Neutral Citation Number: [2011] EWCA Civ 437
Case No: C1/2011/0123 & C1/2010/2978
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
(The President of the Queen's Bench Division)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/6/2011

Before :

MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LADY JUSTICE ARDEN
- -

Between :

THE QUEEN ON THE APPLICATION OF SINCLAIR COLLIS LIMITED	**Claimant/ 1st Appellant**
- and -	
THE SECRETARY OF STATE FOR HEALTH	**Defendant/ Respondent**
THE MEMBERS OF THE NATIONAL ASSOCIATION OF CIGARETTE MACHINE OPERATORS	**Interested Party/ 2nd Appellant**

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- -

Ms Dinah Rose QC and Mr Brian Kennelly (instructed by **Ashurst LLP**) for the Claimant/1st Appellant
Mr Nicholas Paines QC and Mr Ian Rogers (instructed by the **DWP/DH Legal Services, on behalf of the DWP & The Dept of Health)** for the Defendant/Respondent
Mr Thomas De La Mare and Mr Iain Steele (instructed by **Davies Arnold Cooper LLP**) for the Interested Party (NACMO)/2nd Appellant

Hearing dates : 8 & 9 March 2011
- -

Judgment

Lord Justice Laws:

Introduction

1. These are two appeals against the decision of Sir Anthony May PQBD given in the Administrative Court on 1 December 2010 ([2010] EWHC Admin 3112). The appeals are respectively brought by the claimants in the proceedings, Sinclair Collis Ltd (to whom I will refer as the claimants), and by the National Association of Cigarette Machine Operators, who were joined as an interested party below and to whom I will refer by the acronym NACMO. The claimants and NACMO were both granted permission to appeal by Stanley Burnton LJ on consideration of the papers on 24 January 2011. Stanley Burnton LJ also ordered that the appeals be expedited.

2. By means of these judicial review proceedings the claimants (with NACMO's support) seek to impugn ss.22 and 23 of the Health Act 2009 ("the 2009 Act") and the Protection from Tobacco (Sales from Vending Machines) Regulations 2010 ("the Regulations") made under it, pursuant to which, if the judicial review does not prevail, the sale of tobacco from automatic vending machines will be altogether prohibited with effect from 1 October 2011. The essence of the challenge to the Act and Regulations is that they violate the principle of proportionality which the law requires to be respected because the measures' subject-matter engages Articles 34 and 36 of the Treaty on the Functioning of the European Union ("TFEU") and Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

3. The President's judgment begins with an acknowledgement that it has been consistent government policy for a considerable number of years to adopt measures aimed at reducing the incidence of tobacco smoking. The detrimental effect of tobacco on health is well known and has been repeatedly stressed. The legislation under assault in these proceedings is in line with and intended to promote this well established policy, though as I shall show its particular focus is the subject of some controversy between the parties.

THE TOBACCO VENDING MACHINE INDUSTRY

4. At paragraphs 5 – 15 of his judgment the President gave a detailed account of the tobacco vending machine industry in the United Kingdom, taken from the extensive evidence before the court. What follows is a summary only. There are about 50,000 vending machines in the UK, dispensing about 1% of all tobacco sales. Many are in pubs and restaurants and the like. There some 550 people directly employed in the industry. The claimants own about 20,000 of the machines and employ 148 people, some redundancies having already been necessitated. The remaining machines are owned by independent operators, most of whom are represented by NACMO. NACMO is an unincorporated association formed in 1968. Of its 79 members some are very small, having fewer than 20 sites. The largest, Cherwell Tobacco Factors LLP, had machines at 3,481 sites at the time of the hearing before the President, though the number has since dropped to 3,292. It is to be noted that earlier anti-smoking measures have substantially reduced demand for cigarettes from vending machines. Sales have fallen by 80% (as I understand it since 2007, when the ban on smoking in public was introduced). More than 11,000 machines have been removed from sites belonging to the claimants' clients.

5. If the ban for which the Regulations provide comes into effect, all turnover arising from tobacco vending machines will be abruptly and entirely eliminated. The President (paragraph 15) dismissed the suggestion advanced by the Secretary of State that the machine operators might diversify their businesses. He also noted that in a Final Impact Assessment dated 27 January 2010, which was considered by the responsible Minister (the Minister for Public Health) before she made the Regulations and to which I shall have to return, there appeared a cost/benefit analysis which referred to an immediate one-off cost of £22m as being "the total value of UK cigarette vending machines". However, Miss Rose QC for the claimants submits that if the President considered that this reference indicated that in making the Regulations the Minister appreciated that the businesses could not diversify, he was in error: the contemporary documents tend to show that she believed diversification would be possible.

6. In the result, then, the ban will wipe out the tobacco vending machine industry. There will also be effects upon suppliers to the industry, including suppliers located in other Member States of the European Union, from which most, if not, all of the machines have been imported.

HISTORY OF THE LEGISLATION

7. On 31 May 2008 the then Secretary of State published a consultation paper entitled "Consultation on the Future of Tobacco Control". On 11 December 2008, after the end of the consultation period, the Minister signed an Impact Assessment whose focus was the use of cigarette vending machines by young people under 18. It stated that under-18s were uniquely vulnerable to the risks of tobacco smoking and that government intervention was necessary to prevent them buying tobacco products. As the President indicated (paragraph 22) three options were considered: (1) retaining the status quo, (2) introducing age restriction mechanisms onto all tobacco vending machines, or (3) prohibiting the sale of tobacco from vending machines. Three possible types of age restriction mechanism (to which for convenience I will refer hereafter as ARM) were examined: (a) electronic ID card age verification; (b) ID coin mechanisms, by which the purchaser would have to obtain an ID coin or token from a member of staff who would be required to verify the purchaser's age; and (c) remote radio control by which a member of staff would open the vending machine by remote control having verified the purchaser's age. As the President stated (paragraph 22):

> "The preferred option was to introduce age restriction mechanisms. If, after this had been implemented for two years, clear and strong evidence showed that children were still buying cigarettes from vending machines, then there might be a prohibition. There followed a detailed cost/benefit analysis for each of the second and third options."

8. The President considered that there was a degree of artificiality (my words) in the cost/benefit analysis, expressed as it was in monetary terms, which was provided in the Assessment. At paragraph 23 he stated that "ascribing a money value to some of the benefits at least is a difficult concept". At paragraph 24 he describes in detail the monetary calculation of benefits ascribed to the second option, that is the adoption of ARM. At paragraph 25 he expresses his scepticism at this enterprise

and gives forceful reasons for it. At paragraph 27 he observed that it was noted in the December 2008 Impact Assessment that option 3 – the outright ban – might reduce adult cigarette smoking as well as child consumption "because it would make cigarettes slightly more difficult to acquire".

9. The claimants and NACMO supported option 2: ARM. The industry expended considerable resources on the development of radio frequency control mechanisms as a means of putting ARM into effect. The technology was tested by means of trial purchases conducted by a company recommended to NACMO by the Secretary of State, and a success rate of 80% (therefore, of course, a failure rate of 20%) was recorded. It is in use at over 600 sites in the United Kingdom.

10. That is the background against which clause 20 of the Health Bill 2009 ("the Bill") was introduced in the House of Lords on 16 January 2009. The clause would have amended the Children and Young Persons (Protection from Tobacco) Act 1991 ("the 1991 Act") by inserting a new section 3A which would provide in part as follows:

> "(1) The appropriate national authority may by regulations make provision prohibiting or imposing requirements in relation to the sale of tobacco from an automatic machine in England and Wales."

Clause 21 of the Bill made like provision for Northern Ireland.

11. Plainly the terms of s.3A(1) would allow the appropriate national authority (the Secretary of State) to impose the ban – option 3 ("prohibiting") or to require ARM – option 2 ("imposing requirements"); or to do nothing (option 1). In October 2009 the Secretary of State issued draft regulations, prospectively to be made under the new s.3A, together with a Consultation Paper, to which responses were invited by 4 January 2010. A further Impact Assessment was published at the same time. It recorded the Minister's view that, at least for an initial two-year period, the imposition of ARM rather than an outright ban of tobacco vending machines was the appropriate means of achieving the aim of reducing under-age smoking. The draft regulations reflected this. The details are quite complex but the critical provision was contained in paragraph 3(5) which would have provided:

> "An automatic machine must be activated only by a member of staff... in response to a request from an individual... aged 18 or over."

I should also note part of paragraph 4(2):

> "An automatic machine must (a) require activation by remote control prior to use; (b) enable the sale of a single product only after activation..."

12. Suddenly, however, the picture changed. On 12 October 2009 a backbench MP, Mr Ian McCartney, moved an amendment to the Bill in the House of Commons. The amendment removed the words "or imposing requirements in relation to" from the new s.3A(1) to be inserted into the 1991 Act. It was adopted by the House of

Commons, approved by the House of Lords on 9 November 2009, and the 2009 Act incorporating the amendment received the Royal Assent on 12 November 2009. The new s.3A was now provided for by what had become s.22 of the Act. S.23 made like provision for Northern Ireland. For convenience I should set out s.3A(1) as enacted, and also (having regard to part of the argument in the case) s.3A(6):

> "(1) The appropriate national authority may by regulations make provision prohibiting the sale of tobacco from an automatic machine in England and Wales.
>
> …
>
> (6) The power of the appropriate national authority to make regulations under this section—
>
> (a) is exercisable by statutory instrument,
>
> (b) may be exercised to make different provision for different cases or circumstances, and
>
> (c) includes power to make supplementary, incidental, consequential or transitional provision."

13. In November 2009, the month the Bill was passed into law, the Secretary of State issued a revised consultation document. It contained a "Vending Machine Supplement". Draft regulations were annexed. They contained a simple provision at paragraph 2(1):

> "The sale of tobacco from an automatic machine is prohibited."

14. The consultation document stated that the role of the policies in the Bill was to do everything possible "to enable young people to remain smoke free and to support those people who want to give up smoking". The focus and emphasis was on the under-18s. However the observation that prohibition might also reduce adult cigarette consumption "because it would make cigarettes slightly more difficult to acquire" is repeated (at paragraph 36 of the "Evidence Base") from the December 2008 Impact Assessment.

15. The Regulations were laid before Parliament on 27 January 2010 in exactly the same terms as the draft regulations published in November 2009. They were approved under the affirmative resolution procedure on 17 March 2010. They were accompanied by an Explanatory Memorandum, to which was attached a further, Final Impact Assessment ("the FIA"). There the policy objective was stated to be "to reduce smoking take-up, prevalence and/or the number of cigarettes smoked by under-18s... Because 10% of regular smokers aged 11 – 15 report that cigarette vending machines are a usual source of tobacco, further restricting access to these machines will contribute to the above objective". However "adult quitters", as they have been called, are referred to at paragraph 44 of the Evidence Base attached to the FIA as follows:

> "Policy option 2 [sc. the ban: option 1 was to do nothing] is likely to have a positive health impact on adults. The number of cigarettes smoked by adults may fall and therefore there would be an associated health gain."

16. The FIA contains much besides, including a cost/benefit calculation which builds on previous such exercises. Whereas in November 2009 the net benefit calculation was put at a range of -£553m to £74m with a best estimate of -£398m, by January 2010 the figure was +£116m. The reasoning behind these figures is Delphic (and contains a series of assumptions as to which the President was, to say the least, sceptical). Miss Rose says the change for the better was attributable to the Minister's taking account of the supposed benefits relating to adult quitters. That is one part of the context of her trenchant criticism of the process by which the Regulations came to be made; the discussion of a cost of £22m as being "the total value of UK cigarette vending machines" (to which I referred in passing at paragraph 5 above) is another. I will consider those submissions after introducing the relevant legal materials.

17. The FIA was signed by the Minister on 27 January 2010 (the day the 2009 Act received the Royal Assent and the Regulations were laid before Parliament) indicating her satisfaction that "(a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs".

TFEU and A1P1

18. Article 34 TFEU provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

Article 36 TFEU provides in part:

> "The provisions of Article 34... shall not preclude prohibitions or restrictions on imports... on grounds of... the protection of health and life of humans..."

A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

THE PRINCIPLE OF PROPORTIONALITY – OUTLINE

19. *Prima facie* the ban (I make no distinction at this stage between the 2009 Act and the Regulations) violates TFEU Article 34 and the first sentence of A1P1. Accordingly it is unlawful unless justified pursuant to Article 36 and (on the footing that the interference with property amounts to control of use rather than deprivation)

the second paragraph of A1P1. Any justification will depend (I summarise) on the force of the public health interest which the ban seeks to promote. It is common ground, indeed elementary, that such a justification must fulfil the principle of proportionality.

20. There is much learning on the subject of proportionality. For present purposes two cases will set the scene, one from the Court of Justice and one from the Court of Appeal. The first is *R v Minister of Agriculture, Fisheries and Food, Ex parte Federation Européenne de la Santé Animale (FEDESA) and Others* [1990] ECR I-4023. It is unnecessary to set out the facts. At paragraph 13 the Court of Justice said this:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

In light of the position taken by Mr Paines QC for the Secretary of State as to the proper scope of the proportionality principle in the present case, I should also set out paragraph 14:

> "However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 *Schraeder* [1989] ECR 2237, paragraphs 21 and 22)."

21. The second case, which I must cite at greater length, is *R v Secretary of State for Health ex p Eastside Cheese* [1999] 3 CMLR 123. The case concerned an emergency control order, made following a case of *E. coli* infection, which prohibited the carrying on of any commercial operation – necessarily including export – in relation to cheese originating from a particular dairy. The issue was the order's justification under Article 36. Lord Bingham CJ delivering the judgment of the Court of Appeal said this:

> "41 The principle of proportionality is one of the basic principles of Community law. It has been expressed by the European Court of Justice in [*FEDESA*] [Lord Bingham cites paragraph 13 of *FEDESA*]…

Because the principle is so general (and may affect a range of issues from the validity of primary legislation such as the Shops Act 1950 to much narrower points such as the quantum of penalties for customs infringements) it must be related to the particular situation in which it is invoked…

43 However the test is formulated, it is clear that in the application of Article 36 the maintenance of public health must be regarded as a very important objective and must carry great weight in the balancing exercise. In *De Peijper* [1976] ECR 613, 635 (paragraph 15) the Court of Justice said that health and the life of humans rank first among the interests protected by Article 36, and it is for member states to decide (within the limits imposed by the Treaty) what degree of protection to provide…

45 In principle the decision on proportionality has to be taken by the national court which is seised of an issue on Article 36, subject of course to any possible reference to the Court of Justice (the collaboration called for between the Court of Justice and national courts is described in the opinion of Mr Advocate-General Van Gerven in *Rochdale BC v Anders* [1992] ECR I 6457, 6474 - 5, paragraph 19). But in the case of a legislative measure the national court must not simply accept the view of the national legislature or confine itself to deciding whether what the legislature has enacted is reasonable.

46 Nevertheless it is clear that the national legislature has a considerable margin of appreciation, especially in legislating on matters which raise complex economic issues connected with the Community's fundamental policies. [Paragraph 14 of *FEDESA* is then cited.]

The same approach can be seen in *Aragonesa v DSSSG Cataluna* [1991 ECR I - 4151, 4184-5 (paragraphs 17 to 18); *Germany v Council* [1994] ECR I - 4973, 5068 - 9 (paragraphs 89 - 91); *R v MAFF ex parte NFFO* [1995] ECR I - 3115, 3130 (paragraph 28) *; UK v Commission* [1996] ECR I - 5755, 5811 (paragraph 58); and *Commission v Council* [1996] ECR I-881, 924 (paragraph 18) , in which the Court of Justice stated,

> 'In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion (see the judgment in *Roquette Freres v Council* [1980] ECR 3333, paragraph 25).'...

> 48 Eastside and Ducketts submit that *FEDESA*, and the numerous cases following *FEDESA*, are also distinguishable since in those cases the Court of Justice approved the application of a special test in special circumstances. In this case, it is submitted, the court should apply what counsel called the orthodox test, requiring a critical revaluation of all the factors bearing on proportionality. But there seems to be no good reason in principle or authority for two sharply different tests. The margin of appreciation for a decision-maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the member state in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided (not, as the secretary of state submits, only with the latter).
>
> 49 … The judge's task was (so far as Article 36 was concerned) to see whether the exercise of the secretary of state's power under section 13 of [the Food Safety Act 1990] Act had been objectively justified and had been shown not to be disproportionate. The test is more demanding than that of 'manifest error' and is also more demanding than that of *Wednesbury* unreasonableness (although in *ex parte ITF*, Lord Slynn, at page 1277, thought that the same result is often produced under both tests). The difference between the two tests has been lucidly described by Laws J in *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250, 278 - 9; … its conclusion is that,
>
> > '*Wednesbury* and European review are different models - one looser, one tighter - of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power.'"

22. Paragraph 13 of *FEDESA* provides a classic formulation of the proportionality doctrine. *Eastside Cheese* shows, as does much other authority cited by the parties, that the doctrine applies differentially between cases; and the engine of the differences is the scope of the margin of discretion or appreciation accorded to the decision-maker. I will use the expression "margin of appreciation", although as is well known it primarily denotes the extent to which the European Court of Human Rights applies the Convention rights remotely, out of respect for differing conditions in the signatory States.

23. Two factors in particular affect the margin's scope. The first is the identity of the decision-maker. Acts of the primary legislator attract a broader margin; acts of the secondary legislator, a narrower. The second of the two factors is the subject-matter

of the decision. Where it is the promotion of a benefit of great general importance such as public health, or a general policy of the European Union, again the margin will be broader.

THE PARTIES' CONTENTIONS – OUTLINE

24. Though the arguments have been refined and various, what in essence divides the parties is the proper scope of the margin of appreciation in the circumstances of the case. Miss Rose says that the legality of the ban is to be tested by a rigorous application of the general principles set out in paragraph 13 of *FEDESA*. She submits (a) that the margin is not to be broadened by an assumption, or a finding, that the ban was distinctly willed by Parliament as primary legislator; (b) that the importance of the aim in view – the protection of health, and especially (Miss Rose would say exclusively) the health of children – does not absolve the decision-maker from his obligation to consider less draconian alternatives and to ensure that the measure he proposes is objectively well-founded: an obligation, she says, substantially unfulfilled on the facts of the case; and (c) that the legislation properly construed in truth allows, though perhaps indirectly, for a less draconian alternative in the shape of ARM. This last point in particular is supported by Mr de la Mare for NACMO.

25. Mr Paines by contrast contends for a very broad margin of appreciation, such that the ban would only fall to be struck down if it were shown to be "manifestly without foundation" or "manifestly unreasonable or inappropriate". He lays particular emphasis on the purpose of the ban, the protection of public health. He also appeals to the supposed will of Parliament, as primary legislator, as the source of the ban: Parliament's will would attract a broader margin than that of the secondary legislator, the Secretary of State. Initially (skeleton argument paragraph 3) this submission went so high as to suggest, as indeed the President had found, that by introducing the ban the Secretary of State "was implementing the will of Parliament". However this argument was softened on being tested at the hearing, as I shall show.

THE JUDGMENT BELOW

26. On the core issue concerning the scope of the margin of appreciation, the President agreed with Mr Paines. In relation to A1P1 he held that "the court will respect the legislature's judgment unless it is manifestly without foundation" (paragraph 94). As regards Articles 34 and 36 he concluded that "the legislature's margin of discretion is broad and the court will not interfere unless the measure was in error as being manifestly unreasonable or inappropriate" (paragraph 95).

