyond the time when they are in the district court.

The appeal case can be decided in writing in accordance with the main rule in the Norwegian Constitution Act § 29-15 first paragraph. It is shown that the County Court's ruling is very thorough and extensive appeal and appeal response has been given. However, if a verbal debate is decided, it is sufficient to set 3-4 court days.

The State of the Ministry of Health and Care has made such a claim:

1. The appeal is rejected.
2. The state's Ministry of Health and Care is accused of costs.

**The Court of Appeal** notes:

The Court of Appeal will first determine whether there is a protection basis, cf. the Dispute Act

Section 34-1, first paragraph cf. section 34-2 first paragraph. It is letter b of section 34-1, first paragraph, which is invoked. The imposition requirement for postponed implementation of the regulations on standardised nail packages is claimed to be necessary in order to avoid significant injury or disadvantage for Swedish Match.

In e-mail on January 18th, the Supreme Court informed the parties that the court would first assess the protection basis and that the court did not consider it necessary to depart from the general rule of law on written grounds if the appeal was settled on this basis, cf. section 29-15 of the Constitution Act first cf. second paragraph. At the same time, the parties were informed that there will be a court hearing if it appears that the court of appeal must consider the main requirement. The appealing party has argued that in this case it is difficult to determine the basis of security and proportionality in isolation. It is apparent that the essence of the case - if the requirement for standardised snuff packaging is based on a failing factual basis of health risk in the case of snuff - is very closely linked to the questions about protection basis and the consideration of interest, which, therefore, should be considered by the appellant's opinion after verbal hearing.

The Court of Appeal has concluded that the protection basis has not been established and believe that, based on the grounds given by the Court of Appeal for its outcome, it is reasonable to settle this without verbal hearing and without considering the main requirement. Main requirements and protection basis are basically independent conditions of imposition. Even though the threshold for establishing a protection basis on circumstances can be influenced by how clear it is that the main requirement leads

forward, cf. Flock, Temporary Assurance, page 107, there is no legal reason to consider the security requirement in isolation, cf. Flock page 277 with references to case law.

The requirement for protection basis in section 34-1, first paragraph, letter b, provides for a composite assessment, which includes, inter alia, the importance of the disputed legal relationship for the plaintiff, the plaintiff's need for a temporary injunction, how invasive a temporary injunction would be, the behaviour of the sued etc., cf. Rt-2002-108. Where the damage or disadvantage relied on is of an economic nature, the possibility of claiming compensation could lead to the alleged damage being not considered material or justify the absence of any injunction. Refer to Rt-1996-1625, Rt-1999-1220 and LB-2008- 183125. However, if the loss is difficult to calculate or pursue, or it is also a matter of other material adverse effects than the economic, injunction may still be necessary, cf. Flock page 103 with references to case law. The possibility of claiming compensation will be one of several factors in the overall assessment that must be undertaken if a temporary arrangement is required to avoid material injury or inconvenience. The Court of Appeal cannot see that it is raising problems in relation to the EEA's efficiency principle to emphasise the possibility of claiming damages in assessing whether there is a protection basis, see presumably, for example, C-432/05 Unibet, in particular the Advocate General's proposal.

The Appealing party has in particular shown three factors to support the existence of a protection basis. Firstly, the regulation's rules on snuff packaging improperly stigmatise snuff, by virtually equating snuff and cigarettes. By this, the general public is given a clear but wrong impression that both are equally harmful to health. This damage is said to be at least partially irreparable, and nevertheless difficult to quantify. Furthermore, it is stated that the rules apply to the appellant party to adjust the production especially for the Norwegian market. Finally, it appears that the rules on standardised snuff boxes in the long term may adversely affect the applicant's sales, both by launching new products and by losing market shares to competitors offering cheaper lower quality snuff products.

Regarding the cost of production restructuring, the request for a preliminary ruling made it clear that the appellant must develop and produce its own packaging and labels for the Norwegian market. At the time of the request, the regulations had recently come, and it was stated that the production implications for the appellant party were not yet explained in detail yet. The costs were estimated to amount to MSEK 40 +/- 30%. There has been no further information about this during the course of the case, despite the fact that the company should now have sufficient grounds for estimating expected costs somewhat more precisely.

The Court of Appeal, however, finds it clear that costs for production adjustments do not constitute a material injury or disadvantage that necessitates dismissal. If the injunction proves to be illegal, these costs may be required to be replaced by the state. Persecution of a

compensation claim will not be hampered by no refusal now, cf. Rt-1996-626. The state is undoubtedly capable of being sued. It is not necessary for the Court of Appeal to take a preliminary ruling on whether the conditions for compensation are met, including the importance of the liability, that the case concerns a law / regulation alleged to be contrary to a provision in the main part of the EEA Agreement.

