



PHILIP MORRIS NORWAY AS

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Avdelingsdirektør Lisbeth Hårstad

Response to the public hearing on the proposal to ban the visible display of tobacco products at points of sale, as well as other changes to the Tobacco Damage Act and the Advertising Regulation.

Philip Morris Norway AS welcomes the opportunity provided by the Department of Health and Care Services to comment on its proposal to ban the display of tobacco products at points of sale and certain other amendments to the Tobacco Damage Act and the Advertising Regulation. As we are not a member of the Norwegian Tobacco Manufacturers Association (Tobakkindustriens Felleskontor), we respectfully submit these separate comments for consideration by the Department.

We support the “main objective” of the proposal which the Department states is to “reduce the number of smokers and snuff users among children and young persons.” We and our parent company, Philip Morris International, believe that preventing minors from smoking and using other tobacco products should be an integral part of a comprehensive regulatory framework governing the manufacture, marketing, sale and use of tobacco products. We therefore have supported and will continue to support regulations that are intended to reduce tobacco use among minors and the serious harm caused by tobacco products.

However, we do not support a ban on the display of tobacco products at points of sale. Such a ban is disproportionate and contrary to the law because (1) it would significantly restrict competition and commercial freedom, (2) its benefit to public health is speculative, and (3) the Department has failed to consider or implement other less restrictive and, we believe, more effective measures to achieve its objective. In short, the proposal does not pass the proportionality test required by Norwegian law and the law governing the European Economic Area (EEA). We therefore urge the Department to amend its proposal in order to reduce the impact on competition and, at the same time, further its legitimate goal of preventing youth tobacco use in Norway.

1. A Point of Sale Display Ban Would Unduly Restrict Competition and Adult Consumer's Ability to Select Tobacco Products

The Department states that there is no “doubt that ... a [display] ban will remove the use of positioning as a competitive measure between the producers” but claims that the public health benefits. We agree that a display ban would remove a means of competition between manufacturers, importers and retailers. It is well established and beyond dispute that a point of sale display ban will adversely impact the ability of manufacturers, importers and retailers in Norway to compete in the already restricted tobacco market.

To begin with, Norway's laws regulating the promotion of tobacco products are some of the most restrictive in the world. As a result, tobacco product display at retail is the only legal means for manufacturers and retailers to let consumers know which brands are available in the marketplace. In these circumstances, the effects of a display ban on the competition will be substantial. Moreover, as the Department knows, display space at retail is an important component of competition in the consumer goods sector. In fact, display space has been at the heart of numerous anti-competition disputes in the EU where courts, governments and manufacturers have stressed the importance of access to display in retail to the ability to enter into and compete in a market.¹ Thus a product display ban would strip manufacturers of one of the only means left in Norway to grow market share and/or introduce new brands and would likely provide a competitive advantage to companies and brands with existing high market shares and consumer recognition.

The Department asserts that a ban would “not result in any hindrance to the adult tobacco consumer or a reduction of the product range” and claims that “[m]ost adult consumers know which brand they prefer and need no visible reminder of this.” To support this point, the Department cites an Australian study that purports to establish that 84% of adults have already decided their brand prior to entering the point of sale. But even if we assumed this were true, 16% of adults have not – and that, even the Department surely recognizes, is a substantial share of the market. The Department cannot seriously contend that eliminating point of sale display would not make it more difficult for those adult consumers who have not made the decision as to what brand to buy or who may choose a new brand – whether 16% of the market or more -- to consider the range of brands available for sale on the market or that a neutral list of brand names is an adequate alternative either for them or the manufacturer.²

¹ Case C-405/98, *Konsumentombudsmannen v Gourmet International Products Aktiebolag*, Decision of the Court, paras 19-21, 38, 39.

Case C-405/98, Opinion of Advocate General Jacobs, paras 35, 36.

Joint cases C-34/95 *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB*, C-35/95 and C-35/95 *TV-Shop i Sverige AB*, paras 42- 44.