27. It seems plain that this approach was greatly influenced by the President's view of who the real decision-maker was. I have already referred in passing to his finding that the Secretary of State (strictly the Minister who made the Regulations) was implementing the will of Parliament. This is an important feature of the President's judgment, and I should set out these passages:

> "88... In so far as the regulations were those of the Secretary of State who in theory had a choice under the primary legislation, the reality was that she was implementing the will of

> Parliament. In my view, both should be seen as, or as equivalent to, primary legislation enacted by the national legislature in a matter aimed at protecting the nation's health.
>
> 89 There is, in my view, a broad similarity between the present case and the *Countryside Alliance* case [sc. [2008] 1 AC 719)], which also concerned human rights and European law challenges to a legislative ban which was not that which the relevant Minister had promoted in Parliament. The relevant legislative aim, for the purposes of justification and proportionality, in that case as in this, is that of Parliament which enacted the legislation, not that of the Minister who promoted legislation which was rejected. Mr Paines is, in my judgment, correct to submit in the present case that the claimants wrongly developed a case which looks mainly at what they see as the Minister's aim."

THE RELEVANT DECISION-MAKER

28. I will first address the President's conclusion that for the purposes of the proportionality principle the ban is to be treated for all the world as if it were contained in main legislation. This conclusion seems to me to have constitutional implications. It suggests that where statute confers a discretionary power, and it appears that Parliament's will is that the power be exercised, then the subordinate legislator so exercising the power will in principle enjoy the same margin of appreciation in the face of legal challenge as would Parliament if it enacted the same measure directly. It is of course right that even if the measure were thus directly enacted, given the engagement of the law of the European Union and of the ECHR that would not immunise the measure from judicial scrutiny for failure of proportionality. But (as Lord Bingham made clear at paragraph 48 in *Eastside Cheese*) the margin of appreciation would be distinctly broader.

29. The President's approach contains a hidden premise. It is that the will of Parliament may bear quite a different sense from the meaning generally attributed to it by the common law. The will of Parliament is ordinarily taken to refer to the intended effects of a statute, whose ascertainment by the court is integral to the statute's correct interpretation. So understood, however, it is an artificial construct. It is of course not arrived by collecting evidence as to what the members of Parliament subjectively intended when they passed the Bill, but by examining the language of the statute and (subject to certain exceptions and qualifications) applying its ordinary meaning. There is some scope for looking at other material, notably pursuant to the rule in *Pepper v Hart* [1993] AC 593, but it is quite strictly circumscribed.

30. In this sense, then, the will of Parliament means the intended effects of a statute, but only as they may be ascertained by the conventional process of statutory construction. In my judgment s.3A(1) as enacted in the 2009 Act cannot be construed, in accordance with that process, as meaning that the ban should be put into effect by the Secretary of State. The subsection confers a discretion, and does so in familiar, everyday terms: "[t]he appropriate national authority may by regulations make provision…" This is not a case in which it is possible to read

"may" as meaning "shall", and the President does not purport to do so (paragraph 88: "the Secretary of State... in theory had a choice under the primary legislation"). Plainly, Parliament could have legislated to impose the ban itself. As Miss Rose pointed out, that was the means by which a prohibition on the display of tobacco products at the point of sale was introduced (s.21 of the 2009 Act, inserting a new s.7A(1) into the Tobacco Advertising and Promotion Act 2002).

31. In these circumstances, although the President referred (paragraph 90) to the account given of the ordinary canons of interpretation in the judgment of the Divisional Court in the *Countryside Alliance* case ([2005] EWHC Admin 1677), I consider that he must in fact have been engaged upon quite another exercise. What he has done is to identify the political aspiration behind Mr McCartney's amendment to the Bill, namely a desire to see the ban in place. But this is, with respect, to attribute a different meaning to the will of Parliament from its conventional sense as a function of statutory construction. The court has no duty to scrutinise such a meaning. We are not concerned with the legislators' subjective motivation. It cannot condition the rule-maker's discretion to make regulations under a provision such as s.3A(1). Nor can it serve to broaden the margin of appreciation allowed by the rule-maker in the face of a proportionality challenge to the rule he makes. That is to confer on the executive what belongs to the legislature. This, it seems to me, is the constitutional implication of the President's conclusion.

32. I should say, with deference to the President, that the *Countryside Alliance* case seems to me to be entirely different. It involved an assault, in part based on the ECHR and thus the proportionality principle, upon the legality of the Hunting Act 2004. It was a feature of the case that the Act as passed differed in significant respects from the Bill as it had been originally introduced. In ascertaining the aim of the legislation for the purpose of deciding the ECHR claim the Divisional Court considered various materials including the terms of the original Bill. The House of Lords held they were entitled to do so (see Lord Bingham's opinion, paragraph 40). But nothing in the case touched the nexus between primary and secondary legislation, or the relative scope of the margin of appreciation apt for either.

33. How then is the will of Parliament, expressed in s.3A(1), to be understood according to the ordinary canons of statutory interpretation? (There is a separate question of construction, engaging s.3A(6), raised by Mr de la Mare: I will come to that in due course). The answer can only be, I think, that Parliament intended the Secretary of State to be empowered, at his discretion, to impose the ban. The decision whether to do so would be his. So much is plain from the subsection's words, and there are no hidden meanings. But in that case the proportionality of the ban cannot be judged by reference to the margin of appreciation which might aptly be applied to the product of primary legislation.

34. Mr Paines' distinct appeal to the will of Parliament therefore travels nowhere. In fairness, this part of his argument (as I have indicated) was softened on being tested at the hearing. In the end he submitted that by s.3A(1) Parliament decided that a ban was appropriate, not necessarily required, and left it to the Secretary of State to decide whether it should be introduced. It might be more accurate to say that Parliament decided the ban *might* be appropriate; but that would be a quibble. In

my judgment, even formulated as Mr Paines finally expressed it, a distinct appeal to the will of Parliament as a driver of the margin of appreciation lacks all force.

PUBLIC HEALTH AND THE MARGIN OF APPRECIATION – DISCUSSION

35. As I have said, the other principal element in Mr Paines' argument for a very broad margin of appreciation consists in his reliance on the purpose of the ban, namely the protection of public health. It will be convenient first to consider the European Union materials: there is a question whether a different approach falls to be taken in relation to A1P1.

36. There is a wealth of authority to support the general proposition that public health is a goal or aspiration of special importance and that State (or Community) measures which promote it will attract a broad margin of appreciation. We have seen Lord Bingham's reference to *De Peijper* [1976] ECR 613, (635, paragraph 15) at paragraph 43 of *Eastside Cheese.* Other materials specifically relied on by Mr Paines include *Aragonesa* [1991] ECR I-4151 (referred to in *Eastside Cheese* at paragraph 45), dealing with the advertisement of alcoholic drink, and the Opinion of Advocate General Geelhoed in *R v Secretary of State ex p BAT and Imperial Tobacco* [2002] ECR I-11453, which concerned the validity of an EU Directive harmonising national law on aspects of the manufacture, presentation and sale of tobacco products. Mr Paines places emphasis in particular on a proposition stated at paragraph 16 of the judgment of the Court of Justice in *Aragonesa*:

> "[I]t is for the Member States to decide on the *degree* of protection which they wish to afford to public health and on *the way* in which that protection is to be achieved." (my emphasis)

Like observations are to be found for instance in the Opinion of Advocate General Tizzano given jointly in two cases, *Commission v France* [2004] ECR 6569 and *Bacardi* [2004] ECR I-6617. He said at paragraph 79:

> "I am nevertheless of the view that these decisions fall within the freedom of the Member States to 'decide on *the degree* of protection which they wish to afford to public health and on *the way* in which that protection is to be achieved', and are therefore among the options available to Member States for attaining that objective." (original emphasis)

This language, submits Mr Paines, implies a broad margin of appreciation. It means, he suggests, that in this area the courts will not enquire whether the benefits to human health to be obtained from the measure in question outweigh any detriments. He cites paragraph 24 of the judgment in *Commission v France*:

> "In that context, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality: see [*Aragonesa* paragraph 16] which requires that the measures adopted be appropriate to secure the attainment of the objective

> which they pursue and not go beyond what is necessary in order to attain it..."

Mr Paines says that this excludes any requirement for an enquiry into detriments.

37. In *BAT and Imperial Tobacco* the Advocate General said this:

> "120 [T]he Community legislature enjoys a broad degree of latitude, at any rate where health protection is in issue. In this the Community legislature does not therefore differ from the national legislature which utilises the scope conferred on it by Article [36 TFEU]. In this appraisal by the legislature, a multitude of aspects enter into play. The need for protective measures depends not only on the scientific understanding of specific health risks but also on the social and political evaluation of those risks. The same holds true with regard to the choice of measure."

Then dealing specifically with proportionality, the Advocate General said:

> "230... [The principle of proportionality] does not provide that two matters of interest have to be weighed one against the other but focuses only on the choice of measure which has been or is being adopted to protect public health. Is this measure appropriate and is any other - less intrusive - measure available which would provide equally good protection for public health? The Community Courts exercise a limited appraisal of these issues."

38. Unsurprisingly Mr Paines referred to passages in the learning which, he said, supported a test framed in terms of what was "manifestly inappropriate". Thus in *BAT and Imperial Tobacco* the Court of Justice stated (the emphasis and the other citations which follow is mine):

> "123 With regard to judicial review of the conditions referred to in the previous paragraph [sc. the requirements of proportionality], the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue..."

And at paragraph 17 of the Court's judgment in *Aragonesa*:

> "A national measure such as that at issue restricts freedom of trade only to a limited extent since it concerns only beverages having an alcoholic strength of more than 23 degrees. In

> principle, the latter criterion does not appear to be *manifestly unreasonable* as part of a campaign against alcoholism."

But I should also note paragraph 18 of the same judgment:

> "On the other hand, the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which, such as public highways and cinemas, are particularly frequented by motorists and young persons, two categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticized for being disproportionate to its stated objective."

In *National Federation of Fishermen's Organisations* [1995] ECR I-3115 the statutory instrument under challenge contained the measures which as a matter of discretion the United Kingdom government had selected as the means of implementing certain Community requirements relating to sea fishing. The Court stated:

> "56 The national measures at issue... do in fact correspond to the objectives of general interest pursued by the Community in the fisheries sector since their purpose is the structural improvement of that sector. They do not constitute a disproportionate and intolerable interference impairing the very substance of the rights guaranteed.
>
> 57 Nor are those measures contrary to the principle of proportionality. The Commission decision approving the MAGP leaves the United Kingdom considerable freedom to evaluate and choose the measures to be taken in order to implement the plan. When considering whether the exercise of such freedom is lawful, the courts cannot substitute their own evaluation for that of the competent authority, but must restrict themselves to examining whether the evaluation of the latter contains a *patent error* or constitutes a *misuse of power*..."

And there is also paragraph 14 of *FEDESA*, which I have cited above at paragraph 20.

39. Two difficulties in particular stand in the way of Mr Paines' submission that a "manifestly inappropriate" test should be applied. The first is that a good deal of the argument's muscle depends on the proposition that the ban is to be treated as the will of Parliament as primary legislator, and I have rejected that. The second is that some of the passages on which Mr Paines relies, while containing expressions such as "manifestly inappropriate", also – and almost, so to speak, in the same breath – use the language of proportionality in its standard sense: the sense attributed by paragraph 13 of *FEDESA*. Thus one may compare paragraph 123 of the Court's judgment in *BAT and Imperial Tobacco* ("the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective...") with the immediately preceding paragraph 122 ("measures must not go beyond what is necessary to achieve [the objective pursued]"). And of

course the Advocate General in the same case had posed the question (paragraph 230), "is any other - less intrusive - measure available which would provide equally good protection for public health?"; and that is unmistakeably the language of proportionality. Likewise one may compare and contrast paragraphs 17 ("manifestly unreasonable") and 18 ("cannot... be criticized for being disproportionate to its stated objective") of the Court's judgment in *Aragonesa*, and note paragraphs 56 and 57 of the judgment in *National Federation of Fishermen's Organisations*.

40. Mr Paines submits (as I have shown) that a "manifestly inappropriate" test for the margin of appreciation should proceed on the footing that in this area the courts will not enquire whether the benefits to human health to be obtained from the measure in question outweigh any detriments. As advanced by Mr Paines the test would also, I think, disapply proportionality's ordinary rule that the least intrusive measure be chosen, or so dilute it that the rule's value as a legal standard for public decision-making would be critically undermined. If it were otherwise, any substantive distinction between Mr Paines' test and proportionality's paradigm case is effectively lost. Though he was at pains to disavow it, in my judgment Mr Paines in truth contends for an approach effectively tantamount, at least very close, to the *Wednesbury* standard of judicial review ([1948] 1 KB 223).

41. That position is not vouchsafed on the authorities. I do not consider that the Court of Justice has evolved such a test for the margin of appreciation in public health cases, or comparable cases of public policy, at least where a national measure is challenged on proportionality grounds. In *Eastside Cheese* this court was as we have seen faced with an argument that "the Court of Justice [had] approved the application of a special test [for proportionality] in special circumstances" (paragraph 48). Lord Bingham held (ibid.) that "there seems to be no good reason in principle or authority for two sharply different tests". He proceeded to discuss the considerations which broaden or narrow the margin of appreciation, but was clear (paragraph 49) that at no point did the test approximate to one of *Wednesbury* unreasonableness.

42. Though it is not of course a source of law, I have also found helpful the European Commission's *Guidance on the application of Articles 34 and 36 TFEU*, cited by Miss Rose:

> "6.1.2 … Protection of health and life of humans, animals and plants is the most popular justification under which Member States usually try to justify obstacles to the free movement of goods. While the court's case law is very extensive in this area, there are some principal rules that have to be observed: the protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market, even though in the absence of harmonisation it is for a Member State to decide on the level of protection; the measures adopted have to be proportionate, i.e. restricted to what is necessary to attain the legitimate aim of protecting public health. Furthermore, measures at issue have to be well-founded – providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information (… *Commission v Germany* [2007] ECR I-9811).
>
> …

> 6.3 … An important element in the analysis of the justification provided by a Member State will therefore be the existence of alternative measures hindering trade less. The Member State has an obligation to opt for the 'less restrictive alternative' and failure to do so will constitute a breach of the proportionality principle.
>
> The justification provided by the Member State must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated..."

43. Miss Rose also cited *Rosengren* [2007] ECR I-4071, which concerned a ban imposed by Swedish law on the importation of alcoholic drink into Sweden by private individuals (there being a State monopoly in Sweden in relation to the retail sale of alcohol). The fourth question referred to the Court of Justice was whether the ban could "be considered justified and proportionate in order to protect health and life of humans". The Court of Justice held:

> "49 It cannot be disputed that if the ban at issue in the main proceedings thus proves to be a means effectively of preventing younger persons from becoming purchasers of alcoholic beverages and therefore of reducing the risk of their becoming consumers of such beverages, it must be regarded as being justified in the light of the objective of protection of public health referred to in Article 30 EC [now Article 36].
>
> 50 However, since a ban such as that which arises from the national legislation at issue in the main proceedings amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that those rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade..."

The Court held that the ban was not proportionate: it applied to everyone, irrespective of age.

44. *Rosengren* appears to be a clear case of the application of a conventional proportionality approach to a public health measure, in contrast to a "manifestly inappropriate" test. Mr Paines sought to distinguish it on two grounds. First, there was a significant difference between the policy goal of the Swedish prohibition and that of the ban in the present case: the former was to restrain *excessive* consumption (of alcohol), whereas the latter was, ideally, to restrain *all* consumption (of tobacco). Secondly, the Swedish measure was for the protection of minors only; but the ban in our case is also to assist adult quitters. The first point of distinction cannot, in my judgment, form a rational basis for the respective application of markedly different legal standards. As for the second, the constituency of those

sought to be protected by the Swedish prohibition (minors only) is relevant only to the result – was it in fact disproportionate? – and not to the applicable test.

45. However Miss Rose accepts, indeed asserts, that there is one area where the test for proportionality indeed requires the court only to consider whether the impugned act or decision is "manifestly inappropriate". It is where proportionality is invoked as a ground for review of EU policy measures. She cites paragraph 14 of *FEDESA*, and also Professor Tridimas' *The General Principles of EU Law* (Oxford, 2nd edition) pp. 138:

> "The underlying interest which the principle seeks to protect is the rights of the individual but, given the discretion of the legislature, review of policy measures is based on the so-called 'manifestly inappropriate' test... By contrast, where proportionality is invoked in order to challenge the compatibility with Community law of national measures affecting one of the fundamental freedoms,... the intensity of review is much stronger. It is based, at least in most cases, on the notion of 'necessity' exemplified by the 'less restrictive alternative' test."

Professor Tridimas adds (footnote 12) that the 'manifestly inappropriate' test also generally applies to national measures implementing EU law, and cites *Upjohn* [1999] ECR I-223 (briefly discussed by Lord Bingham in *Eastside Cheese* in a passage at paragraph 47 which I have not set out).

46. Professor Tridimas proceeds to describe the "manifestly inappropriate" test. At p. 143:

> "The expression 'manifestly inappropriate' delineates what the Court [sc. the Court of Justice] perceives to be the limits of judicial function with regard to review of measures involving choices of economic policy... The test grants to the Community institutions ample discretion and applies to both aspects of proportionality, i.e. suitability and necessity... [A]rgument concentrates usually on the requirement of necessity."

At p. 144 Professor Tridimas states that the manifestly inappropriate test applies "in any area involving decision of economic or social policy where the Community legislature enjoys wide discretion".

47. With great respect I confess to some misgiving as to the contrast drawn by Professor Tridimas between the application of the now conventional proportionality standard in a challenge to national measures affecting one of the fundamental freedoms, and the application of the manifestly inappropriate test where the challenge is to a strategic measure of the Community legislature. I find it difficult to see why (if this is what is implied) the distribution of public legal authority between legislature and judiciary should differ from the one case to the other. The matter may however be less stark than this. If the requirement of necessity is inherent in the manifestly inappropriate test, as Professor Tridimas suggests, then however remote the judicial

review, the court cannot altogether be absolved of its responsibility to look for the "less restrictive alternative", since that is surely a condition of necessity. That seems to me to be an important consideration for the ascertainment of any difference of principle between proportionality as it is conventionally understood and a test of "manifestly inappropriate". At least where the subject-matter of review is a measure giving effect (as here) to domestic policy rather than European legislation, there is in my judgment a single principle whose application, however, varies according to the subject-matter and the identity of the decision-maker.

PUBLIC HEALTH AND THE MARGIN OF APPRECIATION – CONCLUSIONS

48. I have already indicated my view that Mr Paines' preferred touchstone for the margin of appreciation approximates to the *Wednesbury* test for review, and that no such test is on authority justified for cases like the present. As I have made clear the proportionality standard in my judgment applies as it was described at paragraph 13 of *FEDESA.* And I should say that I accept Miss Rose's submission that it is for the relevant decision-maker to show that the standard is satisfied.

49. However it is important to have in mind that proportionality is not a principle where "one size fits all" (*per* Lord Walker in *R (Pro Life Alliance) v BBC* [2004] 1 AC 185, paragraph 144, where the context was freedom of expression and ECHR Article 10(2)): compare Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paragraphs 27 and 28. Public health, and perhaps especially the health of minors, is surely the particular responsibility of elected government. It is in my judgment a strategic goal or aspiration of such importance as to confer a broad margin of appreciation on the decision-maker. So much is well demonstrated on the cases.