There are no indications that the costs that may arise due to necessary manufacturing adjustments are so high that they may threaten the company's existence or otherwise cause irreparable damage to Swedish Match. The fact that a provisional temporary restructuring process does not impose *significant* damage or disadvantage on the appellant party in such a way that a temporary arrangement is required to stop the implementation of the regulation is also substantiated by the fact that the company has not expired more time to reject the order through a lawsuit against the state, thereby avoiding such costs incurred. It is now about a year since the legislature adopted a long-term injunction on standardised packaging of snuff.

Regarding the claim that the requirement for standardised packaging will lead to a sales loss for the appellant party, partly as a result of narrower product range and partly in the form of loss of market shares to competitors with cheaper / inferior products, suggest that "the injunction over time could affect" the sale. The effect is thus produced as remote and uncertain. In addition, there must be sales reduction beyond what is attributable to the appellant party names such as stigmatisation - denormalization - of the product as such, a separate statement which the court of law returns to below.

The Appellant Party has not been likely to cause damage or inconvenience associated with the launch of any new products that were covered by the new regulations on standardised snuff packaging already from the entry into force on 1 July 2017.

According to the Court of Appeal's view, it is not probable that the alleged effects of the injunction will occur, and at least not that they will have an extent and a character which means that the damage must be considered as essential that it necessitates deportation by a temporary injunction.

In addition, the Court of Appeal notes that this is also a purely economic loss that could be compensated through a claim for damages. According to the Appellate Court's view, this type of loss in the circumstances may be difficult to quantify and document, not a decisive argument for the existence of a security basis. It is shown, inter alia, for LB-2014-55091 and LB-2008-183125. In a compensation case it is sufficient to prove a loss. It is not uncommon for this assessment to be an essential element of discretion. Nor will the pursuit of a possible claim for damages on this basis be hampered by the accused party having to wait for the claim.

Finally, the appellant claims that the most serious damage suffered by the company when implementing the injunction on standardised snuff packaging is that this will lead to immediate and irreversible reputation consequences in the form of an unjustified and unsustainable stigma of snuff. It is therefore a harm that not only affects Swedish Match, but all the snuff producers that sell in Norway.

The claim of reputation loss includes, as the Court of Appeal sees, two arguments. Firstly, stigmatisation is unjustified because the actual assumptions about the health risk associated with the use of snuff on which the injunction is based is incorrect. Furthermore, by requiring standardised packaging for both snuff and cigarettes, the order misleads the market as believing that snuff is as harmful to cigarettes, thereby reducing both the turnover in general and the role of the snuff as harm-limiting alternative to cigarettes.

Particularly the first argument is closely linked to the main requirement. However, the Court of Appeal does not consider that this precludes legal compliance with the fact that the court can determine the claim for lack of security without considering the main requirement. The argument only becomes self-relevant if Swedish Match is legally established that the requirement for standardised snuff packaging is based on the incorrect fact regarding the health risk of snuff and that the injunction cannot therefore be validly justified in the interests of the public. In that case, stigmatisation will initially be corrected. However, Swedish Match claims that the company will still be subject to permanent injury or inconvenience, as understood by Swedish Match as a result of the advertising ban, it will be prevented from disclosing this. The Court of Appeal, however, cannot see that the appellant has proved that the company with a legally enforceable judgment, which will be publicly known, of low health risk with the use of snuff and freedom to choose packaging design will cause continued and lasting damage or disadvantage in terms of reputation or turnover.

If Swedish Match does not agree with its view on health risk, but the injunction is known for other reasons, for example in the suitability or necessity test under Article 13 EEA, stigma can hardly be described as unjustified and untenable.

Regardless of which of these two reasons Swedish Match had to gain in the main, the company may again use such snuff packaging that the company finds useful to promote sales. As the state has pointed out with references to actual information in the preamble to the amendment (Prop. 142 L (2015-2016)) and the report from the Public Health Institute, information that Swedish Match has not contested, the breadth of the company's product range and the number of young snuff users, both men and women, have risen sharply since the millennium, despite the fact that during the period been a strict regulatory framework with many restrictions on the sales of the product. According to the Court of Appeal's opinion, the appellant has not shown that a recovery of the current situation in terms of packaging freedom will be caused by injury or disadvantage in the form of a lasting and

irreversible financial or non-financial loss. Revenue loss in the interim period in which the injunction has been in force may be compensated by compensation.