² In this regard, the proposed ban is also an infringement of the constitutional right to commercial speech, preventing manufacturers from adequately informing consumers about their brands through display of the product. In light of the speculative basis of the Department's proposal, the public health purposes of the display ban cannot outweigh the right of commercial speech.

The display of products, therefore, is a vital and fundamental means for manufacturers to compete and, as such, is protected by the Norwegian constitution. Further, since the domestic Norwegian tobacco producers have a strong market position in Norway, the proposed display ban could have a greater impact on the ability of foreign producers from accessing the Norwegian tobacco market and thus may violate regulations governing the European Economic Area (EEA).³

2. The Effectiveness of a Point of Sale Display Ban on Youth Smoking Is Speculative

The Department contends that a display ban's benefit to public health "will equal out the reduction in competitive scope that the ban will entail." But, as the Department acknowledges, the principle of proportionality "*requires that the measure in question must be able to reach the goal sought.*" Under this or any other reasonable standard, none of the examples cited by the Department are sufficient either individually or in combination to warrant a display ban.

In fact, the Department supports its position with numerous "facts" and "findings" that it must acknowledge are speculative. Indeed, the Department concedes that "*there is yet no scientific study published that definitively shows the impact that a ban against public display would have on the number of people who smoke.*" The Department's use of data from Iceland is instructive and representative. The Department notes that from 2001 when Iceland first banned point of sale display to 2005, smoking rates dropped from 25% to 20%, but states that "*there are no indications to prove that this reduction is a result of the ban, more than other tobacco preventive measures introduced at the same time.*" In order to deprive manufacturers of a core means of competition, it is not enough to cite studies, reports or data that state or show that a display ban *may* contribute to valid public health objectives.

The Department appears to attempt to sidestep the law by stating that no evidence of effectiveness is needed because the Department is acting on a moral and ethical basis. This is an astounding repudiation of the rule of law which would permit the government to discard legal principles simply by claiming that it is acting on "moral grounds." Clearly, the Department's view is unsupportable.

3. The Department Has Failed to Pursue Less Restrictive and More or Equally Effective Measures

The existence of effective alternative measures that would have less impact on competition further undermines the validity of the Department's proposal.⁴ We hope that

³ Art 11 and 12 of the EEA Agreement

⁴ Joint cases C-34/95 *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB*, C-35/95 and C-35/95 *TV-Shop i Sverige AB*, para 47.

Case C-405/98, *Konsumentombudsmannen v Gourmet International Products Aktiebolag*, Decision of the Court, para 34.

the Department will consider these alternative measures rather than taking the drastic and perhaps ineffective step of a total display ban at points of sale.

- **Enforcing the law prohibiting the sale of tobacco products to minors.**

While Norway already bans sales to persons under the age of 18, the Department has recognized that additional measures and resources are needed to ensure that the law is adequately enforced. In fact, over the last decade, the Department has considered several measures to strengthen the compliance with the law. For example, in September 2005 the Department called for a hearing on “State Oversight of the Sale of Tobacco Products,” stating that although improvements had occurred through voluntary measures taken by the retail sector, more was needed to be done in order to achieve effective compliance with the law. In the hearing notice, the Department stated that a majority of the bodies participating in a 2004 hearing on “alternative measures to strengthen the compliance with the minimum age law” were in favour of the National Food Authority (Mattilsynet) or another State entity, administering measures to achieve a better compliance with the age limit.

Accordingly, the Department recommended granting the National Food Authority the authority to oversee and enforce retail compliance with the law banning tobacco sales to minors. Philip Morris Norway AS also supported this proposal, which included oversight of retail control systems, sanctions, signage in stores stating the legal age limit of 18 and ID checks.⁵ Despite the Department’s view then and now that more needs to be done to prevent youth smoking, no action has been taken on this particular measure.

In addition to that proposal, there are many actions that are as yet untried in Norway to improve enforcement of the law and to prevent kids from purchasing tobacco products. For example, the Department could:

- impose strict penalties for underage sales, including monetary fines, elimination of retailers’ right to sell in case of repeated violations, and prohibit manufacturers, distributors and wholesalers from supplying retailers who are shown to be knowingly selling to minors;
- mandate age verification by retailers of customer appearing to be under the age of 25;
- establish government monitoring systems, including government “mystery shopper” programs and other auditing systems;
- require manufacturers to develop state of the art youth access programs, including retailer training and retail signage;

⁵ See Philip Morris Norway’s December 22, 2005 submission to the Health and Welfare Department.