50. I should say a little more about how these conclusions are to be applied in practice. Given that there can be no abrogation of the standards of proportionality – the criteria set out in *FEDESA* paragraph 13 or, in Professor Tridimas' words, "the notion of 'necessity' exemplified by the 'less restrictive alternative' test" – how is the decision-maker's broad margin of appreciation actually to be made good? The answer is that the court leaves a wider space for the decision-maker's own judgment as to the application of the standards. The questions the standards represent must still be asked and answered, first by the decision-maker himself; but the broader the margin of appreciation, the less inclined the court will be to strike an autonomous balance of the material factors. The flaw at the root of Mr Paines' case is that by seeking to articulate the generous margin of appreciation enjoyed by the Secretary of State in the language of "manifestly inappropriate", he has undercut the standards themselves; and that is illegitimate.

51. My conclusion as to the margin of appreciation and the means by which it is to be recognised in practice affects the court's approach to Miss Rose's wholesale assault on the decision-making process leading to the ban. She advanced a series of what may perhaps be called close-range criticisms (to some of which I have already referred in passing: paragraph 16 above), not least of the FIA. In my judgment these arguments, which I will consider below, allow insufficient space for the broad margin of appreciation I would accord to the Secretary of State.

52. Mr Paines made a submission whose truth, I think, reflects this. He points to the first witness statement of Mr Franklin, Senior Economic Adviser at the Department of Health, who indicates (paragraph 6) that the purpose of an impact assessment is to inform the policy decision that falls to be made. Mr Paines drew an obvious but important contrast: whereas the FIA was concerned with whether the ban should be enacted, the court is (of course) concerned with whether it is proportionate. Thus while Mr Paines needs to show that the ban has a proper objective basis ("measures at issue have to be well-founded – providing relevant evidence": European Commission *Guidance*, paragraph 6.1.2), it is not our task to make precise judgments as to the quality of such documents as the FIA. The FIA is not the subject of the judicial review. Too close an engagement with its merits tends to shrink the margin properly available to the Secretary of State. And its authors, if their work were done in the judicial shadow, might perhaps view their duty with too guarded and conservative a state of mind. All this should colour our approach to Miss Rose's criticisms.

PUBLIC HEALTH AND THE MARGIN OF APPRECIATION – FOOTNOTE: A1P1

53. I said at paragraph 35 that there is a question whether a different approach to the margin of appreciation falls to be taken in relation to A1P1 from that applicable to Article 36. Mr Paines points out (skeleton at first instance, paragraph 83) that in *Marckx v Belgium* [1979] 2 EHRR 330 the Strasbourg court stated (paragraph 64):

> "The second paragraph of Article 1 (P1-1) nevertheless authorises a Contracting State to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. This paragraph thus sets the Contracting States up as sole judges of the 'necessity' for such a law..."

Mr Paines accordingly submits that the State in any event enjoys a very broad margin of appreciation when acting under the second paragraph of A1P1. Miss Rose appears to accept – or assert – that the position differs as between TFEU Article 36 and ECHR A1P1 (skeleton argument, paragraph 38).

54. There being no suggestion that A1P1 enjoins a more intrusive standard of review than Article 36, it is unnecessary to take time with such comparisons. However out of respect for the President who relied on it (paragraph 95), and Miss Rose who disagreed with it (paragraph 38), I should note the *obiter* observations of Lord Brown at paragraph 163 of *Countryside Alliance*:

> "If anything, indeed, I would have thought interferences with the fundamental rights and freedoms guaranteed by the Convention more, rather than less, difficult to justify than restrictions on the merely economic rights of free movement of goods and services provided for by the Treaty. If anything, these economic rights seem to me more akin to the property rights protected under Article 1 of the First Protocol than to the core rights guaranteed, for example, under Articles 8-11 – and therefore to be more readily overridden in the broad public interest than the Convention's core rights."

In relation to the second paragraph of A1P1 this seems to me, with great deference, to have much force.

THE CLAIMANTS' CRITICISMS OF THE BAN

55. I turn to Miss Rose's case on the merits. It is convenient to start with the two criticisms of the FIA to which I referred in passing at paragraph 16. The first drew attention to the fact that the cost/benefit analysis jumped from -£398m to +£116m through taking into account (as Miss Rose submits was done) the ban's anticipated benign effect on adult quitters. As I said, the reasoning behind these figures is Delphic, and contains a series of assumptions as to which the President was, to say the least, sceptical. However Miss Rose's principal point is that adult quitters should not have been made the touchstone of so important a shift in the data, or indeed regarded as a dimension of the legitimate aim which, for the purpose of the proportionality doctrine, the ban is to be taken to pursue. The whole thrust of the policy was to protect minors. Their protection was the only legitimate aim. Adults were an afterthought.

56. In my judgment this point does not begin to undermine the legality of the ban. Undoubtedly the focus of the policy was on the protection of the young; but I see no reason why the Secretary of State should not regard adult quitters, even in small numbers, as an additional benefit if that might reasonably eventuate, and thus as part of the legitimate aim pursued by the prospective ban. It is not without interest that at a meeting with officials on 26 January 2010, the day before the Regulations were laid before Parliament, the Minister asked why the benefits to adults from the ban had not been quantified in the draft FIA; and a quantitative assessment was incorporated into a revised version provided to the Minister the next day.

57. There is some force in Miss Rose's submission that the cost/benefit analysis itself suffers from technical and other shortcomings. But the Secretary of State was not obliged to conform his policy to its results. Here is the value of Mr Paines' contrast between the different concerns of the FIA and the court: the first to inform the policy-maker, the second to judge the policy once made.

58. The second criticism to which I referred earlier concerned the discussion of a cost of £22m as being "the total value of UK cigarette vending machines". Miss Rose's point is that the Regulations were made in the erroneous belief that the claimants and others in the industry would be able to diversify, and so the FIA made no allowance for redundancies. It is true that the Explanatory Memorandum attached to the Regulations as laid before Parliament contains an observation at paragraph 10.1 ("these businesses will no longer be able to carry out what is now their principal or only business, or use their machines in the same way as at present") which could be said to contemplate that the businesses might diversify. However the FIA, and indeed the earlier Impact Assessment of December 2008, estimated the cost of the ban as including the loss of the total value of UK cigarette vending machines (the £22m figure) and contained no suggestion that the vending machine companies would in fact be able to diversify. In fact there is some material to show that diversification was under consideration (not least a letter of 4 February 2010 to the claimants' solicitors). And Mr Black, Tobacco Programme Manager at the Department of Health, gave evidence in his witness statement of 30 July 2010 of the Department's belief that "there may be some scope for other products to be sold

from tobacco vending machines with minimal conversion" (paragraph 15); but this is not I think consistent with the FIA's counting the full value of the machines as a loss.

59. It is also true that the FIA allowed no figure for redundancies. Mr Franklin considered (first statement, paragraph 34) that "new jobs would be found". That is not, of course, the same as diversification of the businesses. He also considered (paragraph 36) that "much of the redeployment is likely to occur with no additional cost, as many employees find alternative work in anticipation of redundancy".

60. It is useful to consider this aspect of the case alongside a criticism advanced by the Regulatory Policy Committee ("the RPC") to which Miss Rose drew our attention. The remit of the RPC, whose members are independent experts, is to provide independent advice to government on the quality of analysis supporting new regulations. In this case they offered observations on some of the materials supporting the ban, though too late to be considered during the finalisation of the FIA. They stated:

> "13 The economic impact on the vending machine operators and pubs, clubs etc seems to be neglected... [T]he impact on businesses has not been fully considered and more should have been done to quantify this."

To this the Department of Health appended the following comment:

> "Manufacturers' profit is not factored in as, unless tobacco manufacture is more heavily monopolised than goods generally (and it possibly is), the capital employed in it would attract the same return in other uses.
>
> The key issue is the net effect on the economy as a whole..."

61. The truth is that at the time the Regulations were laid before Parliament issues relating to the impact of the prospective ban on the businesses and their employees must have involved a degree of intelligent guesswork, not to say speculation. The FIA and other documents generated in the evolution of the policy dealt with such matters superficially and in very general terms, so far as they dealt with them at all. If that is a failing, however, the ban would only thereby be amenable to judicial review challenge if the decision-maker's margin of appreciation, far from being broad, were so constrained that the jurisdiction fell to be exercised very intrusively. For reasons I have given the opposite is the case.

62. In all this I have not forgotten the importance of the law's insistence on the right to pursue a business or occupation: see in particular *Swedish Match* [2005] 1 CMLR 26, a case concerned with a challenge to the ban by an EU directive on the marketing of oral snuff. But the right is qualified. Despite the uncertainties at the time, such as they were, concerning the impact of the ban, it is clear that the Secretary of State considered that the protection of public health was an overarching goal. He was entitled to take that approach.

63. All these points fall within what I have called Miss Rose's close-range criticisms of the decision-making process. Taking them compendiously, as I have said (paragraph 49) they cannot in my judgment prevail over the broad margin of appreciation I would accord to the decision-maker. But Miss Rose assaults the process on three further, more strategic fronts.

INCONSISTENCY

64. The first of these asserts what is said to be an objectionable inconsistency between prohibiting tobacco sales from vending machines while permitting such sales to continue in shops and other retail outlets subject to age verification systems (just as had been earlier proposed as a means of ARM for machines). This argument was developed by Mr de la Mare as well as Miss Rose. Miss Rose cites *Hartlauer* [2009] ECR I-1721 and *Corporacion Dermoestetica* [2008] ECR I-5785. In the former case a prior authorisation based on an assessment of the needs of the market was required for the establishment and operation of new independent outpatient dental clinics but not for setting up new group dental practices. This was found to constitute an objectionable inconsistency (see paragraphs 56, 61 and 63). In the latter case the inconsistent treatment of comparable dental practices was held to be unjustified (see paragraphs 39, 40 and 55).

65. I do not consider that these authorities provide analogies with the present case. As the President said (paragraph 66) "[t]he comparison is not between rejecting age control mechanisms for vending machines but permitting age control to operate in shops, but between banning the sale of cigarettes from vending machines and permitting sales in shops subject to age restrictions". It is not current government policy to prohibit the retail sale of tobacco products altogether. Given that it is for the Member States to decide on the extent and form of health protection measures (see the citations at paragraph 36 above) it was in my judgment open to the Secretary of State, other things being equal, to prohibit sales from vending machines but allow other retail modes to continue subject to conditions. As the President noted at paragraph 67, it is in any event unlawful to sell cigarettes to under-18s by any means. There is no inconsistency in banning one form of sale without for the present banning others. I would reject the submission to the contrary advanced by Miss Rose and Mr de la Mare.

NO EVIDENCE

66. Miss Rose's next strategic argument is very ambitious. She says that the Secretary of State had no evidence that the ban would reduce smoking at all – whether by minors or adults. She appears to have some support from the RPC. In their final Opinion of 1 March 2010 they say:

> "The evidence set out in the [FIA] does not provide a specific link between the proposed measure and a reduction in smoking by under-18s. Evidence that young people are accessing cigarettes from vending machines does not in itself show that the new regulation will lead to reduced smoking, as under-18s may still access cigarettes from other sources."

And this is the burden of Miss Rose's submission. She says that cutting off one source of supply does not demonstrate or imply that its users will not find an equal supply elsewhere. This is, of course, literally true: the ban is no proof that the gap it leaves will not be filled. But we are not in the realm of proof. The question is as to the probabilities of future human conduct. That is not to say that the Secretary of State may act without any evidence ("precise evidence enabling its arguments to be substantiated..."): Commission *Guidance*, paragraph 6.4). However Mr Paines has made it very clear that it has never been the Secretary of State's case that the ban is justified under Article 36 TFEU and A1P1 because its effects are capable of being accurately calculated in a cost/benefit analysis. As he submitted:

> "[N]one of the tobacco control measures that have been introduced in recent years could have been introduced if the burden of justification involved quantifying with precise accuracy effects that are not capable of such quantification." (skeleton argument paragraph 19)

67. The President (paragraph 93) regarded it as "obvious… that, if you shut off one source of tobacco supply, there will be some reduction in smoking". I would with respect be wary of reaching such a conclusion without paying some attention to the nature of other possible sources of supply. In that regard, one of Miss Rose's points was that prohibiting vending machines would stimulate the trade in illicit cigarettes. But illicit cigarettes are cheaper than those sold from vending machines, which actually sell at higher than normal retail prices. The President was right to state (paragraph 64) that it was "implausible speculation to suppose that young people who do not already buy cheaper illicit cigarettes will be driven to do so if vending machines are banned". It is also I think significant that whereas vending machines account for 1% of retail sales of cigarettes to the population as a whole, they are estimated to account for 4.5% of purchases by children. Some minors may be less likely to seek to buy cigarettes face-to-face over the counter, thus having to lie (implicitly or expressly) about their age and to risk rejection, than use a machine. Moreover – and this perhaps goes more to adult quitters – the overwhelming majority of vending machine sites are licensed premises where the public do not generally go purely for the purpose of purchasing cigarettes. They may represent a particular source of temptation to patrons relaxing in a public house, perhaps when cigarettes from shops are not available (either at all or at least not so immediately). And I note that the World Health Organisation FCTC Guidelines recommend that "[v]ending machines should be banned because they constitute by their very presence a means of advertising or promotion under the terms of the Convention".

68. In all these circumstances I would reject Miss Rose's submission that the Secretary of State had no evidence that the ban would reduce smoking, among minors or generally.

THE THIRD STRATEGIC ARGUMENT: THE BAN IS NOT SHOWN TO BE PROPORTIONATE

69. However I consider that Miss Rose's final strategic point is well made. It is that the Secretary of State has not shown that a "less restrictive alternative" than an outright ban – a less intrusive means of achieving the legitimate goal of enhancing human health by a reduction in smoking – could not be adopted. It appears that after the

amendment to the Bill was introduced in the House of Commons in October 2009 and accepted, the possibility that ARM might be introduced was simply dropped. No reasoning has been offered to justify this shift of policy which was made law by the 2009 Act.

70. This argument is coloured by a subsidiary submission, advanced by Miss Rose but particularly emphasised by Mr de la Mare. I will first explain the submission and then see where it takes the claimants' and NACMO's case.

THE CONSTRUCTION ARGUMENT: SELECTIVE USE OF S.3A(1)

71. The argument is one of construction. It is to the effect that s.3A(1) read with s.3A(6) of the 2009 Act would in fact have allowed the Minister to promote the introduction of ARM by a threatened or selective use of the s.3A(1) power. As we have seen, s.3A(6) allows the s.3A(1) power to be exercised "to make different provision for different cases or circumstances". Accordingly, says Mr de la Mare, it was open to the Minister to impose the prohibition only in relation to those machines which were not fitted with ARM. As a possibly more practical variant, the Minister might indicate to the vending machine industry that she had in mind to introduce a ban under the subsection, but proposed to wait for a period of, say, two years, after which the ban would be implemented but again only in relation to machines without ARM.

72. Addressing the argument on s.3A(6) the President said this at paragraph 32:

> "Mr de la Mare... has a submission that the amended section 3A(6)... retains a power to make regulations which do not impose an outright ban... It does not seem to me to be possible to construe this subsection in the way Mr de la Mare suggests. The power to make regulations in section 3A(1) is to make provisions prohibiting the sale of tobacco from an automatic machine, and I do not read section 3A(6) as extending to a power to make provisions which do not prohibit such sale. It looks as if section 3A(6) was a subsection in the unamended Bill, which the amendment did not remove or modify. However that may be, the passage of the Bill through Parliament and its amendment did not leave the Secretary of State with the practical political option of making regulations to provide for precisely that which Parliament had removed from the Bill."

If it had indeed been submitted that s.3A(6) allowed the Secretary of State to make regulations "to provide for precisely that which Parliament had removed from the Bill" that would of course have been misconceived and the President would with respect plainly have been right to reject it. But the actual submission, which I have described at any rate as it was advanced in this court, was more modest and less obviously objectionable.

73. Even so I am inclined to reject it. Of course there must be proper space for the use of s.3A(6). There might, I suppose, be reasons (I do not suggest there are) for introducing the ban at different times in different parts of the country. But what is suggested by Mr de la Mare, though not amounting to a power actually to require

the installation of ARM, is in effect a means of at least promoting the very policy which was dropped from the Bill by the amendment. As I have said (paragraph 33) Parliament by s.3A intended the Secretary of State to be empowered, at his discretion, to impose the ban; and the corollary was that if he chose not to do so, he would do nothing. Mr de la Mare's qualified and conditional approach to the Act's construction gives the statutory policy's driving force to s.3A(6), whereas it belongs to s.3A(1). For that reason I conclude that it is mistaken.

EFFECT OF THE CONSTRUCTION ARGUMENT

74. However even had this submission been correct it could not, I think, affect the appeal's result. It would have meant that the Minister in failing to consider ARM had misapprehended her powers or for other reasons chosen not to contemplate a course of action that was open to her and which (assuming only that the proper application of the proportionality principle required that the less intrusive option of ARM should indeed be considered) she ought at least to have had in mind. But if as I would hold the submission is incorrect, then (on the same assumption) the Minister cannot in my judgment find solace in the fact that the enabling statute on its proper construction did not allow her to impose ARM as a policy choice.

75. However I have considered whether my conclusion that this construction point is mistaken might nevertheless influence the appeal's result in the following way. As I have shown (paragraphs 21 – 23), the identity of the public decision-maker can affect the margin of appreciation he or it enjoys. If Mr de la Mare's submission on s.3A(6) is wrong, might it not be said that the failure to consider ARM after the Bill was amended was a function of the 2009 Act, and thus brought about by the powers of the primary decision-maker, the legislature, which on this basis had ruled out such consideration? The legislature as primary decision-maker enjoyed a margin of appreciation distinctly broader than that of the Minister; and the difference between the margins respectively enjoyed by the primary and secondary legislators is a constitutional matter (see above paragraph 31).

76. But I do not think this consequence follows. S.3A on what I would hold is its true construction does no more than empower the Secretary of State, at his discretion, to impose the ban. The bare conferment of the power cannot offend TFEU Article 36 or ECHR A1P1. Accordingly the burden of the judicial review must fall on the Regulations, under which the Secretary of State had to decide whether to use the power conferred. Faced with s.3A as enacted he might have decided to do so albeit after considering ARM, if he concluded for sound reasons that ARM would be insufficiently effective to achieve the legitimate aim in hand and only the ban would do. If on the other hand his conclusion was that ARM would suffice and the ban would be disproportionate, no doubt the ban would not be imposed. However he could not impose ARM; and in those circumstances the government might ask Parliament to reconsider the legislation. But the effective decision for the purpose of these proceedings would be that of the Secretary of State, whatever the *realpolitik.* He would enjoy the margin of appreciation appropriate to him. And he cannot, as I have said, find solace in the fact that the enabling statute on its proper construction did not allow him (or the Minister) to impose ARM as a policy choice.

77. Accordingly in my judgment the proper scope of s.3A does not touch the question whether in the events which have happened a broad or narrow margin of appreciation colours the application of the proportionality principle.