In connection with the "denormalizing effect" of snuff products as the accusing party claims to inflict damage to the company, the Court of Appeal notes that it is unlikely that over time a certain loss of reputation will occur for both snuff and other tobacco products through the

"Denormalization" of tobacco that is taking place in Norway and the EU. This is a desired effect that is expressed both by the government's attitude campaigns and by the extensive public-law restrictions on the marketing and sale of such products. Negative consequences for tobacco manufacturers of this regulation in terms of reduced use and sales, however, are not caused by the contested packaging requirement, and therefore cannot serve as a protection basis.

Regarding the argument that the requirement for standard snuff packaging must be interpreted as a statement from the authorities that snuff is as hazardous as cigarettes because cigarettes are subject to similar requirements for neutral packaging, the court of appeal is difficult to see that the accused party has coverage for such a postulate. It must be clear from the Court of Appeal that the type of injunction we are talking about here is based on threshold considerations and does not in itself involve any direct or indirect comparison of the degree of health harmfulness between the tobacco products covered by the injunction. In this context, it is also necessary to point out that the regulations on standard snuff packaging have the specific purpose of protecting teenagers from snuff usage, while the purpose of the corresponding cigarette rules applies to all sections of the population. During the legislative preparation, the majority of the Health and Care Committee at Parliament stated that "although smoking is far more dangerous than snuff, it is also not desirable for young people to start with snuff, which is highly addictive" (Rec. 101 L (2016-207) page 11).

Appealing Party has not shown examples that the authorities have, in ways other than through common marketing and marketing restrictions, issued statements that cut snuff and cigarettes over one comb in health damage. On the other hand, the various requirements set out for mandatory health warnings on the packs for snuff and cigarettes, respectively, in FOR-2003-02-06-141, sections 10 and 11, clearly indicate that cigarette smoking results in a significantly greater health risk than snuff use.

The Court of Appeal cannot see that the appellant has proved that standardised snuff packages will cause reduced sales to those customers who would otherwise choose snuff as harmful alternatives to cigarettes.

With regard to Swedish Match's claim that an immediate and irreparable loss of reputation will arise when implementing the injunction, in addition to the financial loss that can be compensated for compensation, the Court of Appeal will also mention that the appellant's own conduct raises doubts about the gravity of this argument. As mentioned above, the regulations on standard snuff packaging have been in preparation since 2015. In the course of the process towards final legislative decision about a year ago, it must have been clear to Swedish Match that the company would not raise its objections to the proposed regulations in connection with the legislative process. Nevertheless, the company has still not taken legal action today to ensure that the injunction on standardised snuff packaging is illegal. Although it may not have been possible for a ruling to be enforceable before the injunction came into force on 1st of July 2018, it is likely that full consideration of the case at least in one court with the outcome expected by Swedish Match would increase the opportunity to reach with a delay in time to ward off the negative consequences of the implementation that are as immediate and irreversible as the accused party now claims.

Based on an overall assessment, the Court of Appeal concludes that there is no basis for protection. The Appellant Party has not shown that the entry into force of the injunction on standardised snuff packaging will cause material damage or disadvantages of such a character that it necessitates displacement, even if considering the reported damage and inconvenience. The appeal must therefore be rejected.

The Court of Appeal does not have to decide if the requisition will be disproportionate from an interest settlement, cf. section 34-1 second paragraph of the Dispute Act. Furthermore, the Court of Appeal considers that it would be difficult to make such an interest rejection without having considered the main requirement. The strength of the interests concerned on the government side, and therefore the outcome of the interest denomination, will depend on the basis on which the main requirement is considered probable. For example, the assessment under Section 34-1 of the Dispute Act may fall unequal if the order for neutral packaging was considered contrary to the EEA law on the grounds that the risk of serious health damage to snuff was not considered probable, compared to undercutting on the grounds of lack of consistency in the use of funds or that the purpose can be achieved with less intervention measures.

The respondent has won the case and, according to the main rule in section 20-2 of the Disputes Act, has a claim to cover its costs. There is no basis for exempting Swedish Match from the obligation to pay compensation under the third paragraph of the provision. The state has submitted a cost statement of NOK 101,500, which is stated in full as a fee up to and including appeal. No objections have been raised to the claim. Nor has there been any additional requirement for subsequent processing. The Court of Appeal considers that the claim made appears to be somewhat high, but accepts it as a substitute for the necessary work, pending the decision of the Court of Appeal, cf. section 20-5, first paragraph of the Disputes Act.

The verdict is unanimous.

# ORDER

1. The appeal is rejected.
2. In the costs incurred by the Court of Appeals, Swedish Match AB pays to the State at The Ministry of Health and Care 101,500 - one hundred and one thousand five hundred kroner within two weeks from the announcement of the order.

Fanny Platou Amble Torkjel Nesheim Thomas Chr. Poulsen

Documents in accordance with signed original: Britt Lise Hagen, signed electronically