

**Alþingi**  
**Erindi nr. Þ 141/1870**  
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Case No: 72866  
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EFTA SURVEILLANCE  
AUTHORITY

Dear Sir or Madam,

**Subject: Comments by the EFTA Surveillance Authority to Iceland concerning notification DTR 2012/9009/IS**

The Icelandic notification 2012/9009/IS under the information procedure laid down in the Act referred to at point 1 of Chapter XIX of Annex II to the Agreement on the European Economic Area (*Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended*), as adapted by the Agreement, regarding a draft regulation concerning tobacco products, has prompted the EFTA Surveillance Authority (“the Authority”) to make the following comments:

### **Introduction**

The notified draft Act amending the Tobacco Control Act No 6/2002 and Act No 86/2011 on Trade in Alcohol and Tobacco introduces, *inter alia*, a ban on the importation, manufacture and sale of tobacco products especially directed at youths with regard to their flavourings or scents, appearance, size or shape of packaging, name and marketing or presentation in other respects. Furthermore, it extends the current ban on import, manufacture and sale of fine-grained nasal tobacco and oral tobacco, to chewing tobacco. It also foresees the adoption of a Regulation defining the permitted grain size of smokeless tobacco for the purpose of assessing whether it may be placed on the Icelandic market. Furthermore, it prohibits all tobacco consumption in upper secondary schools and special schools. Finally, the draft regulation proposes to adopt a Regulation on tobacco product selection similar to the current provisions on alcohol product selection that gives the competence to the Icelandic State Alcohol and Tobacco Company, which has a monopoly on the retailing of alcohol and wholesale of tobacco in Iceland, to reject certain tobacco products.

The Authority welcomes the initiative of the Icelandic Government to adopt rules aiming at protection of young people from the harmful effects of tobacco use. However, the Authority considers it appropriate to comment on certain planned amendments to the Tobacco Control Act No 6/2002, namely on the ban on import, manufacture and sale of chewing tobacco and on the introduction of stricter grain size control of smokeless tobacco products.

### **Assessment**

Pursuant to Article 8 of the Act referred to at point 3 of Chapter XXV of Annex II to the EEA Agreement (*Directive 2001/37/EC of the European Parliament and of the Council of*

5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products), as amended and adapted to the EEA Agreement (“Directive 2001/37/EC”), the placing on the market of tobacco for oral use shall be prohibited.<sup>1</sup> The Directive does not regulate the use of nasal and chewing tobacco, nor does it set rules for tobacco products especially directed at youths. Pursuant to Article 13(2) of Directive 2001/37/EC, the EEA States have the right to keep or introduce more stringent rules concerning manufacture, import, sale and consumption of tobacco products which they deem necessary in order to protect public health, provided that such rules do not prejudice the rules laid down in this Directive and provided that these rules are in accordance with the Treaty.

The planned amendments to the Tobacco Control Act No 6/2002 concern issues that are separable from the operation of the monopoly although they have a bearing upon it (i.e. import and manufacture of tobacco products).<sup>2</sup> Therefore, the proposed measures are assessed under Article 11 of the Agreement of the European Economic Area (“EEA Agreement”).

### **Restriction on the free movement of goods**

It is settled case-law that the prohibition of quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.<sup>3</sup> Iceland intends to introduce a total prohibition on placing on the market of chewing tobacco. Furthermore, there is already a ban in place on import, manufacture and sale of fine-grained nasal tobacco and the Icelandic Government intends to introduce rules on testing of the grain size on tobacco, the cost of which should be borne by producers and importers.

In light of the above, it must be concluded that the above-mentioned prohibitions constitute quantitative restrictions on imports within the meaning of Article 11 EEA.

### **Justification advanced by Iceland – health protection**

It follows from established case law that a restriction to the free movement of goods can be maintained if justified by overriding reasons of public interest referred to in Article 13 of the EEA Agreement or by mandatory requirements developed in the case law of the EFTA Court and the Court of Justice. Moreover, restrictions can only be justified if they are suitable, necessary and proportionate to the aim pursued.<sup>4</sup>

As a preliminary remark, it should be noted that according to the information provided by the Icelandic Government, only the following smokeless tobacco products seem to be currently authorised in Iceland: rough-grained nasal tobacco (which is produced in Iceland) and chewing tobacco (which, although authorised, has not been imported to Iceland in recent years).

<sup>1</sup> The prohibition does not apply to Sweden and Norway.

<sup>2</sup> Case E-4/05 *HOB-vin* [2006] EFTA Ct. Rep. 4, paragraph 24; Case E-19/12 *Vín Trió ehf v the Icelandic State*, judgment of 30 November 2012, not yet published, paragraph 36.