CONCLUSION ON PROPORTIONALITY

78. I return to the merits of Miss Rose's third and last strategic argument. As we have seen, by December 2008 ARM was the Secretary of State's preferred policy option. It was allowed for by the terms of the Bill introduced in the House of Lords on 16 January 2009. The draft regulations issued by the Secretary of State in October 2009 would have implemented it. The Impact Assessment published at the same time (see paragraph 11 above) confirmed the Minister's view that, at least for an initial two-year period, the imposition of ARM rather than an outright ban of tobacco vending machines was the appropriate means of achieving the aim of reducing under-age smoking. The amendment to the Bill was introduced in the House of Commons on 12 October 2009, and the 2009 Act and the Regulations followed. No reasoning of any kind was offered, in any consultation document, Evidence Base or Impact Assessment, to justify or explain the outright abandonment of ARM as a policy option – whether in the form of a compulsory regulation, or a voluntary code which would be supplanted by a ban if, after a specified period, the code proved unsatisfactory. It is plain that the Secretary of State considered (and, as I find, believed himself only entitled to consider) two options: an outright ban or doing nothing.

79. What has, I think, made this case elusive is that while s.3A as enacted did not empower the Secretary of State to impose ARM, on the view I take he was nevertheless obliged to consider ARM's merits before exercising the power to impose a ban. If he did not, the imposition of the ban would be (and in my judgment is) disproportionate. I reiterate: the Minister cannot find solace in the fact that the enabling statute on its proper construction did not allow her to impose ARM as a policy choice. The point is important because, as it seems to me, any other view involves treating the 2009 Act as conferring on the Secretary of State a discretionary power which he might exercise free of the discipline and constraint of proportionality. But there is nothing in the statute, and certainly not in the general law, to justify such a position. This approach moreover preserves the constitutional divide between the power of Parliament and the power of the Secretary of State.

80. I have said (paragraphs 48 – 51 above) that there can be no abrogation of the standards of proportionality however broad the margin of appreciation accorded to the decision-maker. Indeed where the margin is particularly generous, as I would hold is the case here, strict adherence to the standards – necessity and the "less restrictive alternative" test – has if anything an enhanced importance, because it is they, rather than any muscular adjudication of the facts by the court, that bear in such cases the stamp of the rule of law. In my judgment, and notwithstanding the terms of s.3A(1), the Secretary of State and the Minister have on the facts of this case failed to apply, or even to consider, the "less restrictive alternative" approach. They should have done so. It follows that it is not shown that the ban is proportionate to the legitimate aim in view; it is therefore unlawful.

81. I should emphasise that the force of the proportionality standards on the decision that fell to be made is in the circumstances thoroughly practical. One of Miss

Rose's submissions, vigorously pursued, was that the ban is no better a preventive of smoking, especially among the young, than ARM would have been. She says for example that the 20% failure rate in the ARM tests (see paragraph 9 above) does not necessarily favour the outright ban, because in the latter case under-age smokers resorting to other outlets would face age detection systems in that context whose success rate might be no better. Mr Paines sought to address this in the course of his argument. But despite being in favour of ARM right up until October 2009 the Secretary of State did not consider it, any more than he considered any other aspect of ARM, in the course of the deliberations following the Bill's amendment and leading to the 2009 Act and the Regulations. He should in my judgment have done so.

POSTSCRIPT

82. I would allow the appeal for the reasons I have given. In so deciding I have the misfortune to disagree with the conclusions of my Lord the Master of the Rolls and my Lady Arden LJ, whose judgments I have had the pleasure of reading in draft. I have carefully considered their detailed deployment of factual aspects of the case as well, of course, as their treatment of the relevant law. In the end, however, it seems to me that the appeal falls to be resolved in the appellants' favour, for all the reasons I have given, by what with respect I would regard as the proper application of two central considerations: the proportionality principle, and the maintenance of what I have called the constitutional divide between the power of Parliament and the power of the Secretary of State. The case is a good example of the common law and the law of Europe in harness. Though proportionality has its inspiration in the civilian systems, its alliance of firm principle (the standards) and varying application (the margin of appreciation) is highly characteristic of the common law's method. Principle and pragmatism are conformed by such alliances, and the law is more effective accordingly.

Lady Justice Arden:

83. I have read with enormous admiration the judgments of Laws LJ and of the Master of the Rolls. Their extensive judgments will make it unnecessary for me to go through all the complex background to this appeal. I will, however, have to touch on facts they have not mentioned (see "*Some further facts about smoking and about banning TVMs"*, below, paragraphs 86 to 114). I am ultimately of a different opinion from Laws LJ on (a) the intensity of review in this case under the principles of proportionality (see "*The principles of proportionality*", below, paragraphs 115 to 147); (b) the relevant decision-maker (see *"The relevant decision-maker"*, below, paragraphs 148 to 155); (c) whether the measures satisfy the requirement of suitability (see "*Suitability of the measures*", below, paragraphs 156 to 162); and (d) whether the appellants have discharged the onus on them of adducing evidence to show that there are measures less onerous to them, which are equally suitable for the purpose of public health protection (see "*Least intrusive means: how is this issue to be decided?"*, below, paragraphs 163 to 166). There are three further sections in this judgment: *"Drawing the threads together"* (paragraphs 167 to 180); *"Some observations on the approach of the Master of the Rolls to the legal issues on this appeal"* (paragraph 181); and *"Concluding observations – the wider picture"* (paragraphs 182 to 183).

84. Where Laws LJ has already used an abbreviation, I will use it also and where he has already cited an authority, I will not repeat the citation. By the word "children", I refer to all young people up to the age of 18 years. In addition, I gratefully adopt the description of the background in paragraphs 4 to 17 of the judgment of Laws LJ. I agree with paragraphs 53 to 65 and 71 to 73 of the judgment of Laws LJ, and will not repeat the points that he makes there. There is much common ground between the judgment of the Master of the Rolls and my own, but there is some difference of approach as I seek to explain in paragraph 181 below.

85. In summary, my conclusions are as follows:

a. Banning tobacco vending machines (which I shall call "TVMs") is for the purpose of protecting public health, particularly that of children, and this is the aim of the measures of which the appellants are seeking judicial review under European Union law. Those measures are: ss 22 and 23 of the 2009 Act, and the Regulations;
b. This aim of the measures is to be considered a legitimate aim for the purposes of European Union law;
c. By virtue of ss 22 and 23 of the 2009 Act, Parliament made two decisions: (i) to give the Secretary of State power to ban TVMs; and (ii) to rule out the possibility of the Secretary of State regulating TVMs by secondary legislation;
d. The level of intensity of review of the decisions of Parliament for the purposes of the principles of proportionality is that of "manifest error", and the test of "least intrusive means" either does not apply or applies with the same lower level of intensity;
e. The appellants cannot show any manifest error on the part of Parliament;
f. The same level of intensity applies to the acts of the Secretary of State in relation to the decision authorised by ss 22 and 23 of the 2009 Act whether or not to ban TVMs;
g. The Secretary of State has considered and rejected a purely voluntary code, and was only willing to permit the use of TVMs fitted with ARM on the basis of regulation;
h. The decision of the Secretary of State to impose a ban was not on its face manifestly inappropriate. Accordingly, the appellants bear the burden of adducing evidence to show that there are other, equally suitable, means of achieving the gain in public health sought by the legitimate aim of the Secretary of State. For this purpose, the appellants rely on the option of a purely voluntary code for requiring TVMs to be fitted and operated with ARM;
i. In my judgment, on the evidence, the burden on the appellants has not been discharged;
j. In respectful disagreement with Laws LJ, it is inappropriate to declare the decision of the Secretary of State disproportionate on the basis that the Secretary of State has failed to form a view about a purely voluntary code for ARM but that he might properly form such a view (favourable or unfavourable) on reconsideration of the matter. The court must decide whether or not, on the evidence adduced, the requirement as to least intrusive means has been met; and
k. The President of the Queen's Bench Division came to the right conclusions and these appeals should be dismissed.

Some further facts about smoking and about banning TVMs

86. The further facts, which I propose now to set out, concern:

a. The effects of smoking on public health to which the measure is directed;

b. The nature of the Secretary of State's earlier proposal for adopting ARM; and

c. The response of the European Commission to notification under the Technical Standards Directive.

87. It is well known, but worthy of repetition, that smoking kills: there are about 80,000 deaths related to smoking per year in England alone. This is clearly an area of health policy where Parliament and the government have a responsibility to use their powers, so far as they can, to protect children. There are an estimated 200,000 children between 11-15 years old who regularly smoke. That suggests that about 40,000 children become regular smokers with each year that passes.

88. Added to that, children are particularly vulnerable to addiction to smoking. They are often unable to comprehend the dangers they are creating for themselves, and society owes them some obligation to ensure that, so far as possible, they are protected. The evidence filed on behalf of the Secretary of State includes advice from the Royal College of Surgeons ("the RCS") that nicotine is highly addictive and there can be symptoms of dependence within even a day of smoking for the first time. In addition, the RCS reports that cigarettes have been designed and marketed to enhance the development and maintenance of addiction. Despite the fact that TVMs sell cigarettes at a premium price, it nevertheless appears that a substantial number of children use and prefer this source of tobacco products.

89. As every parent knows, children learn by example and, since what the measures under review seek to achieve is a change in the behaviour of children, it is conducive to that aim to reduce adult smoking too. That would also produce potential benefits to the adults themselves. Accordingly, it does not follow, as Miss Dinah Rose QC, for Sinclair Collis, submits that, even if the legitimate aim is exclusively the protection of child health, regard need not be had to adults and that ARM must, therefore, be adopted, as opposed to a ban.

90. The development of policy in this field is a matter in which the government has been involved for many years and the Department of Health now has considerable accumulated wisdom on what needs to be done and what works.

91. The policy behind the Regulations is set out in the explanatory memorandum accompanying the Regulations. This includes the following passages:

> "7. Policy Background
>
> *What is being done and why*
>
> 7.1 Protecting children from the health harms of smoking is a public health priority for the Government. There is evidence that in 2008, 12% of young people aged 11-15 who are regular smokers usually access cigarettes through vending machines (2008 is the latest data

set). Removing this form of access to cigarettes for young people will assist our key public health priority of reducing smoking uptake amongst young people. With two thirds of smokers stating that they started smoking before the age of 18, the Government believes that preventing the uptake of smoking by young people is vital.

7.2 The National Association of Cigarette Machine Operators (NACMO) has had in place a voluntary code designed to limit the number of under age sales made from vending machines, for over 10 years. This has not achieved adequate results, as demonstrated by the proportion of young people still using tobacco vending machines and therefore the Government believes it is necessary to introduce these regulations.

7.3 The Regulations are designed to help prevent access to tobacco products by children. Adults will be able to buy tobacco from other sources.

…

Rationale for further control on tobacco vending machines

7. Tobacco smoking is proven to cause serious harm to the health of the smoker. It also poses significant externalities to the rest of society and is a leading cause of health inequalities. Smoking prevalence is higher among routine and manual groups, and tobacco use is a significant cause of health inequalities.

8. Young people are uniquely vulnerable consumers, as they do not always have the capacity to make informed decisions, and society generally recognises this by providing greater protections for children than for adults. Nicotine addiction can develop extremely quickly in children. The National Statistics *General Household Survey* estimates that around two-thirds of smokers say they started smoking regularly before turning 18.

9. Government intervention is justified to prevent young people from accessing tobacco. The Government believes that children can far too easily access tobacco from vending machines, and that action is necessary to prevent this. The current voluntary code of practice on the siting of tobacco vending machines to prevent underage access (the NACMO code of practice) has proved to be insufficiently effective in restricting the access young people have to this source of tobacco.

10. Latest data collected from the English local authorities by the Local Authorities Coordinators of Regulatory Services (LACORS) on test purchasing from vending machines covers the 2008-09 period and shows that illegal sales to under-18s were made at the majority (58%) of vending machines tested across England during this period. Despite the NACMO voluntary code of practice in the siting of vending

> machines, LACORS found that 26.5% of vending machines checked in England over 2008-09 were located in unsupervised areas and nearly a third of vending machines checked were assessed by trading standards officers as being *likely* to result in sales to under 18s.
>
> 11. The UK is a party to the WHO Framework Convention on Tobacco Control (FCTC), the world's first public health treaty. The treaty includes the following treaty obligations under Article 16 (sales to and by minors):
>
> > "Each party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen. These measures may include…. ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors.
> >
> > When signing, ratifying, accepting, approving or acceding to the Convention or at any time thereafter, a Party may, by means of a binding written declaration, indicate its commitment to prohibit the introduction of tobacco vending machines within its jurisdiction or, as appropriate, to a total ban on tobacco vending machines."
>
> 12. The FCTC is elaborated through guidelines for parties. Under Article 13 (tobacco advertising, promotion and sponsorship), guidelines have been agreed and provided to parties that suggest that "vending machines should be banned because they constitute by their very presence a means of advertising or promotion under the terms of the Convention."
>
> 13. The World Health Organization's *European Strategy for Tobacco Control* recommends that strategic national action should include "banning sales [of tobacco] through vending machines". According to the World Health Organisation, 22 countries in the WHO EURO region have banned the sale of tobacco through vending machines (10 since 2002). Of these 22 countries, 12 are European Union Member States."

92. The consultation document, "*A Smokefree future*", published by the government on 1 February 2010, demonstrates that the ban on TVMs is part of a wider, rational strategy to control smoking:

> "7. We have three overarching objectives to make significant progress towards a smokefree society. Against each objective, we have also set an aspiration for what could be achieved by 2020 if all our partners across the public, the private and the voluntary sectors were to continue to prioritise tobacco control

and implement the evidence-based policies set out in this strategy.

To stop the inflow of young people recruited as smokers: aspiring to reduce the smoking rate among 11–15-year-olds to 1% or less, and the rate among 16–17-year-olds to 8% by 2020.

To motivate and assist every smoker to quit: aspiring to reduce adult smoking rates to 10% or less, and halve smoking rates for routine and manual workers, among pregnant women and in the most disadvantaged areas by 2020.

To protect our families and communities from tobacco-related harm: aspiring to increase to two-thirds the proportion of homes where parents smoke but that are entirely smokefree indoors by 2020.

Stopping the inflow of young people recruited as smokers

8 Each year in England, an estimated 200,000 children and young people start smoking; and most adult smokers say they started smoking regularly before they turned 18. We need to focus on preventing young people from taking up smoking in the first place. The home environment is very important: young people are much more likely to smoke if they live with smokers. For this reason, supporting adult smokers to quit is a key aspect in encouraging young people not to take up smoking.

9 By placing a greater emphasis on preventing young people from taking up smoking, we have the opportunity to break the intergenerational cycle of initiation and addiction to tobacco. The perpetuation of tobacco use through the generations is one of the major reasons for the difference in quality of life and life expectancy between the richest and the poorest.

10 Action already taken to reduce the appeal and the supply of tobacco to young people has included a ban on most forms of tobacco advertising, the inclusion of pictorial warnings on tobacco packs to raise awareness of the risks of smoking, and an increase in the age at which young people can be sold tobacco products – from 16 to 18 years.

11 The affordability of tobacco products affects youth uptake and adult consumption alike. We have worked to reduce the affordability of such products by increasing the tax on them and maintaining the downward pressure on the illicit tobacco market. Despite these efforts, the evidence shows that young

people are continuing to take up smoking for a number of reasons, including the way tobacco products are promoted.

12 In pursuit of our first objective, we will:

• Make tobacco less affordable by continuing to consider the case for real increases in duty on tobacco on a Budget-by-Budget basis, and by additional investment in overseas Fiscal Crime Liaison Officers, whom we expect to prevent over 200 million illicit cigarettes from being smuggled into the UK each year. More broadly we will continue to bear down on the market for illicit cigarettes, which has fallen from 21% in 2000 to 10% in 2007/08 (midpoint estimates), and achieve similar success in reducing the illicit market for hand-rolled tobacco.

- Remove tobacco products from display in shops.

- Prohibit the sale of tobacco from vending machines, a significant source of tobacco for young people, subject to Parliamentary consideration of regulations.

- Take action to ensure that the advertising of tobacco accessories is not being used to encourage the use of tobacco products of any type.

- Encourage research to further our understanding of the possible links between tobacco packaging and smoking behaviours.

- Restrict tobacco availability to children by reviewing the current restrictions on the retail of tobacco and enforcement of tobacco retail regulations. Alongside this, we will launch a review within the first three months of this year into the purchase for and supply of tobacco to young people. This review will assess what more can be done to limit these sources, including examining the current legislation around the confiscation of tobacco that children are found to have in their possession.

- Continue to engage with young people to raise awareness about the dangers of smoking and develop skills that will encourage them to play a role in building our smokefree future.

…

Vending machines

3.17 Since vending machines are self-service, they offer easy (and often unsupervised) access to tobacco, including for young people under the legal age at which they may be sold tobacco (18 years). Although sales of tobacco products from vending machines represent just 1% of the overall tobacco market, a disproportionate number of purchases from vending machines are made by young people. In 2008, vending machines were the usual source of tobacco for 10% of those children aged 11–15

> who said they smoked. Trading standards test purchasing has also shown that young people can easily access tobacco from vending machines.
>
> 3.18 We will prohibit the sale of tobacco from vending machines, subject to Parliamentary consideration of regulations."

93. I turn now to the engagement of the Minister with ARM. The first proposal for regulating TVMs in the appeal bundle is a document contained in a proposal signed by the Minister in December 2008 for imposing requirements for ARM on TVMs. This document shows that what was proposed was secondary legislation, which would be enforced by Trading Standards Officers.

94. From this, and indeed from the later documents contemplating the use of ARM, the Minister evidenced an intention to regulate the use of ARM by secondary legislation. Successive Ministers and Secretaries of State clearly took the view that a purely voluntary code was not an acceptable way forward.

95. The only sanctions backing up a purely voluntary code are s 7 of the Children and Young Persons Act 1933 ("the 1933 Act") and s 145 of the Licensed Premises Act 2003. Section 7 (as amended by the 2009 Act) provides:

> "Sale of tobacco, etc, to persons under eighteen
>
> (1) Any person who sells to a person . . . under the age of eighteen years any tobacco or cigarette papers, whether for his own use or not, shall be liable, on summary conviction to a fine not exceeding level 4 on the standard scale…
>
> (1A) It shall be a defence for a person charged with an offence under subsection (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence."

96. The defence in s 7 of the 1933 Act no doubt makes it more difficult to obtain a conviction. Section 145 of the Licensed Premises Act 2003 provides:

> "145 Unaccompanied children prohibited from certain premises
>
> (1) A person to whom subsection (3) applies commits an offence if –
>
> (a) knowing that relevant premises are within subsection (4), he allows an unaccompanied child to be on the premises at a time when they are open for the purposes of being used for the supply of alcohol for consumption there, or
>
> (b) he allows an unaccompanied child to be on relevant premises at a time between the hours of midnight and 5 a.m. when the

> premises are open for the purposes of being used for the supply of alcohol for consumption there.
>
> (2) For the purposes of this section –
>
> "(a) "child" means an individual aged under 16,... "

97. However, this applies only to certain premises and only to unaccompanied children under 16.

98. Unsurprisingly, although no detail on this appeared in the 2008 document, the view was taken on behalf of the Secretary of State that these provisions alone do not provide a suitable framework of regulation. There was, for instance, no statutory control over the siting of TVMs; no statutory requirement to install ARM or use it; and no statutory power to prevent persistent offenders from operating TVMs. The consultation document accompanying the Bill that became the 2009 Act referred to the possibility of imposing requirements with the aim of "eliminating" underage sales from TVMs on the basis of a two-year trial period. However, this was not to be on the basis of a purely voluntary code. On the contrary, there was to be extensive regulation during this trial period, and beyond, were the trials successful. Accordingly, the proposal was not just that the Secretary of State should impose a requirement on all who offered tobacco for sale through TVMs to ensure that ARM was installed, but also that the failure to do so should be backed up by regulatory sanctions and criminal penalties. To quote the 2009 consultation document:

> "Enforcement
>
> …
>
> The provisions in the Health Bill on tobacco vending machines in England and Wales insert a new Section 3A into the Children and Young Persons (Protection from Tobacco) Act 1991. They also insert a new Section 12D(1)(c) into the Children and Young Persons Act 1933 (CYPA). Any offence for breaking the requirements on vending machines will therefore be covered by sections 12A to 12D of CYPA. Sections 12A to 12D of CYPA were introduced by the Criminal Justice and Immigration Act 2008 and they provide for magistrates to impose orders prohibiting the sale of tobacco, for periods of up to a year, by persons or shop found to have committed specified tobacco offences (which relate to the sale of tobacco to people under 18) on three occasions. Under Section 5 of the 1991 Act, enforcement is the responsibility of specified local authorities."