- prohibit self-service displays or require self-service displays to be in line of sight of the retailer;
- require notification of parents/guardians and/or schools when a minor is caught purchasing or using tobacco products and mandate special educational courses on smoking and health and addiction for the minor and parents; and/or
- make it a crime for an adult to provide a minor with tobacco products, with sanctions including fines and/or community support addressing youth access prevention.

We believe it is neither appropriate nor legal for the Department to pursue a display ban when it has not implemented these alternative means to prevent minors from smoking, including the implementation of its own recommendations from 2004 and 2005.

- **Establishing a licensing system for tobacco retailers and all other parts of the tobacco supply chain.**

For several years now, the government has been considering implementing a retail licensing system in Norway to improve enforcement with the minimum age law. For example, in 2000, the Tobacco Damage Board proposed the introduction of a retail license system. In 2004, the Department submitted a proposal for public hearing to introduce retail licensing as well as alternative measures to strengthen the compliance with the minimum age law. Philip Morris International fully supported the proposal to introduce licensing, as stated in our response to the hearing dated July 2004. Unfortunately, no action has been taken to implement a licensing system.

We continue to believe that retail licensing is an important and effective tool to reduce youth access to tobacco products and would be far more effective tool for reducing youth smoking than a display ban. Indeed, retail licensing has been identified by public health groups as the most effective method to stop minors from purchasing tobacco products and has been an approach followed in the United States.⁶ In 2002, in a report prepared for the Directorate of Health and Social Affairs by the Norwegian Institute for Alcohol and Drug Research (Statens Institutt for Rusmiddelforskning (SIRUS)), the authors similarly concluded that, based on the literature, retail licensing appears to be an effective way to prevent youth smoking.⁷ The authors stated, *“The majority of the literature in this field shows that licensing of tobacco retailers, with the threat of a loss of license if*

⁶ See California Cigarette and Tobacco Products Licensing Act of 2003 (establishing a system for suspending or revoking a tobacco retailer's license if convicted a certain number of times for selling tobacco to minors.)

⁷ “En gjennomgang av forskningslitteraturen om tiltak for å redusere røyking blant ungdom” by Karl Erik Lund and Jostein Rise, Statens Institutt for Rusmiddelforskning, 2002

*tobacco is sold to minors, is the only measure for compliance with the minimum age law which has led to a reduction in the self-supply amongst youth.*⁸

As we recommended in our comments supporting the Department's 2004 proposal to introduce retail licensing, a licensing system should require the revocation of a retailer's license if the retailer is caught knowingly and repeatedly selling to under-age consumers. Licensing should also apply to all participants in the tobacco industry, including manufacturers, importers and distributors. In this way, a licensing system could be the cornerstone of a comprehensive regulatory framework, providing a mechanism to enforce compliance with a broad range of laws, including minimum age laws, product regulations and prevention of illicit trade, and that only legitimate operators are engaged in the tobacco business. Further, licensing fees could raise funds to support enforcement measures.

- **Requiring state of the art educational programs and other communications**

The Department argues that tobacco product displays at retail "contributes to the perception among children and young persons that smoking is not that harmful and far more usual than it is in fact" and that while adults can "handle this double communications by means of the government's extensive health warnings...children are not able to evaluate and interpret such mixed messages." Aside from the fact that the Department offers no substantial support for its position, there are alternative ways to ensure that children understand the serious health effects of tobacco use. For example, the Department could increase and improve educational programs in primary and secondary schools and provide parents with the tools and education to help prevent their children from using tobacco products. We would support measures to generate industry funding for such programs through earmarked taxation, licensing fees or other methods as long as they are applied equally to all tobacco products and all tobacco manufacturers and importers.