<sup>3</sup> Case C-2/73 *Geddo v Ente Nazionale Risi* [1973] ECR 865, paragraph 7; Case C-34/79 *R v Henn and Darby* [1979] ECR 3795, paragraph 12.

<sup>4</sup> Case C-120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8; Case E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 28; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 29.

In order to justify the draft measures, the Icelandic Government observes that in the last couple of years the oral use of Icelandic rough-grained nasal tobacco among young people in Iceland has increased. It explains furthermore that the Icelandic State Alcohol and Tobacco Company did not import any smokeless tobacco products in recent years, due to the suspicion that this was not the allowed nasal tobacco but rather oral tobacco, but it intends to start the importation of the currently authorised smokeless tobacco products as of the end of this year unless the regulatory framework changes. Given the interest of young people in Iceland in smokeless tobacco products, the Icelandic Government would like to prevent a situation where new products that have not yet been sold and known on the Icelandic market, are being put on sale in Iceland. Thus, it would like to protect the health of young people from tobacco use additional to the current use of tobacco for smoking and rough-grained nasal tobacco.

### **The Authority's assessment of the justification**

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 health concerns recognised by Article 13 EEA.<sup>5</sup> 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.<sup>6</sup> Furthermore, such restrictive measures can be considered suitable for securing the attainment of the objective pursued only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner.<sup>7</sup>

The burden of proof when invoking exemptions based on Article 13 EEA and the mandatory requirements rests with the EEA/EFTA State that invokes them.<sup>8</sup>

With regard to the intention of the Icelandic Government to introduce rules on permitted grain size of smokeless tobacco for the purpose of assessing whether it may be placed on the Icelandic market and to put the burden of costs for the measurements and testing on the producers and importers, it should be noted that the current distinction between the fine and rough grained tobacco as well as the current ban on fine-grained tobacco (in place in Iceland since 1997) raise doubts as to their compatibility with the principle of free movement of goods. The Icelandic Government has not provided reasons to justify such a difference in treatment of both products, in particular, it has not explained why it considers that the fine-grained tobacco is more harmful for human health than the rough-granulated one.

It is furthermore not clear from the information provided by Iceland why it considers it appropriate to ban the import, manufacture and sale of chewing tobacco on health grounds while keeping the rough-grained nasal tobacco on the market. Here again, the Icelandic Government has not explained why it considers that the chewing tobacco is more harmful for human health than the nasal rough-granulated tobacco.

<sup>5</sup> Case E-16/10 *Philip Morris Norway AS* [2011] EFTA Ct.Rep. 330, paragraph 77.

<sup>6</sup> *Philip Morris Norway AS*, cited above, paragraph 81.

<sup>7</sup> Case E-3/00 *EFTA Surveillance Authority v Norway* [2000-2001] EFTA Ct. Rep. 73, paragraph 26; Case C-137/09 *Josemans* [2010] ECR I-13019, paragraph 70; Case C-28/09 *Commission v Austria*, judgment of 21 December 2011, not yet reported, paragraph 126.

<sup>8</sup> Case C-251/78 *Denkavit Futtermittel v Minister of Agriculture* [1979] ECR 3369, paragraph 24; Case C-286/07 *Commission v Grand Duchy of Luxembourg* [2008] ECR I-63, paragraph 37.

When assessing the suitability of the proposed framework according to which the only smokeless tobacco product allowed to be marketed in Iceland would be rough-grained tobacco, it should be noted that the current increase in the use of smokeless tobacco by young people in Iceland is, in the view of the Icelandic Government, due to the use of the Icelandic rough-grained nasal tobacco as oral tobacco. It is furthermore important to recall that placing on the market of oral tobacco is prohibited at the EEA level.

Finally, with regard to the intention of the Icelandic Government to introduce a ban on the importation, manufacture and sale of tobacco products especially directed at youths with regard to their flavourings or scents, appearance, size or shape of packaging, name and marketing or presentation in other respects, it should be noted that certain issues addressed by the Icelandic notification may in the near future be partially regulated at the EEA level. The proposal for a revision of Directive 2001/37/EC adopted by the Commission on 19 December 2012 contains a prohibition on tobacco products with characteristic flavours and with increased toxicity or addictiveness. Among others, additives which have characterising flavours (e.g. vanilla, chocolate, menthol), additives associated with energy and vitality (e.g. caffeine and taurine) and additives creating the impression that products have health benefits (e.g. vitamins) would be prohibited. It should be noted that the proposal upholds the prohibition on oral tobacco and does not prohibit chewing or nasal tobacco.

The Authority invites the Icelandic Government to take note of the observations contained in this letter.

For the EFTA Surveillance Authority,

Yours faithfully,



Sverrir Haukur Gunnlaugsson  
College Member