99. So far as I can see, the position of the Secretary of State was consistent throughout that there needed to be a regulatory framework if ARM was to be adopted. This point provides an explanation why, when the Bill was amended and the Secretary of State came to draft new regulations, the position taken was that, in the absence of a

power to impose requirements, it was not possible to permit the use of ARM. As has been explained by Laws LJ, the new section 3A does not permit the Secretary of State to introduce a partial ban, limiting its effect to TVMs not fitted with acceptable ARM. By rejecting the provisions in the Bill enabling the Secretary of State to impose requirements on the operation of TVMs, Parliament decided that, if there was to be a ban, it should (subject to s.3A(6)(b), properly construed) be a complete ban and the Secretary of State should impose it but that the Secretary of State should not be permitted to take the alternative course of having a voluntary code with statutory underpinning. That part of the discretion was thus carved out, and, in agreement with Laws LJ, I consider that section 3A(6) does not enable the Secretary of State to impose requirements to have ARM.

100. On that basis, it was entirely consistent with earlier decisions for the Secretary of State to take the position that was taken in the revised 2009 consultation document and in the letter of 4 February 2010, referred to in paragraph 103 below, that in the absence of powers of delegated legislation, the only option was a ban. Thus the revised 2009 document states:

> "There is no longer a power to impose requirements on how tobacco products are sold from vending machines, as there was when the Health Bill was first introduced. The appropriate national authorities in England, Wales and Northern Ireland may now only make regulations to prohibit tobacco sales from vending machines"

101. I do not consider that the proper reading of this statement, or that in the 4 February 2010 letter, was that the Secretary of State took the view that he was not entitled to use the option of doing nothing so as to allow ARM to be used as an alternative to a ban, as Laws LJ has held (at, for example, paragraph 78 above). In my judgment, these statements merely build on the Secretary of State's well-established position that a purely voluntary ban, unsupported by any statutory underpinning, was not a viable option. Put another way, in my judgment, it is implicit in this statement that the Secretary of State has decided that it is not in the public interest to have a purely voluntary code. Moreover, for the reasons given above, Mr Kevin Pascal, managing director of Sinclair Collis, was wrong to say in his witness statement of 16 April 2010 at [47] that the Department of Health could "have used a code to similar effect to the draft regulations contained in the original consultation." It also does not follow simply from the fact that ARM has been developed that there can simply be a voluntary code. The question whether requirements should be embodied in legislation or left as "soft law" is quintessentially one for Parliament and those with delegated powers to legislate, and not the courts.

102. It is also incorrect for Miss Rose to submit that there was a *volte-face* by the Department of Health. The position of the Secretary of State on the need for statutory underpinning was consistent throughout the period from 2008 to the adoption of the Regulations providing for a ban. As far as I can see, the Secretary of State has never publicly contemplated a purely voluntary code without any statutory underpinning.

103. The question of which option to take was reconsidered again in a letter dated 4 February 2010 but the same answer was reached. In this letter, the Minister gave the following reasons for her decision to introduce the Regulations:

> "…
>
> 6. The Minister considered that there were strong arguments in favour of a prohibition. She considered that a prohibition would be easy to operate and enforce, and would therefore be likely to achieve the public policy aim of preventing young people's access to cigarettes through vending machines.
>
> 7. In particular she took the following factors into account:
>
> a) *Access to tobacco by children from vending machines*: The primary reason for the Minister's decision was the evidence that in 2008, 12% of young people aged 11-15 who are regular smokers and 10% of young people aged 11-15 who are current smokers usually access cigarettes through vending machines (2008 was the latest data set). The evidence for this was contained in the publication "Smoking, drinking and drug use among young people in England 2008" published by the NHS Information Centre for health and social care (part of the Government Statistical Service). The Minister therefore considered that removing this form of access of cigarettes for young people would assist the Secretary of State's key public health priority of reducing smoking uptake amongst young people.
>
> b) The Minister noted that trading standards test purchasing programmes showed that children can easily buy tobacco from vending machines and that 1 in 4 vending machines checked by trading standards officers across England over 2008-09 were not located in an area that is supervised. The evidence for this was contained in a number of reports, a report entitled: "Test purchasing of tobacco products: Results from local authority trading standards, 1st October 2007 to 31 March 2008" compiled by LACORS (the Local Authority Co-Ordinators of Regulatory Services, which provides support and guidance to local authorities on a range of regulatory issues); results of test purchasing conducted on 634 vending machines across England over 2008-09, using volunteer "test purchasers" aged 11-16 years old LACORS (2010): Comprehensive Tobacco Control and Council Trading Standards: Delivering outcomes 2008 and 2009. We can provide copies of these publications if need be.
>
> c) *Access to tobacco by adults from vending machines*: The Minister noted that the prohibition on sales from vending machines would also be likely to have a beneficial impact on adult quitters, who might otherwise be tempted to lapse by the presence of vending machines in locations such as pubs, clubs and restaurants. She noted the comments of ASH made in response to the consultation that smokers often

> associate purchases with relapse during attempts to quit or unplanned purchases when drinking.
>
> d) *Enforceability of a prohibition*: The Minister noted evidence received in response to consultation on the Regulations that anything less than a total prohibition would place extra burdens on regulators and enforcers, and make enforcement harder and possibly more expensive. Prohibition would be easier and cheaper to enforce than imposing restrictions.
>
> …
>
> 12. The Minister noted that the possibility for regulatory restrictions no longer existed under the primary powers now contained in the Health Act 2009, but that it was open to her to consider whether a further voluntary approach could be appropriate.
>
> 13. The Minister noted that previous voluntary approaches, including the NACMO voluntary code of practice, had not been effective in limiting under-age access to cigarette vending machines, despite having been in place for over ten years; she noted the finding from LACORS that 26.5% of vending machines checked in England in 2008-2009 were located in unsupervised areas, and that nearly a third of all vending machines checked were assessed by trading standards officers as being likely to result in sales to under 18s. (This information is contained in the document LACORS (2010): Comprehensive Tobacco Control and Council Trading Standards: Delivering outcomes 2008 and 2009 referred to in paragraph 7(b) above).
>
> …"

104. It is accepted by the Secretary of State that the figures of 10% and 12% used in para 7(a) of this letter and in "*A Smokefree Future*" should read 4.5% due to a regrettable error in the basis of the calculation.

105. The position is made clear by the insertion of paragraph 13 of that letter, which only made sense against the background that the Secretary of State (on whose behalf the Minister acted in writing the letter) had considered the option of a purely voluntary code. There was no point in the Secretary of State considering ARM unless he also considered that it was sufficient to have a purely voluntary code, and so his failure to consider ARM before imposing a ban did not necessarily make the Regulations disproportionate (cf paragraph 79 of the judgment of Laws LJ). If it were the case that a voluntary code was not considered before the Regulations were adopted, there was a satisfactory explanation as to why it was not considered.

106. It will be recalled that the research carried out by NACMO in May 2009 to test age compliance with a form of ARM achieved much better results than from over-the-counter cigarette sales, raising the level of compliance from approximately 59% to

some 80%. However, the figure of 80% compliance has to be properly understood. The group chosen for this testing was a limited group of 15 sites chosen by NACMO. Significant human error occurred. Accordingly, the evidence supporting the effectiveness of ARM from those results is weak. Mr Nicholas Paines QC, for the Secretary of State, summarised the position about the evidence on these tests as follows:

> "The Appellants place greater weight on the test results than they can reasonably bear. Quite apart from the fact that only 15 purchases were attempted during the course of the trial, there was a 20% failure rate: 20% of purchases by a test purchaser who ought to have been subject to the age verification procedure were made without the procedure being applied by the staff …
>
> Furthermore, 93% of attempts took place when the bar was described as "not busy". The other tests were carried out when the bar was "average" in terms of level of business. None of the attempts were made when a bar was "busy". An e-mail from Helen Williamson of Serve Legal, the organisation which conducted the testing noted, "The day of the week performance is probably as you would expect with the Friday and Saturday being the lowest pass rates. Again, with time of day, the evening is the worst performing time (after 5pm)." The age verification procedure was not applied correctly in 100% of attempts taking place after midday on Saturday. Only one purchase attempt was made in the tests during the busiest periods for bars – Friday and Saturday evenings – and on that occasion the bar staff failed to apply the procedure correctly. It can be assumed that the scope for human lapse or error would be significantly higher if at least some of the testing had been carried out when the bars in question were busy.
>
> Moreover, while the test results showed that radio control restrictions on tobacco vending machines failed to work in 20% of cases because of human lapse or error, notwithstanding the staff had been trained in age verification procedures and the correct operation of the radio controls, the testing did not test for other sources of failure, such as
>
> (1) an underage person operating the machine before the requesting adult reaches the machine;
>
> (2) reliance on false identification;
>
> (3) proxy purchasing by adults; or
>
> (4) malfunctioning or circumvention of the remote control device."

107. There is no evidence of any further trials. Moreover, once the new regulations made pursuant to s 7A of the Tobacco Advertising and Promotion Act 2002 take effect prohibiting the display of tobacco products ("the display regulations"), over-the-counter sales to children should in any event fall.

108. I take into account that a ban on TVMs will have a disastrous effect on the business of the TVM operators. The President of the Queen's Bench Division records in his judgment that the industry alone employs some 550 people and their suppliers employ many more. The ban will render their machines worthless and cause extensive redundancies, the effects being felt in the many communities in which the operators are to be found. The ban will lead to substantial losses for them, and the President, in his judgment, concluded that it was unrealistic to expect them to diversify their businesses. Mr Thomas De La Mare, for NACMO, submits that the effects of the ban on the members of NACMO will be "devastating". Two points should be added. First, the costs of researching ARM, in the case of Sinclair Collis, were £70,000 (before tax relief). I doubt whether this was a significant amount for a commercial enterprise, of Sinclair Collis' size. Secondly, paragraph 73 of the judgment of the Court of Justice in *Swedish Match*, cited in paragraph 160 below, makes it clear that the loss of future profits is not a matter of which the appellants can complain in law.

109. There are some miscellaneous points to be mentioned for the sake of completeness.

110. I note that, in addition to the right of property protected by article 17, article 35 of the Charter of Fundamental Rights and Freedoms, which has a status equivalent to that of the fundamental freedoms under the TFEU (pursuant to article 6 TEU), contains the following right:

> "A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."

111. While this right applies in terms to policies of the European Union's institutions (and restates an earlier provision of the EC treaty), it is difficult to believe that it would be contrary to European Union law for member states to adopt the same approach.

112. The evidence filed on behalf of the Secretary of State states that, within the European Union, 12 countries have banned TVMs, 12 more have introduced restrictions and 3 other countries have no restrictions. The precise statistics are disputed by Mr Pascal, who states that in 11 out of the 12 countries with a ban, there was previously no tradition of TVMs and that the countries introducing bans did so before ARM was widely available. According to Mr Pascal, all the countries which have a significant number of TVMs have introduced some form of restricted access, not a ban.

113. Finally, but not completely without significance, we are informed that the UK's notification of the Regulations to the European Commission has not led the Commission to take action against the UK. The Technical Standards Directive (98/34/EC) requires member states to notify the European Commission of particulars of any enactment which constitutes a quantitative restriction. The UK

government notified the European Commission of the draft regulations. The government stated that the purpose of the regulations was to protect child health; that the government had a responsibility to protect children and young people from taking up smoking; that in 2008 TVMs were a usual source of obtaining cigarettes for 10-15% of children who smoked; that previous efforts to limit the sale of tobacco from TVMs had not been successful; and that test purchases conducted in 2007/8 produced a failure rate of 41% of children being able to purchase cigarettes from TVMs. The European Commission has not sought to challenge the Regulations as a disproportionate restriction on trade in the European Union or at all. This may be some indication that, on their face at least, the Regulations are not an unjustified restriction on the fundamental freedom to sell goods within the European Union.

114. For completeness, I note that there has been no suggestion that the reason for banning TVMs is to protect some national trade or commercial interest.

The principles of proportionality

115. The core principle is that (as explained by Laws LJ at paragraph 19, above), where, as in this case, a measure represents a *prima facie* derogation from article 34 TFEU, to be valid that measure must be proportionate. That is to say, it must shown that the measure is suitable and necessary for the purpose of achieving its legitimate aim. As a corollary of the test of necessity, where there is a choice of measures for achieving the legitimate aim, it must be shown that the least intrusive means of interfering with a fundamental freedom has been employed. The core principle can be seen, for instance, in *FEDESA* at [13], which is set out by Laws LJ in paragraph 20 above.

116. Laws LJ makes the point (at paragraph 39 of his judgment) that "some of the passages on which Mr Paines relies, while containing expressions such as "manifestly inappropriate", also - and almost, so to speak, in the same breath – use the language of proportionality in its standard sense: the sense attributed by paragraph 13 of *FEDESA*." In my judgment, that is, with respect, a misunderstanding of the function of the "manifestly inappropriate" test. The "manifestly inappropriate" test is a statement of the level of intensity of review that is applicable to any of the requirements of the test of proportionality. It can, therefore, either form part of, or appear side-by-side with, a conventional statement of the core principle of proportionality. I will give some examples of that from cases cited on this appeal.

117. The first example is from *FEDESA*, where the Court of Justice stated the issues, and then the core principle of proportionality. Paragraph 13 set out the general principles, and paragraph 14 set out the level of intensity of review applicable, in that case, to a policy measure of a Community institution:

> "12. It was argued that the directive at issue infringes the principle of proportionality in three respects. In the first place, the outright prohibition on the administration of the five hormones in question is inappropriate in order to attain the declared objectives, since it is impossible to apply in practice and leads to the creation of a dangerous black market. In the

> second place, outright prohibition is not necessary because consumer anxieties can be allayed simply by the dissemination of information and advice. Finally, the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.
>
> 13. The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.
>
> 14. However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 *Schraeder* [1989] ECR 2237, paragraphs 21 and 22). "

118. Consistently with the lower level of intensity of review applicable to a Community institution, the Court of Justice proceeded to apply the "manifestly inappropriate" test:

> "15. On the question whether or not the prohibition is appropriate in the present case, it should first be stated that even if the presence of natural hormones in all meat prevents detection of the presence of prohibited hormones by tests on animals or on meat, other control methods may be used and indeed were imposed on the Member States by Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602/EEC (Official Journal 1985 L 191, p.46). It is not obvious that the authorization of only those hormones described as "natural" would be likely to prevent the emergence of a black market for dangerous but less expensive substances. Moreover, according to the Council, which was not contradicted on that point, any system of partial authorization would require costly control measures whose effectiveness would not be guaranteed. It follows that the prohibition at issue cannot be regarded as a manifestly inappropriate measure.

> 16. As regards the arguments which have been advanced in support of the claim that the prohibition in question is not necessary, those arguments are in fact based on the premiss that the contested measure is inappropriate for attaining objectives other than that of allaying consumer anxieties which are said to be unfounded . Since the Council committed no manifest error in that respect, it was also entitled to take the view that, regard being had to the requirements of health protection, the removal of barriers to trade and distortions of competition could not be achieved by means of less onerous measures such as the dissemination of information to consumers and the labelling of meat."

119. Paragraphs 56 and 57 of the judgment of the Court of Justice in *National Federation of Fishermen's Organisations*, set out by Laws LJ at paragraph 38 above, illustrate the same point.

120. Likewise, the Court of Justice, in *BAT and Imperial Tobacco* first stated the core principle of proportionality (paragraph 122) and then the level of intensity of review applicable in that case, again the "manifestly inappropriate" test (paragraph 123):

> "122. As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia* , Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15, and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).
>
> 123. With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 61)."

121. The same pattern is also to be found in the case of *Rosengren,* to which Laws LJ attaches importance. The Court of Justice set out the core principle of proportionality but then went on to find that it was "manifestly" unsuitable for the purpose of meeting the legitimate aim. (Alternatively, the case should be analysed

as explained in paragraph 124 below). At paragraphs 49 and 51, where the burden of rebutting manifest error was not discharged, the Court of Justice held:

> "49. It cannot be disputed that if the ban at issue in the main proceedings thus proves to be a means effectively of preventing younger persons from becoming purchasers of alcoholic beverages and therefore of reducing the risk of their becoming consumers of such beverages, it must be regarded as being justified in the light of the objective of protection of public health referred to in Article 30 EC.
>
> 50. However, since a ban such as that which arises from the national legislation at issue in the main proceedings amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that those rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade (see, to that effect, Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 15; *Franzén*, paragraphs 75 and 76; and *Ahokainen and Leppik*, paragraph 31).
>
> 51. The ban on imports at issue in the main proceedings applies to everyone, irrespective of age. Accordingly, it goes manifestly beyond what is necessary for the objective sought, which is to protect younger persons against the harmful effects of alcohol consumption."

122. In *Rosengren*, the protection of child health was a legitimate aim but the total prohibition on imports of alcoholic beverages into Sweden was held to be disproportionate because it barred all imports to the benefit of the state monopoly for the supply of alcohol. The Court considered that effective age restrictions could be introduced but this was not a case where there was evidence that the age restrictions would be difficult to use effectively or where there was evidence that they would not be properly applied. There were also in that case criminal sanctions, whereas, in the present case, there would be no sanctions for failure to install or use ARM because it is not within the power of the Secretary of State to impose such sanctions.

123. The Master of the Rolls cites *Arnold André* (at paragraph 209 below), but in this case also the Court of Justice applied the test of "manifestly inappropriate" (see [46] and [56] of its judgment).

124. The "manifestly inappropriate" test does not apply to measures which are, on analysis, not health policy measures, even though they relate to health issues, but measures to protect some national interest, such as the commercial interest of a national profession or some national public financial interest: see Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV*. It also does not apply where there is some obvious material inconsistency in the policy, as where it is

sought to prohibit the sale of contact lenses on the internet on the grounds that an opthalmic examination is necessary but there is no obligation to have such an examination for sales which are not online: see *Hartlauer*, *Corporación Dermoestética*, *Ker-Optika bt v ÀNSTZ dél-dunántúli Regionális Intézete*. The "manifestly inappropriate" test is not a licence to do things which are not rationally connected with their legitimate aim, or to do things in a manner which discriminates without justification. A member state cannot rely on the "manifestly inappropriate" test if what it is doing, under the cloak of the proportionality test, actually amounts to achieving some quite different objective from its stated legitimate aim. In *Rosengren*, it is clear, when paragraphs 49 and 50 of the judgment (see paragraph 121 above) are read together, that the Court of Justice rejected the contention that the measures were a means of effectively protecting minors as suggested. Indeed, the Court stated in paragraph 51 of its judgment that the ban on imports applied to everyone, irrespective of age, and thus went well beyond the objective of preventing young persons from the harmful effects of alcohol consumption. In those circumstances, the "manifestly inappropriate" test was quite simply not met.