Another possible approach is to require retailers to post next to or prominently in their shops informational materials (e.g., posters or pamphlets) informing the public about the serious health effects of tobacco use. Again, such materials and the costs of installing them could be funded by the industry.

- **Imposing less restrictive limitations on point of sale display**

Even if the Department was correct and "eye-catching" and "prominent" displays of products were undermining public health objectives, the Department could have chosen several alternative restrictions which would still allow limited competition in the marketplace.

- **Limiting size and visibility of tobacco product displays**

⁸ Hearing Notice – Government Oversight of Sales of Tobacco Products, September 2005, quoting "En gjennomgang av forskningslitteraturen om tiltak for å redusere røyking blant ungdom" by Karl Erik Lund and Jostein Rise, Statens Institutt for Rusmiddelforskning, 2002.

Instead of a total display ban, the Department could have either restricted tobacco product displays to (1) a small number of packs per brand or manufacturer/importer or (2) a limited space in each retail outlet. That is the approach taken by the three Australian States of Queensland, Western Australia and South Australia, where retail display of tobacco products is limited by law to between 1 to 3 square meters per retail outlet.

Another potential limitation on point of sale display could be to prohibit product displays that can be seen from outside of the shop. The Turkish Republic of Northern Cyprus and Turkey are considering similar approaches.

– **Restricting display to certain parts of general retail stores**

One of the concerns expressed by the Department is the fact that tobacco products are displayed in general retail stores. Even if this concern were valid, the Department could have restricted tobacco product displays to specific areas in the store – in effect, a store within a store – rather than completely banning them.

– **Permitting product lists that show images of the packs**

While the proposal permits retailers and manufacturers to provide “neutral information” to consumers at points of sale, it is not clear from the language of the proposal or the Department’s comments (which refer to a “neutrally designed price list”) whether the “neutral information” could show images of the pack in addition to the name of the product. If the intent is to prohibit the use of pack images on such lists, the law would be unnecessarily restrictive. Including uniform images of the pack image on a standardized price list would not lead to “eye-catching displays” and would provide manufacturers with a better and more effective way to inform adult consumers about the range of brands offered than is possible with a plain list of brand names and prices.

– **Permitting product display for products that have been determined to provide potential reduction in risk and/or exposure**

The proposal is also excessive because it does not permit for any distinction between tobacco products. As has been noted by the WHO and others, tobacco products are being developed and marketed with claims of potential benefits, including reduction of exposure to harmful smoke constituents and reduction in risk of disease. Further, there is currently discussion among public health officials as to whether snus is a reduced risk product when compared to conventional cigarettes. Philip Morris International believes that all products marketed with claims should be subject to strict regulatory oversight and that the decision whether to permit claims must be made by an appropriate regulatory body, such as the Ministry of Health. However, if the Minister of Health determines, based on sound scientific data, that a product has the potential to reduce the risk of one or

more tobacco related diseases, provision should be made in the legislation to authorize the Minister to allow display of the product at retail level.⁹

4. Comments on Other Provisions in the Department's Proposal

- **Clarification to the definition of "advertising"**

We agree that advertising for pipes, cigarette papers and cigarette rollers should be restricted in the same manner as advertising for cigarettes and therefore support the proposal to amend the law to clarify that it covers these products.

- **Ban on distribution of tobacco products**

The Department proposes that the current ban on distribution of free tobacco products in Section 2(5) be amended to clarify that it "covers both distribution of tobacco products to employees and pensioners and the provision of tobacco products for free consumption at the production company's own premises." We believe that manufacturers should have the ability to provide limited quantities of free products to its employees, but recognize the Department's rationale and do not oppose the proposal.

That said, the proposed amendment to the Law appears to be unintentionally broad, covering "*any kind of distribution*" not just *free* distribution. Obviously, the Department did not intend to prevent the distribution of tobacco products in Norway, which would, of course, result in total prohibition. We request therefore that the Department amend the language to permit the continued sale and distribution of tobacco products in Norway.