125. These cases, however, are principled exceptions to prove the rule and do not affect the application of the "manifestly inappropriate" test to the present case or to the generality of cases in the field of public health protection.

126. The effect of the level of intensity of review denoted by the expression "manifestly inappropriate" is that the Court of Justice does not apply the "least intrusive means" requirement (as in *FEDESA*), or, if it does, it applies it with the lower level of intensity of scrutiny consistent with the "manifestly inappropriate" level: see, for example, *R (o/a National Federation of Fishermen's Organisations) v Minister of Agriculture, Fisheries and Food and Fish* (cited by Laws LJ at paragraph 38 above) at [59]:

> "Nor can doubt be cast on the finding that the disputed measures are proportionate merely because other kinds of measures could have been adopted, since the selection of measures to be taken is a political decision falling within the purview of the Member State concerned, within the limits set by Decision 92/593."

127. These different levels of scrutiny reflect the flexibility of the principles of proportionality. That flexibility enables the Court of Justice to recognise the diversity of regulatory systems and national values within the European Union. Not all member states will seek to protect public health in the same way. European Union law allows for that choice to be made by the national legislature, not free from European Union control but with a much less intensive level of scrutiny than under a strict test of proportionality.

128. The passage from the European Commission guidance, cited by Laws LJ at paragraph 42 of his judgment, is simply not directed to the various levels of scrutiny. I accept that, although the Secretary of State's argument has referred to two tests only, the normal test and the "manifestly inappropriate" level of scrutiny, others may exist at various points on the spectrum between strict scrutiny and very light scrutiny.

129. The "manifestly inappropriate" level of intensity is clearly not limited to judicial review of European Union policy measures, as Miss Rose submits. It can be applied to the acts of national legislatures (see, for example, *Eastside Cheese* at [41], and *Aragonesa v DSSSG Cataluna*). For an example of the application of the "manifestly inappropriate" test to a decision maker other than the national legislature, see *R (Mabanaft) v Secretary of State for Climate Change* [2009] EWCA Civ 224 (Arden and Hallett LJJ and Blackburne J). In this case I too refer to the core principle of proportionality at [46] and [47] and then separately to the level of intensity of review in [48]:

> "46. Proportionality in this context also involves judging the appropriateness of the national measure in order to meet the objective required by the 2006 directive. Proportionality must also be assessed by reference to whether the member state was seeking to obtain some other objective, apart from that required by Community law, as where the member state seeks to impose some restriction in order to protect its own domestic industry: see, for example, Case C-398/98 *Commission v Greece*. There is no suggestion of unsuitability of the new regime in this sense or any ulterior objective on the part of the Secretary of State in this case.
>
> 47. Proportionality also requires that the court should consider whether there is any less restrictive means of effectively achieving the objective required by Community law: see, for example *Commission v Greece*, above. In this case, the Secretary of State could not justify the decision to adopt the new regime if Mabanaft could show that some other regime would be demonstrably less intrusive into competition between oil suppliers, and less intrusive into the fundamental rights of movement and competition guaranteed by Community law. But Mabanaft does not go this far. It simply says that the Secretary of State should have investigated actual costs and taken them into account. In my judgment, that is not enough.
>
> 48. In any assessment of proportionality in a technical field, the court must allow a proper margin of discretion to the decision maker, because of the complexity of the assessment he is called upon to make in this field. It is a specific function of government to take decisions such as these for ensuring the supply of essential products in the situation of an emergency. The court therefore exercises restraint in reviewing any decision of this kind and requires it to be shown that the new regime was a manifestly disproportionate means of achieving the end of allocating the burden of CSO. [compulsory stocking obligations]."

130. The Court of Justice does not always carry out the proportionality review itself. In some cases, it permits the national court to define whether the circumstances are sufficient to exclude the application of a fundamental freedom. This has occurred in

the context of national security and criminal penalties (see, for example, Case C-367/89 *Richardt* at [24]) and in the context of the public policy exception from the fundamental freedoms (see, for example, Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbűrgermeisterin der Bundesstadt Bonn*, which concerned a decision of the German courts as to the constitutionality of an act of the Bonn police authority). In those circumstances, the Court of Justice may or may not provide guidelines for the national court. If the submission were correct that the lower levels of scrutiny were only applicable to policy measures enacted by the European Union institutions, and that the Court of Justice would always otherwise apply the strict level of scrutiny, the Court of Justice would hardly defer in these situations to the national court's evaluation as to whether a departure from a fundamental freedom was justified or whether it went beyond the least restrictive means test. I, therefore, do not agree with Laws LJ that European Union law does not recognise a lower level of scrutiny than the normal strict proportionality test.

131. My conclusions are consistent with Lord Bingham's holding in paragraph 41 of *Eastside Cheese* that the national legislature is entitled to a considerable margin of appreciation. I note the reliance that Miss Rose placed, for the purposes of the submission which I have just rejected, on a passage from Professor Tridimas' work, *The General Principles of EU Law*, and further note the criticisms that Laws LJ has expressed of the extracts that he has quoted (see paragraphs 45 to 47 above), but the answer is surely that Professor Tridimas is making the point, which I have already made, that the expression of the core principle of proportionality does not inform the reader about the level of intensity of review. In the case of a European Union policy measure, the Court of Justice applies a low level of intensity. In some circumstances, it will apply the same level to acts of national institutions as well.

132. The approach of the Court of Justice is bound to vary according to whether the act in question is that of a European Union institution or that of a national institution, since in the former case, the Court of Justice will be deciding whether an interest of the Union should prevail over that of a person or state, whereas in the latter case it is concerned also to ensure that the member state has resisted any temptation to favour its national interest at the expense of the Union's interest. That, no doubt, is why there are only a limited number of situations in which the Court of Justice applies the lower level of intensity of scrutiny to the acts of a member state institution.

133. This discussion leads to the point so well made by Lord Bingham CJ in the *Eastside Cheese* case that proportionality is to be applied with considerable flexibility dependent on the nature of the case. There are not just two tests but many points on a spectrum: see paragraph 48 of the judgment of Lord Bingham, which Laws LJ has set out at paragraph 21 of his judgment. However, sitting as we do in this case as judges of the European Union legal order, in an area where the Court of Justice has laid down a particular level of intensity, we are obliged to apply that level, neither more nor less, and not the level which we would prefer to apply if free to do so. It is particularly important to follow this course in a case of judicial review of an enactment by Parliament and a decision of a minister of state in circumstances such as the present case, where no similar judicial review would be available under domestic law. EU law clearly recognises the "manifestly inappropriate" test, and other levels of intensity of scrutiny as well. The Court of Justice in its jurisprudence has essentially recognised that, when reviewing acts of a member state for their

compatibility with article 34 TFEU, the judges of the European Union legal order have a "toolkit" containing many different tools. Pursuing that analogy, when it comes to the particular area of reviewing decisions genuinely taken to promote public health, the Court has recognised that the decisions often involve complex policy considerations and that, in those circumstances, it is appropriate for the judiciary to take a spirit level or chisel to the task, rather than the heavy-headed hammer of the strict test of proportionality.

134. Although the Court of Justice would generally apply more intensive scrutiny to the act of a national institution than to that of a European Union institution, this is not always the case. The Court of Justice has recognised in the field of public policy, as applied to distasteful recreational games and to gaming, that national cultures and attitudes on such matters differ; that there is no need for European Union law to require uniformity on these matters; and that the proper body to decide these matters is the relevant national institution: see (in the case of recreational games) *Omega*, above, and (in the case of gaming), C-203/06 *Sporting Exchange Ltd v Minister van Justitie*.

135. In my judgment, smoking is a subject on which national attitudes can differ, including attitudes to TVMs. In this area, therefore, the national decision- making bodies are entitled to a wide margin of appreciation. This will, in appropriate cases, include the secondary legislator. In the case of England and Wales, there are deeply-held views among the public about smoking and, while no doubt there is room for more than one view as to whether there should be a TVM in a public house or other place, Parliament expressed a firm view as to its position at the time of the 2009 Act, and that view must be taken to represent the decisive view on that matter for this jurisdiction.

136. The factors that may be taken into account in determining the application of the three elements of proportionality include the nature of the decision-maker but go far beyond this. The subject matter of the decision is clearly relevant: does it relate to policy or strategy, or is it about the implementation of a policy decision, which has already been taken? If it is a policy decision, does the decision fall in one of the areas that are generally left to member states, such as national security, domestic economic policy or public health? In this case, the subject matter is public health, which has the highest priority under European Union law: see, for example, the citations from *Eastside Cheese* and *Aragonesa* in paragraph 198 of the Master of the Rolls' judgment. European Union law requires manufacturers to make sacrifices for the benefit of public health. Other factors include how the decision was reached and the quality of the decision-making process.

137. I agree with Laws LJ when he holds, at paragraph 23 above, that the identity of the decision-maker and the subject matter of the decision are two matters which particularly affect the margin of appreciation or, as I would call it, the level of intensity of review. However, while the primary legislator, as decision-maker, tends to attract a lower level of scrutiny, this is not inevitably the case when all the relevant factors are taken into account. Likewise, while a secondary legislator, as decision-maker, tends to attract a higher level of scrutiny than the primary legislator, this is also not inevitably the case when all the relevant factors are taken into consideration (see *Mabanaft* above). There is thus no bright line rule that the

"secondary legislator" (to use the term used by Laws LJ in paragraph 23) attracts a narrower margin than the "primary legislator".

138. In the present case, Parliament made the decision at the policy level when it passed the 2009 Act, and it concerned public health. The Secretary of State was left to decide whether to implement it if she or he thought fit. A policy decision is much more complex and open to argumentation than a mere decision to implement. The latter decision is one that it is much easier for a court to review. The decision in issue in *Eastside Cheese* fell very much into this category. The decision in *Mabanaft* was much more complex as the decision as to how to define oil-stocking obligations in the interests of national security is a policy one. There is no obviously right or wrong answer to the formulation of stocking obligations. Another factor in that case was that it involved a considerable amount of scientific and technical expertise, matters on which the decision-maker was clearly better placed to make a decision than a judge. At the level of policy, the court allows a wide margin of discretion to the decision-maker and it is, in my judgment, in that sense that Lord Bingham refers to the narrowing of the margin of discretion in the subsequent stages of the decision-making process. Nonetheless, he clearly recognises that the circumstances in which the manifest error test can be applied are not limited to the European Union institutions.

139. When a court is scrutinising what is, essentially, a decision about the implementation of a policy, which has already been decided on, a wide range of factors may have to be examined, such as whether the measure is temporary or not, whether there is an adequate transitional provision, whether those affected by the new legislation are likely to suffer hardship of which no account has been taken, how far interests are truly adversely affected, the need for urgent action, whether there are less restrictive or intrusive acts that can be taken, and so on.

140. Furthermore, it is possible that a single legislative instrument exercising the power to protect public health may in fact cover a number of ancillary matters. An enactment is a multi-layered instrument and, save in the most simple case, when its layers are peeled back, it may be found that there are different levels and types of decision-making involved. It may, for instance, include ancillary provisions for offences or transitional provisions. In this case, the Secretary of State has in fact deferred the date on which the display regulations are to come into force by eighteen months to (so far as material) 6 April 2015. We know not why. The deferral may have been motivated by a desire to give people more time to make preparations for the new legislation coming into effect or to ease the burden on small businesses. It seems to me that the ancillary matters might well not carry the same breadth of discretion as the core of the enactment, which implements the decision of the legislator as to the manner in which public health is to be protected. Thus, within any single enactment, there may be different tests of proportionality applying.

141. Something must also be said about the approach to the facts which have been relied on by a legislator for the purposes of judicial review of the proportionality of an act, whether the act is of a national or European Union institution. It is one thing for a court to scrutinise a fact relied on where it is clearly right or wrong and is capable of being subjected to the judicial process. But where the accuracy of facts is not clear - and this applies particularly to scientific or technical evidence - the Court of Justice

applies a "precautionary principle". It leaves it to the decision-maker to decide which facts or opinions to act on. This was the approach taken, in agreement with the trial judge, Beatson J, by this court in *Mabanaft* at [13] and [48]. I, therefore, agree with Laws LJ that this court should neither involve itself in questions as to the make-up of the impact assessment nor seek to determine the issue as to whether the Secretary of State or the appellants are right in fact as to the beneficial nature of the ban. What matters is the basis on which the decision-maker acted.

142. The precautionary principle is described in the European Commission's *Guidance on the application of Articles 34 and 36 TFEU*, referred to by Laws LJ at paragraph 42 above as follows:

> "*Application of the 'precautionary principle'*:
>
> The precautionary principle was first used by the Court of Justice in the *National Farmers' Union and Others* case even if it was implicitly present in earlier case law. The Court stated: 'where there is uncertainty as to the existence or extent of rights to human health, the institution may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'. The principle defines the circumstances under which a legislator, whether national, EU or international, can adopt measures to protect consumers against health risks which, given uncertainties at the present state of scientific research, are possibly associated with a product or service.
>
> The Court of Justice has consistently stated that the Member States have to perform a risk assessment before taking precautionary measures under Articles 34 and 36 TFEU. It appears that the Court in general is content with finding that scientific uncertainty is at hand and, once this has been established, it leaves the Member States or the institutions considerable leeway in deciding on what measures to take. However, the measures cannot be based on 'purely hypothetical considerations'.
>
> Generally, when Member States wish to maintain or introduce measures to protect health under Article 36 TFEU, the burden of proving the necessity of such measures rests with them. That this is also the case in situations where the precautionary principle is concerned has been confirmed by the Court of Justice in a number of recent cases. In its rulings the Court has emphasised that real risks need to be demonstrated in the light of the most recent results of international scientific research. Thus, Member States bear the initial burden of showing that precautionary measures can be taken under Article 36 TFEU. However, Member States do not need to show a definite link between the evidence and the risk; instead it is enough to show that the area in question is surrounded by scientific uncertainty. The EU institutions will then evaluate the case brought by the Member States." (footnotes and citations omitted)

143. This principle is clearly relevant to the situation when the Secretary of State is asked to delay a ban on TVMs in order to see whether ARM can be effective in the area of public health. The Secretary of State is not prevented from making a decision by reason of the fact that the effectiveness of the ban on TVMs in reducing underage tobacco purchases is not capable of clear proof or by reason of the fact that only a limited trial of ARM has been conducted.

144. The "manifestly inappropriate" test enables a decision to be taken in the interests of public health even though it may cause loss to one group and may, therefore, not be the least intrusive means: see, for example, *FEDESA* at paragraph 17. The Court of Justice there held:

> "17. Finally, it must be stated that the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders."

145. The result can be harsh. As I said in *Mabanaft* at [27], in the context of a policy goal established in the public interest, "it is inherent in that policy goal that private interests may have to give way to the public interest." Put another way, in the circumstances described, European Union law expects commercial interests to give way to the public interest in health protection and the protection of health can have priority over the financial considerations of private enterprises. This explains why, contrary to the normal principles of proportionality, fundamental freedoms are subordinated to policy goals in this situation (cf per Laws LJ at paragraphs 40 and 41 above).

146. There are in fact a large number of instances in the jurisprudence of the European Court of Human Rights also where the "least intrusive means" test is not applied as part of the test of proportionality. These instances include A1P1. Thus, for example, in *James v United Kingdom* at [51], the Court held:

> "The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in some other way."

147. However, the comparison with Strasbourg jurisprudence should not be taken too far because for the Strasbourg court to use the "least intrusive means" test in all circumstances would in any event be inconsistent with the ECHR system and the supervisory role of the Strasbourg court in the protection of human rights, whereas the role of the Court of Justice is not purely supervisory. For the same reasons as the Master of the Rolls, I take the view that it is unnecessary to give separate consideration to ECHR rights on this appeal.

The relevant decision-maker

148. Whereas Laws LJ begins with the position of the Secretary of State, I start with the decision taken by Parliament. I prefer, as it were, a "top-down" approach as opposed to his "bottom-up" approach. It cannot, however, matter where one starts since what has to be examined is the completed decision-making process.

149. One can well see why Parliament might decide to give the Secretary of State the power to investigate precisely what, if any, prohibition and exceptions, and indeed what transitional periods, are appropriate in the case of a prohibition likely to have complex economic or social consequences. In these situations there will, therefore, have to be a staged process of law-making.

150. In the *Eastside Cheese* case, the issue was not the function of the Secretary of State as a participant in the formulation and creation of a statutory scheme but the exercise of administrative powers in relation to the facts of a specific case. It is, therefore, not, on its facts, paradigmatic of the present case.

151. It must be the case that the act of legislating on a single issue for the protection of public health can be carried out by more than one competent authority in a member state. In this case, Parliament gave the Secretary of State power, if he thought fit, to draft regulations for banning TVMs and to return to Parliament with those regulations for Parliament's approval. As I see it, the Secretary of State and Parliament were engaged on a common enterprise. That does not mean that the Secretary of State merely introduces a ban. The Secretary of State has independently to be satisfied that it is appropriate to do so, or inappropriate not to do so.

152. To reach this conclusion, I do not analyse the role of the Secretary of State as merely a delegate of Parliament. I agree with Laws LJ and the Master of the Rolls that the Secretary of State has a true discretion. If the Secretary of State, acting within the limits of his powers, did not think it fit to make any regulations at all, there would be no regulations banning TVMs. But the conferral of that discretion is not inconsistent with my analysis of the Secretary of State more as a partner, albeit the junior partner, in the legislative enterprise with Parliament, than as a completely independent organ of the state. Lord Bingham considered that the Secretary of State would be entitled to a narrower margin of discretion than Parliament itself but, as I have explained, the role of the Secretary of State in the case before him was of a different nature and Lord Bingham recognised that the margin would only "narrow gradually rather than abruptly". My analysis in this case does not depart to any material degree from the point Lord Bingham was there making.

153. It is to be noted that in *Mabanaft* at [48] the test of "manifestly inappropriate" was applied to the exercise of powers by the Secretary of State, in that case in fulfilment of powers conferred by a European Union directive as implemented pursuant to section 6 of the Energy Act 1976. It is not, therefore, the case that the test of "manifestly inappropriate" has been confined, or is to be confined, to enactments of Parliament. As I explain in more detail below, in this instance, Parliament and the Secretary of State have, to a certain extent, overlapping policy responsibilities for public health. To that extent, they should share the same margin of appreciation, and the intensity with which their acts are reviewed should similarly be the same.

154. I do not myself entertain any doubt but that the "manifestly inappropriate" test is a species of proportionality in European Union law. Laws LJ points to inconsistent statements in the case law, but I have endeavoured to explain above how these passages are to be read. One can often find as well statements by Advocates General which are inconsistent with the formulation in the Court's judgments: in those situations one must follow what the Court of Justice says. Laws LJ sets out paragraph 6.1.2 of the European Commission's guidance in paragraph 42 above. As Laws LJ states, this, of course, is not law. The reference there to the requirement that measures be "restricted to what is necessary to attain the legitimate aim of protecting public health" is not expressly dealing with the situation where there is a lower level of intensity.

155. The intensity of review of the decision to ban TVMs should be no different from what would have been the position if the exercise had been wholly carried out by Parliament. It is not, in my judgment, an objection that decisions are being tested by a national court by a standard of review that is at the lower end of the scale, or by a standard of review that looks like *Wednesbury* unreasonableness, if that is what European Union law itself requires.

Suitability of the measures

156. It can be seen from the authorities set out in paragraph 36 of the judgment of Laws LJ that it is well established in European Union law that, as the Court of Justice held in *Aragonesa* at [16]:

> "[I]t is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved."

157. It also follows from the above discussion that I accept the submission of Mr Paines that the level of intensity of review applicable to the requirement that a measure be suitable for the purpose of protecting public health is that the measure should not be manifestly inappropriate for that purpose. This is demonstrated by the authorities cited by Laws LJ at paragraph 38 of his judgment. With respect, paragraph 18 of *Aragonesa* there set out does not affect Mr Paines's proposition. Laws LJ then goes on to make the points in paragraph 39 of his judgment to which I have already responded in paragraph 116 above. I therefore proceed on the basis that the appropriate level of scrutiny to the requirements of suitability and necessity in this case is that of the "manifestly inappropriate" test.

158. Miss Rose in effect submits that the aim was only to protect children and therefore a ban on TVMs was incapable of justification. I agree with Laws LJ that the protection of adult quitters was a part of the ban and, in this respect, I disagree with the President who would have limited the legitimate aim to protection of children.

159. It is not an objection to a measure that it involves a ban rather than the regulation of an activity. Thus, in *Swedish Match*, the Court of Justice concluded that the sale of snuff could be banned by a Community measure:

> "56. To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.
>
> 57. As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.
>
> 58. It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate."

160. Paragraph 57 set out in the preceding paragraph is of some interest since in it the Court of Justice accepts a preventive argument about banning a product even though access by minors could on its own be limited in some other way. Moreover, in a later part of its judgment, the Court of Justice similarly rejected the argument that the ban was a disproportionate interference with the freedom to pursue a trade or the right to property:

> "73. The prohibition on the marketing of tobacco products for oral use laid down in Article 8 of Directive 2001/37 is indeed capable of restricting the freedom of manufacturers of such products to pursue their trade or profession, assuming that they have envisaged such marketing in the geographical region concerned by that prohibition. However, the operators' right to property is not called into question by the introduction of such a measure. No economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting that market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances (Case C-280/93 *Germany* v *Council*, paragraph 79). Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained (see Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27).

> 74. As stated above, Directive 2001/37 pursues an objective in the general interest by ensuring a high level of protection of health in the context of the harmonisation of the provisions applicable to the placing on the market of tobacco products. It does not appear, as indicated in paragraph 58 above, that the prohibition laid down in Article 8 of that directive is inappropriate to that objective. In those circumstances, the obstacle to the freedom to pursue an economic activity constituted by a measure of such a kind cannot be regarded, in relation to the aim pursued, as a disproportionate interference with the exercise of that freedom or with the right to property."

161. An important aspect of the appellants' challenge to the justification for the proposed ban is that there is "no credible evidence" that the ban will lead to a reduction in underage smoking. Children, Mr Pascal points out in his evidence, have other sources of supply such as shops and illicit sources, where single cigarettes are apparently sold. As to this, the Secretary of State contends that the banning of TVMs will not necessarily lead to the rise in sales of illicit cigarettes, which are being monitored in other ways. For my own part, in so far as the court is required to engage with this issue, I agree with the President and the Master of the Rolls that, in effect, it is likely to be the case that, if cigarettes are less available and less visible, underage purchases will fall. As I describe below, there is no need for the Court to investigate the scientific evidence. The decision-maker has a wide discretion here to make up his own mind. Furthermore, the Secretary of State's case on justification is that there are benefits beyond the cost/benefit analysis. Benefits of health policy include encouraging changes in behaviour and lifestyle, which will enable people to live longer and more fulfilling lives. These are not matters capable of finite measurement. The Treasury *Green Book* recognises the difficulty of evaluation and states that "health impacts are rarely a question simply of lives lost or saved" it recommends the adoption of approach known as "the quality-adjusted life year". So the approach of the President was not out of line with practice in public policy matters.

162. In my judgment, on all the facts of this case, including those set out at paragraphs 86 to 114 above, the decisions of Parliament and of the Secretary of State cannot be said to be "manifestly inappropriate".

Least intrusive means: how is this issue to be decided?

163. As a matter of European Union law, a measure is not proportionate if there are alternative measures which are less onerous to those whose fundamental freedoms are affected and which would be equally suitable for achieving the relevant legitimate aim. Obviously those measures have to be viable. The less intrusive means relied on here is the possibility of a voluntary code under which TVMs would not be allowed to be available for use without being fitted with ARM. The code would be promulgated by NACMO, whose members with Sinclair Collis constitute most of the owners of TVMs in the UK. Non-members of NACMO would also be expected to comply with the code.

164. I accept Miss Rose's submission, based on *Rosengren* at [50] set out above, that it is for the Secretary of State to demonstrate that its measure complies with the principles of proportionality. In my judgment, however, that burden is discharged in

the context of public health protection by showing that the decision-maker's conclusion that there was no less intrusive measure was not a manifestly inappropriate conclusion. The Secretary of State does not have to go further and (on the facts of this case) show that a voluntary code would not be a better means of achieving a reduction in underage smoking. It is not for the Secretary of State to prove the negative. This is not an inquisitorial process where the court can call on parties to produce relevant evidence. As the Master of the Rolls holds in paragraph 255 below, the burden of adducing evidence passes to the appellants to adduce evidence that the voluntary code would be effective to achieve the same benefits. This course is illustrated by paragraphs 128 to 130 of the judgment of the Court of Justice in *BAT and Imperial Tobacco*, which state:

> "128. The proportionality of that ban on manufacture has been called into question on the ground that it is not a measure for the purpose of attaining its objective and that it goes beyond what is necessary to attain it since, in particular, an alternative measure, such as reinforcing inspections of imports from non-member countries, would have been sufficient.
>
> 129. It must here be stated that, while the prohibition at issue does not of itself make it possible to prevent the development of the illegal trade in cigarettes in the Community, having particular regard to the fact that cigarettes which do not comply with the requirements of Article 3(1) of the Directive may also be placed illegally on the Community market after being manufactured in non-member countries, the Community legislature did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market.
>
> 130. Nor has it been established that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provision. It must be observed that the prohibition on manufacture at issue is especially appropriate for preventing at source deflections in trade affecting cigarettes manufactured in the Community for export to non-member countries, deflections which amount to a form of fraud which, *ex hypothesi*, it is not possible to combat as efficiently by means of an alternative measure such as reinforcing controls on the Community's frontiers."

165. As I have explained in paragraph 106 above, the evidence on the effectiveness of the installation of ARM in stopping underage purchases is weak. In my judgment it is insufficient to establish that the decision of the Secretary of State not to have a trial period in which the viability of a voluntary code would be further tested was not manifestly inappropriate. In contradistinction to the Master of the Rolls, I do not consider that the court has the material necessary to form a view that compliance with the code, by members and non-members of NACMO alike, would be likely to be higher if there was a threat of an outright ban despite the absence of any sanctions for non-compliance. There is no evidence that, under the earlier code, the owners and operators were not at fault to a substantial degree in not ensuring

compliance as part of the terms on which machines were made available at their premises. The level of non-compliance was not slight and it must have been obvious that if it did not work there would be other legislation.

166. In all the circumstances of the case, I do not consider that it is shown either that the Secretary of State committed a manifest error in rejecting the voluntary code by implication or in not accepting that the voluntary code would be an equally suitable, less intrusive measure.

Drawing the threads together

167. It is not appropriate to hold that a decision is disproportionate simply because (if that is the case) a particular matter has not been considered, though that failure may inform the court's own evaluation. The court must proceed to its decision on the evidence in the case as to whether the decision, in the absence of consideration of that matter, is proportionate or not. The point that the Secretary of State had a discretion is correct and forms the basis for the appellants' arguments on least intrusive means, but once the court reaches the conclusion that the requirements of proportionality have to be satisfied, the existence of that discretion is not relevant to the process of review.

168. Parliament took the policy decision that the Secretary of State should be empowered to impose a ban if he thought it appropriate to do so. Conversely, it also took the policy decision that he should not be empowered to introduce a regulated scheme for permitting TVMs to be used but requiring them to be fitted with ARM. Parliament also gave the Secretary of State a discretion to consider not having a ban, which would include leaving the matter to be entirely regulated by a voluntary code. That might seem odd but the explanation is that Parliament acted in the confident expectation, backed up by a ministerial assurance to Parliament with all that such an undertaking entails, that the Secretary of State would not take that course. The Secretary of State told Parliament on the third reading of the bill that became the 2009 Act that the government would not seek to overturn the amendment to delete the power to impose requirements but would consider how best to put it into effect.

169. That did not, of course, prevent the Secretary of State from having a real discretion. There might have been some change of circumstances. For its own part, Parliament had clearly rejected a voluntary code since the greater (the rejection of a regulated system of ARM) would include the lesser (a purely voluntary code).

170. The Secretary of State had already decided – subsequent to the 2009 trial of ARM – that a voluntary code would be insufficient. This decision was repeated by implication in the later 2009 consultation.

171. The history of this matter clearly showed that the experience of voluntary codes as to the siting and location of TVMs was unsatisfactory. It had been unsuccessful in reducing underage cigarette purchases. The age-related technology advocated by NACMO is dependent on a similar human factor, namely, the willingness of the person operating the remote control to implement the age restrictions properly. It would not have been unreasonable for the Secretary of State to decline to permit a voluntary code initiated by the TVM industry without any regulation or sanction for those who did not agree to comply, or did not comply, with this code. It was not

unreasonable for the Secretary of State to think that the human factor would be no different with the new code. Mr De La Mare's submissions presupposed that the code would be accompanied by bans for non-compliant vending machines and that, no doubt, was because NACMO (which, though it has a substantial membership, is not an industry-wide organisation) cannot guarantee 100% compliance with a code.

172. To recapitulate on points made at the start of this judgment, the evidence on this application shows that:

a) Approximately 4.5% of children between 11 to 18 years who smoke usually obtain their cigarettes from TVMs. Over the years there has been some variation in this figure but it does not affect it in substance. This suggests that the existing limited sanctions are not on their own an effective means of regulating the sale of cigarettes so as to prevent sales to children;

b) The results of the voluntary code for the siting of TVMs where their use could be supervised by adults were unfavourable. Mr Pascal claims that the siting guidance was "very effective" for the purpose of reducing underage sales to children, but the Secretary of State was entitled to prefer the information on this matter available to him. It cannot be said that the significance attached by the Secretary of State to the failure of the siting code (see for example paragraph 12 of the letter of 4 February 2010) was unreasonable;

c) There had been a short trial of ARM, but it revealed significant human error and its results could not necessarily be extrapolated on to wider basis;

d) There would be no means of preventing repeat offenders from having TVMs on their premises;

e) There would be no statutory regulation of the siting of TVMs;

f) There were risks to health from the use of cigarettes to which children were uniquely vulnerable;

g) A ban would, as a consequence, also aid adult health;

h) There would be no regulation of non-compliance with the voluntary code other than s 7 of the 1933 Act and (where applicable) s 145 of the Licensed Premises Act 2003. The evidence was that, despite these provisions, there were illegal sales to underage persons at 58% of the TVMs tested. There would be little basis for thinking that the position would be any better simply because of the threat of a new sanction, namely a complete ban on TVMs;

i) Although there was no argument on this point, and the point is not in my judgment crucial to the conclusion expressed below, provisionally it seems to me that TVMs may be subject to statutory prohibitions in the display regulations on displaying tobacco products from 6 April

2015 in any event (see the Tobacco Advertising and Promotion (Display) (England) Regulations 2010 as amended). This is likely to make them much less profitable in practice. If this is right, the industry is in terminal decline, and so the cost of the measures to the industry and the economy attributable to a ban on TVMs is reduced;

j) There is no basis for thinking that Parliament's view has changed and, accordingly, no obvious reason why the Secretary of State should decide to take the matter back to Parliament. Parliament, though not binding the Secretary of State to reach the same view, had reached a firm view to reject ARM despite the fact that all members of Parliament had been offered an opportunity to attend a demonstration in the House of Lords showing how ARM worked. As already explained, the effectiveness of ARM still depended on human interaction and there was no guarantee that it would be more satisfactory than the existing age restrictions, which were already backed up by a criminal penalty under section 7 of the 1933 Act. Parliament's view was a considered one and, as such, was capable of informing, though not mandating, the decision of the Secretary of State;

k) The ban was likely to be easier to enforce than compliance with a voluntary code; and

l) It is the view of the Secretary of State, which the court is not in a position to doubt, that by banning TVMs and removing that incentive for tobacco use, the use of tobacco will decline. (Dr Donald Franklin, a Senior Economic Adviser with the Department of Health, also considered that children who could no longer source cigarettes through TVMs would not seek alternative sources.) I agree with the President that this is not a matter that can be demonstrated by scientific proof but it does seem likely that children are attracted to cigarettes by the fact that they can see them in machines and elsewhere, and that they will be less attracted if they can no longer see them sitting there. Miss Rose submits that, if TVMs are banned, children would acquire cigarettes through other outlets (for example, shops) or would resort to sellers of illicit tobacco, which might be more harmful to them. But that is just the sort of predictive judgment to which the precautionary principle endorsed by the Court of Justice applies.

173. In the particular circumstances of this case, since, as I have held above, the appropriate level of intensity of scrutiny of the Secretary of State's decision to impose a ban is of a low level, equivalent to that usually applied to a primary legislator, the level of scrutiny applicable to scrutiny of compliance with the "least intrusive means" test is the level of manifest error. It follows that I reject Miss Rose's submission that it is for the court to assess for itself the adequacy of the justification that actually influenced Parliament and the Secretary of State in reaching their decisions. I accept that the Secretary of State has, as a matter of statutory interpretation, a full discretion, untrammelled by an expression of the wishes of Parliament, but we are not dealing with the question of the meaning of section 3A of the 1991 Act but with the application, in accordance with European

Union law, of the principles of proportionality. For the reasons given above, in the context of public health protection, European Union law without doubt permits a low level of intensity of review with respect to the acts of the national legislature.

174. Parliament and the Secretary of State share responsibility for policy measures in relation to TVMs. The only difference is that, unlike Parliament, the Secretary of State has no power to impose requirements as to the use of TVMs by the Regulations. If the powers of the Secretary of State are to be adjudged by some different standard from that applying to Parliament in those areas where their powers overlap, the measure of discretion given by European Union law to the national legislature is undermined and made useless, and the decision of Parliament is also undermined.

175. As a matter of policy, if there is an area of European Union law (or indeed Strasbourg jurisprudence) where the courts are enjoined by the jurisprudence of the European supranational court to apply a wide margin of appreciation and follow the decision of the national institutions, then the national courts should not, save in exceptional circumstances which do not exist here, surrender that area of competence and seek to narrow the area in which the national legislature is entitled and has sought to act.

176. In this case, Parliament acted as it did in conferring the untrammelled discretion on the Secretary of State in the confident expectation described above. As I have explained, the principles of proportionality are adaptable to the appropriate circumstances of the case and are nuanced. They permit a low level of intensity of scrutiny to be applied to the acts of the secondary legislator, and, in the particular circumstances of this case, that is the appropriate level of scrutiny in this difficult area of public policy.

177. Miss Rose suggests not that there should not be a purely voluntary code for all TVMs but that there should be a ban on TVMs unless the premises are age-restricted and the TVMs are fitted with ARM. But there is simply no means open to the Secretary of State of imposing that limited ban.

178. The Regulatory Policy Committee ("RPC") criticised the Secretary of State on the grounds that the cost benefit of his decision was not clearly demonstrated. But the Secretary of State answered that, in effect, it was not simply a matter of a cold financial calculus of the comparative costs of the allowing and prohibiting access to TVMs. The Secretary of State was, in my judgment, entitled to take the view that the measures which he proposed were sufficiently justified in the interests of child health to be (in my words) “worth the candle”. It is surely difficult to put a price on human health, just as it is on human happiness. The benefits of health policy include changes in behaviour and lifestyle, which enable people to lead longer and more fulfilling lives.

179. In coming to my conclusion on this appeal, I have proceeded on the basis that this is not a case where the Secretary of State has failed to consider the matter of a purely voluntary code. As I have explained elsewhere in this judgment, that was done in 2008, 2009 and 2010 in relation to the siting code. The decision of the Secretary of State was, in effect, that it was only possible to have TVMs with ARM if there were statutory powers exercisable in the public interest to deal with non-compliance. The

Secretary of State has maintained that position since 2008 and there has been no change in circumstances justifying a review of that decision since the trial of ARM, which was considered before the decision in 2009. This is not, therefore, a case of the Secretary of State refusing to exercise the discretion or exercising it for an improper purpose (cf *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). If there were a question of the improper exercise of discretion or a failure to exercise a discretion, then the matter should be dealt with within the proper metes and bounds of domestic judicial review, not in the name of European Union judicial review.

180. The main point of departure between my judgment and that of Laws LJ is that, as I see the position, the judgment of Laws LJ does not apply the level of intensity of review which is appropriate to the circumstances of this case under the principles of proportionality given to us by European Union law. In addition, on this issue, it seems to me to take a course that is inconsistent with the application of the narrow level of scrutiny by the court, which Laws LJ holds in his judgment to be requisite, by requiring matters to proceed on the basis of a reconsideration by the Secretary of State.

Some observations on the approach of the Master of the Rolls to the legal issues on this appeal

181. The Master of the Rolls has come to the same conclusion as I have, but, while there is much common ground, we have to some extent arrived there by a different route. Thus, whereas I would, in the circumstances of this case, apply the same level of intensity to the decision of the Secretary of State as to that of Parliament relative to the issue of the compatibility of a ban on TVMs with article 34 TFEU, the Master of the Rolls would apply a narrower margin of appreciation to the decision of the Secretary of State than to a Community institution or Parliament. (I have dealt with the position of the level of intensity of scrutiny to be applied to acts of Community institutions in paragraphs 131 and 132 above). The Master of the Rolls has derived considerable assistance from the judgment of Lord Bingham in *Eastside Cheese* (to which I also pay tribute) rather than directly from the jurisprudence of the Court of Justice on which Mr Paines relies. However, as the Master of the Rolls observes at paragraph 196 of his judgment, Lord Bingham's judgment is based on the jurisprudence of the Court of Justice and it is not therefore surprising that we should both apply a low level of scrutiny. For my part, I have utilised the "manifestly inappropriate" test, rather than the margin of appreciation. I have preferred to use the terminology of the Court of Justice in order to avoid any suggestion of applying a lower test than that applied by the Court of Justice and so that my reasoning can be tracked into the Court's jurisprudence. Leaving that point aside, the Master of the Rolls and I both importantly conclude that judicial review in European Union law can be distinguished from judicial review in domestic law. In particular, the former is more engaged with the substantive merits of the decision than the latter, which may focus more on the process of decision-making.

Concluding observations – the wider picture

182. For all these reasons I would dismiss this appeal. The legal issue on my analysis is the level of intensity of scrutiny of enactments of Parliament and the decision of the Secretary of State. This appeal, however, also raises much wider issues. Those

issues can be seen at many different levels: of children's health versus the European Union values attached to the fundamental freedoms; of child health versus commercial interests; of national culture versus pan-European values; of the boundaries between the role of the national judge adjudicating on national law and his or her role as a judge in the European Union legal order, and so on. For the reasons I have explained, in my judgment, in the context of this case the level of intensity of review is a low one.