- **Ban on discount pricing**

The Department recommends prohibiting "special discounts for the sale of tobacco products," noting the practice in some retail outlets of providing discounts to their employees. The Department correctly states that price can be used to undermine tobacco control measures and that youth are particularly susceptible to price reductions. We strongly support the integration of fiscal measures into comprehensive tobacco regulation and believe that governments must take steps to prevent the sale of low-price tobacco products. This is consistent with Article 6 of the WHO's FCTC, which has been ratified by Norway, and states that "*price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.*" However, while we support the concept, it is unclear what the Department intends and how the rule would be applied. For example, how is a "special

⁹ We note that there is significant debate as to whether reduced risk tobacco products would benefit public health. Several tobacco control experts take the position that marketing such products to consumers could undermine the goals of preventing initiation and encouraging cessation. Clearly, the best way to reduce the risk of tobacco-specific diseases is to prevent initiation of tobacco use and to encourage cessation, and just as clearly, the marketing of reduced exposure and reduced risk tobacco products should not deflect government efforts from the valid public health goals of preventing initiation and encouraging cessation. However, we believe – as do others – that reducing the risk of tobacco use through product modification is a legitimate component of an overall harm reduction strategy.

discount” defined? What is the baseline against which the definition would be applied? The proposal, therefore, needs to be clarified.

One approach which has been used in several EU Member States is to adopt a minimum reference price below which tobacco products could not be sold.¹⁰ As the Austrian Minister for Health stated, minimum retail price measures are the most effective means by which price can be used to reduce tobacco consumption, particularly among minors.

Contrary to a large general excise tax increase, which could affect all tobacco products on the market, minimum retail price measures could be considered as a targeted means to prevent excessively low priced products, while at the same time being unlikely to result in an excessive increase in all prices that could lead to a greater number of Norwegian consumers purchasing tobacco products in Sweden - thereby potentially undermining the public health goal to prevent youth smoking and reduce tobacco consumption.

We would be pleased to provide additional information about a minimum reference price if requested.

- **Prohibition of consumer taste panels**

The Department proposes to revoke the provision of the law that permits *“testing of new tobacco products in neutral packages without an indication of tobacco brand or producer, which the number of test persons does not exceed 50 and the testing is not repeated with the same test persons.”* Repealing this provision will mean that tobacco manufacturers will have to launch new brands in Norway without first determining whether they appeal to adult Norwegian consumers. This, of course, entails significant costs. Each consumer who participates in such testing panels is a verified adult smoker and, as required by the law, *“the testing is not repeated with the same test subjects.”* As with any company and any product, it is important for us to be able to conduct test panels in order to get consumers’ opinion on key elements such as taste and quality. However, as tobacco products carry serious health risks, such consumer testing should only be allowed to take place with adult tobacco users who are fully informed of the health risks and have agreed to participate in such tests. Consumer panels should also take place within a limited time frame and adult participants should only be supplied with the amount of product necessary to conduct the particular test. We therefore believe that §8, nr. 6 of the Advertising Law should not be revoked.

Conclusion

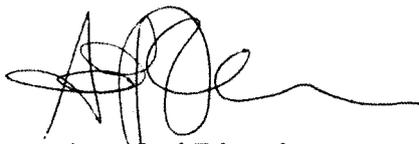
Philip Morris Norway AS supports the Department’s main objective to prevent tobacco use by minors. However, we also believe that this objective can be achieved without resorting to a complete display ban which would unduly inhibit competition and the

¹⁰ Austria, France, Ireland and Italy have established a minimum retail price on cigarettes based in their belief that a price floor was necessary to address the proliferation of low-price cigarettes in the marketplace. The European Commission has challenged these laws based on specific provisions in the EU Directives governing excise taxes. The issue will likely be resolved by the European Court of Justice.

ability of adult consumers to receive information about products they may choose to purchase. We hope that the Department will be willing to consider the proposals we have made in this paper and to discuss alternative measures, including licensing and limitations on point of sale display that fall short of a total ban.

Thank you again for the opportunity to present our views. We would be very pleased to work with the Department on these and any other issues relating to the regulation of tobacco products.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'AJE', with a long horizontal flourish extending to the right.

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