183. For all the reasons given above, I would dismiss this appeal.

The Master of the Rolls:

Introductory

184. The issue in these proceedings is whether the Protection from Tobacco (Sales from Vending Machines) Regulations 2010 ("the Regulations"), which would prohibit the sale of tobacco from vending machines ("TVM"s) from 1 October 2011, (i) violate EU law, in the light of articles 34 and 36 of the Treaty on the Functioning of the European Union ("article 34" and "article 36" respectively), and/or (ii) infringe the appellants' rights under the first paragraph of Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1(1)").

185. I have read the judgments of Laws LJ and Arden LJ in draft, and it causes me no surprise that they have reached different conclusions. I have found this a difficult issue to resolve, and must confess to having changed my mind more than once. I have found both judgments exceptionally helpful in crystallising the issues, and have heavily recast – and shortened - this judgment as a result of considering what they have to say.

The background to the legislation

186. The background in terms of policy and legislative history to the Regulations and to these proceedings has been very clearly and fully set out by Laws LJ in paras 4 to 17 and by Arden LJ at paras 91 to 100, 103 and 108 and 112 above, and I gratefully adopt what they say in those paragraphs.

Did the Secretary of State correctly interpret section 3A of the 1991 Act?

187. The first question is whether the Secretary of State correctly interpreted section 3A of the Children and Young Persons (Protection from Tobacco) Act 1991 ("section 3A") when he concluded that it gave him two options, either to impose a ban on the sale of cigarettes from TVMs, or to permit the sale of cigarettes from TVMs to continue. In particular, the question is whether he was right in his view that it was not open to him to impose a regulatory system, such as permitting sales to take place only from TVMs with ARMs.

188. As explained in paras 10 to 12 above, the precise wording of section 3A(1) changed during its consideration in the House of Commons, when section 22 was debated. However, as there was no suggestion before us that the circumstances of this case satisfy the requirements laid down in *Pepper v Hart* [1993] AC 593 for admitting

Hansard into evidence, it appears to me that we must interpret the section in accordance with normal principles.

189. In that connection, three points may be noted about the way in which section 3A(1) is expressed. The first is that the Secretary of State is given the power to make regulations of the type envisaged: he clearly does not have any obligation to do so. Secondly, it is equally clear that the only power granted is to prohibit the sale of tobacco from TVMs; the Secretary of State cannot invoke section 3A(1) of the 1991 Act to regulate the sale of tobacco from TVMs.

190. Thirdly, and more controversially, the power is not expressed to be in relation to "machines", or all machines, selling tobacco. Clearly this is a case where the singular includes the plural (see the Interpretation Act 1978), but, at least in my view, it is not entirely clear whether it is open to the Secretary of State to exercise the power granted to her in relation to some machines, but not all machines. Initially, I thought it might be, but I think that the natural meaning is that it refers to selling from a machine generically. This view is, I think, supported, by the fact that the 1991 Act refers elsewhere to "a machine" to mean "machines". I also agree with Laws LJ and Arden LJ at paras 71-73 and 99 above that section 3A(6)(b), which permits any regulations "to make different provision for different cases or circumstances", does not assist the appellants.

191. From this it follows that I am of the view that the Secretary of State interpreted the legislation correctly. However, the fact that he could not impose a regulatory scheme does not mean that he had to impose a ban. Nor do the terms of section 3A preclude the Secretary of State from holding off imposing a ban in order to see if some sort of voluntary system involving the use of ARMs would work. It is in connection with that latter aspect that the appellants' argument concentrated.

Proportionality: Luxembourg and Strasbourg

192. As explained in paras 18 and 19 above, the ban contained in para 2(1) would violate (i) article 34, unless it can be justified under article 36, and (ii) A1P1(1), unless it can be justified under the second paragraph ("A1P1(2)"). Although it may be a theoretical possibility, it would, to my mind at least, be surprising if para 2(1) of the Regulations violated A1P1(1) without also violating article 34. Although article 34 and A1P1(1) are concerned with rather different issues, the identity and weight of the factors relevant to the question whether the ban is justifiable under article 36 are, as I see it, very similar to those relevant under A1P1(2).

193. Further, there is greater overlap between European Union law and human rights law in this field than might first appear: the Court of Justice observed in Case C-210/03 *Swedish Match* [2004] ECR I-11893, para 72, that "according to [its case law], the freedom to pursue a trade …, like the right to property, is one of the general principles of Community law". The Court went on to say that any restriction on such freedoms must not be "disproportionate", which is very much the same test as is raised (in addition to domestic lawfulness) by A1P1(2): see *National Federation of Fishermen's Organisations* [1995] ECR I-3115, para 55, and Case C-280/93 *Germany v EU Council* [1994] ECR I-4973, paras 89-91.

194. In those circumstances, partly because it follows the approach adopted by counsel before us, and partly because there is more guidance in this field from the Court of Justice jurisprudence than from that of the European Court of Human Rights, I shall address the issue by reference to articles 34 and 36.

Proportionality: the applicable legal principles

195. In order to determine whether the ban was proportionate it is necessary to identify the width of the discretion, or margin of appreciation, to be accorded to the Government (a term I use in this judgment to mean the executive, and, to the extent that it is relevant, the legislature) in this case. In that connection, the Court of Justice's jurisprudence has been discussed in some detail by Laws LJ and Arden LJ above at paras 35 to 47 and 115 to 147 respectively.

196. The views expressed by Lord Bingham CJ in *R v Secretary of State for Health ex p Eastside Cheese* [1999] 3 CMLR 123, based on the jurisprudence of the Court of Justice, are, at least in my view, particularly valuable for present purposes. Laws LJ has set out the relevant passage *in extenso* in para 21 above.

197. Of particular relevance was what Lord Bingham said at [1999] CMLR 123, paras 41, 48 and 49, where he made these important points:

> "41. Because the principle [of proportionality] is so general (and may affect a range of issues from the validity of primary legislation … to much narrower points …) it must be related to the particular situation in which it is invoked. …
>
> 48. … The margin of appreciation for a decision-maker … may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the member state in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided. …
>
> 49. … The judge's task was (so far as article 36 was concerned) to see whether the exercise of the Secretary of State's power under section 13 of [the Food Safety Act 1990] Act had been objectively justified and had been shown not to be disproportionate."

198. For present purposes, two other important points were made by Lord Bingham in *Eastside Cheese* [1999] CMLR 123. First, at [1999] CMLR 123, para 43, he said that "the maintenance of public health must be regarded as a very important objective and must carry great weight in the balancing exercise". This is well illustrated by what was said by the Court of Justice in one of the cases he cited, Joined Cases C-1/190 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I - 4151, para 16, namely that: "it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way

in which that protection is to be achieved." However, that does not obviate the need for proportionality, as the Court made clear in Case C-262/02 *Commission v France* [2004] ECR I-6569, para 24.

199. Secondly, at [1999] CMLR 123, para 46, Lord Bingham said "it is clear that the national legislature has a considerable margin of appreciation, especially in legislating on matters which raise complex economic issues connected with the Community's fundamental policies." It is worth noting that this observation related to the legislature, but it must also apply to the executive, albeit with less force, in the light of what he had said at [1999] CMLR 123, para 48.

200. The breadth of the margin of appreciation in relation to any decision thus depends on the circumstances of the case and, in particular, on the identity of the decision-maker, the nature of the decision, the reasons for the decision, and the effect of the decision. Further, because the extent of the breadth cannot be expressed in arithmetical terms, it is not easy to describe in words which have the same meaning to everybody, the precise test to be applied to determine whether, in a particular case, a decision is outside the margin. It is therefore unsurprising that in different judgments, the same expression is sometimes used to describe different things, and that sometimes different expressions are used to mean the same thing.

201. With that qualification, I think considerable assistance can also be derived from what the Court of Justice said in Case C-331/88 *FEDESA and others* [1990] ECR I-4023, para 13, quoted in paras 20 and 117 above. Thus, it seems to me that "the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question", and "the disadvantages caused must not be disproportionate to the aims pursued".

202. Further, "when there is a choice between several appropriate measures recourse must be had to the least onerous". In para 6.3 of the European Commission's *Guidance* referred to in paras 42 and 142 above, "the existence of alternative measures hindering trade less" is described as "an important element in the analysis of the justification [for a particular measure] by a Member State", and it is also said that a Member State has "an obligation to opt for the 'less restrictive alternative', and failure to do so will constitute a breach of the proportionality principle".

203. However, that factor should not be applied by a court in such a way as to usurp the role of the primary decision-maker. So, where there is an alternative possible measure, there may be a difference of view as to which measure would be less onerous, and, unless the view of the Member State's government that its measure is the more appropriate is manifestly wrong, the court should not substitute its own view for that of the government. This is, I think, what the Court of Justice had in mind, when it said in *National Federation of Fishermen* [1995] ECR I-3115, para 59, that a measure could not be challenged as disproportionate "merely because other kinds of measures could have been adopted, since the selection of measures to be taken is a political decision falling within the purview of the Member State concerned, within the limits set by Decision 92/593."

204. So, too, when there is said to be a less onerous measure than that proposed, it seems to me that, before rejecting the proposed measure, the court would have to bear in

mind, in the context of the overall margin of appreciation afforded to the Government, that there may reasonably be different opinions on questions such as the relative disadvantages of the allegedly less onerous alternative, and the degree of difference in onerousness.

205. Accordingly, when considering a challenge to any measure which engages article 34 and which a Member State government seeks to justify on the basis of policy and evidence, the court should avoid being too exacting when it comes to an attack on the evidence on which the measure is based. On the other hand, it would be wrong not to address and evaluate the supporting evidence. As stated in paras 6.1.2 and 6.3 of the *Guidance*, any measure must be "well-founded – providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information" and the "justification provided by the Member State must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the [measure], and precise evidence enabling its arguments to be substantiated" – see e.g. Case C-270/02 *Commission v Italy* [2004] ECR I-1559 and Case C-124/97 *Laara and others* [1997] ECR I-6067, para 36. This obligation would ring entirely hollow if the courts did not have a duty to consider and assess the evidence in question.

206. We were referred to a number of judgments of the Court of Justice dealing with cases where national governments had sought to justify decisions by reference to protecting public health under article 36. Inevitably, each case turns on its own precise facts and the danger of considering the facts of other cases is that it can distract one from concentrating on the actual facts and competing arguments in the instant case. On the other hand, both consistency and predictability in judicial decision-making are highly desirable: without the former, the courts lose respect, and, without the latter, government is much more difficult.

207. The decision in Case C-170/04 *Rosengren and others* [2007] ECR I-4071 merits mentioning. It involved a ban on the importing of alcoholic drink into Sweden, where the state has a monopoly on retail alcohol sales. The ban was held to be disproportionate. In so far as it was said to "limi[t] generally the consumption of alcohol in the interest of protecting the health and life of humans", it was held to be "unsuitable" because of "the rather marginal nature of its effects" – [2007] ECR I-0471, para 47. It was also sought to be justified because it "protect[ed] younger persons from becoming purchasers of alcoholic beverages" – [2007] ECR I-0471, para 48. In the following paragraph, the Court accepted that this was justified in principle "in the light of the objective of protection of public health".

208. However, the Court pointed out that that the Swedish Government still had to establish that the ban was "consistent with the principle of proportionality" and that "the objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade" - [2007] ECR I-0471, para 50. The Court then concluded that the ban "[went] manifestly beyond what [was] necessary for the object sought" as it "applie[d] to everyone irrespective of age" – [2007] ECR I-0471, para 51. The Court then went on to consider whether there were other methods "with at least an equivalent level of effectiveness" as the ban, which were "less restrictive of the principle of free movement of goods", and concluded that there were - [2007] ECR I-0471, paras 55-56 - and, therefore, held that the ban was unlawful.

209. Another relevant case, where the Court came to a different conclusion on the facts and upheld a ban, namely on the import of an oral snuff tobacco product, was in Case No C-434/02 *Arnold André* [2004] ECR I-11825. In that case, at [2004] ECR I-11825, paras 48-49, the Court of Justice made it clear that, once it was apparent that the use of the product might well be injurious to health, the decision whether there was a sufficient danger to health to justify the ban was very much one for the Government. At [2004] ECR I-11825, para 55, the Court said that it was apparent that "no other measures [involving regulation rather than banning]… would have the same preventive effect in terms of the protection of health, inasmuch as they would let product which is in any event harmful gain a place in the market."

The application of proportionality in this case

210. In order to determine the breadth of the margin of appreciation to be accorded to the Government in relation to the ban in this case, it is relevant to consider the correct characterisation of the decision to promulgate the Regulations. There is a difference of opinion between Laws LJ and Arden LJ as to the precise characterisation of the decision-maker in the present case (although it appears that it makes no difference to the outcome, at least so far as Arden LJ's view is concerned – see para 174 above).

211. It appears to me clear that, in enacting section 3A(1) in the terms that it did, Parliament left it to the Secretary of State to decide whether or not to impose a ban on TVMs. It was a matter for him whether and when to introduce a ban, what investigations or analysis should be effected, and what alternative courses should be considered, before reaching any decision. Parliament did not give him the right to impose a regulatory system involving controls such as ARMs, but Parliament left him free to opt not to impose a ban if, for instance, he was to conclude that a satisfactory voluntary code involving the use of ARMs ("a voluntary code") was proposed and established.

212. Arden LJ has elegantly characterised the promulgation of the Regulations as having been effected pursuant to a partnership between the executive and the legislature. That cannot, I think, be justified by reference to the enactment of section 3A(1), as that is purely an enabling provision: if it justified Arden LJ's characterisation, it would mean that any rule or regulation made by the executive could be treated as made pursuant to such a partnership, as the executive cannot make rules or regulations without the authority of the legislature. However, I can well see that the affirmative resolution procedure shows that there is a degree of Parliamentary involvement in the making of the Regulations. Nonetheless, in my view, they remain essentially a product of the executive.

213. While the decision to impose the ban must, therefore, be assessed on the basis that it was made by the executive arm of the Government of a single member state, when deciding on the margin of appreciation to be afforded to the Government in relation to the Regulations, it seems to me that (i) the involvement of the legislature is a factor favouring a broader margin than would be appropriate to a purely executive decision, and (ii) the fact that the Regulations are concerned with health and the prevention of premature death supports a relatively broad margin, as does (iii) the fact that the Regulations are based, in part, on complex assessments of the public interest.

214. However, I do not consider that the margin is as broad as it would be if the decision had been that of the democratically elected national legislature. Even less do I consider that the margin is as broad as it would be if the decision had applied across all EU member states.

The case for saying that the ban is disproportionate

215. The case as advanced by the appellants to support the contention that the ban does not satisfy the requirement of proportionality can, I think, be summarised in three propositions:

i) The ban would affect trade in the EU and destroy their businesses, with severe economic and employment consequences for their owners and employees;

ii) The justification for the ban does not bear analysis (as the appellants contend that the RPC concluded), and

iii) The Secretary of State had failed to consider whether the aim of a ban could be achieved by a far less onerous measure, namely a voluntary code using ARMs.

216. Proposition (i) is not really capable of dispute. TVMs are all imported from Germany, Spain or elsewhere in the EU, and the import of such machines into the UK would cease if the ban was imposed.

217. The evidence establishes that, as one would expect, if the ban comes into effect, many of these businesses will collapse, many of their proprietors will suffer acute difficulties with their livelihood, finances and banks, many of their employees will have to be laid off, and their TVMs will probably have to be written off. The Secretary of State suggested that the businesses could diversify, but as Sir Anthony May P said, this is "at best difficult, and at worst unrealistic" – [2010] EWHC 3112 (Admin), para 15.

218. However, the Secretary of State is on stronger ground in saying that the effect of the ban on EU trade would be pretty slight: there is only one TVM per 1000 people in the UK. In that sense, Sir Anthony May P was right in describing the ban's interference with the free movement of goods as "an incidental and unintended consequence of a measure of social reform [intended] to protect public health" – [2010] EWHC 3112 (Admin), para 95. Nonetheless, there is no doubt but that article 34 is engaged, as is the principle set out in the passages in the Court of Justice's judgments quoted or identified at the end of para 193 above.

219. The appellants' proposition (ii) also has force. To some people, the quantitative exercise carried out in the FIA referred to by Laws LJ at paras 15 to 17, and discussed by him more fully at paras 55 to 61, above, may seem questionable, even offensive, when the benefits include avoidance of disease or early death. However, quite apart from Benthamite considerations, it is the only way one can try to make any objective assessment of the net benefit of any proposal, and it is standard UK Government and EU Commission practice - see e.g. paras 21 and 24 of the Treasury

Green Book, and paras 1.2 and 3.1 of the *European Commission Impact Assessment Guidelines* SEC (2009) 92 (January 2009).

220. Having said this, the fact remains that, because they are expressed in numbers, quantitative assessments can give a spurious impression of reliability and accuracy: the essential feature of any such assessment is that it is only as reliable as the assumptions or evidence on which it is based. Further, any such quantitative assessment cannot of itself inevitably be determinative, especially where value judgments of a political, social or moral nature, and issues such as health and longevity, are involved.

221. As the Regulatory Policy Committee (RPC) observed, there is no hard evidence as to whether, and if so to what extent, the ban would actually serve to reduce cigarette smoking among the young, or indeed adults, who purchase cigarettes from TVMs. The percentages assumed in the FIA (10-50% in the case of children and 25-75% in the case of adults) appear to be frankly no more than guesses, as there was no evidence for, or even any attempt at justify, the extent to which either adults or children, who currently purchase cigarettes from TVMs, would simply switch to purchasing cigarette from other sources, including illicit vendors.

222. The possibility of switching was acknowledged in the FIA, but the degree of switching was little more than a matter of guesswork, and it would be crucial to the efficacy of the ban. Many, conceivably nearly all, adults and under 18-year olds who purchase cigarettes from TVMs, also purchase them over the counter, and, in the event of the ban, purchases which would have been from TVMs may simply be switched to over the counter (in which case, the purchaser would be able to buy more cigarettes, as one gets more cigarettes in a packet bought over the counter than bought from a TVM – an example of the law of unintended consequences). Further, the possibility of switches to illicit vendors would be of particular concern, not least because increased illicit tobacco sales would reduce the health and longevity benefits of the ban while not reducing the consequent cost of lost revenue.

223. The views of the RPC are worthy of considerable respect. It was set up to provide "independent advice to Government on the quality of analysis supporting new regulations" including "whether the policy design will ensure the benefits justify the costs". The RPC's six members represent a range of relevant expertise at a high level and its reports have already had a beneficial effect on impact assessments generally, according to the National Audit Office. Further, its original detailed critique on an earlier version of the FIA was available to the Secretary of State well before she signed off the FIA and Memorandum and yet, as is clear from its concluding opinion, the RPC's principal concerns about the Secretary of State's justification for the ban were not met.

224. Quite apart from this, the net benefit of the ban in the FIA was reliant on the benefit attributable to adult quitters, which was something of an afterthought and does not represent a purpose of the ban. Additionally, there are the defects in the FIA discussed by Laws LJ in paras 55 to 61 above.

225. As to the appellants' proposition (iii), it too appears to have some force. Before the Parliamentary amendment to section 3A, the Minister had expressed a clear preference for regulation involving the use of ARMs. The only reason for the

change to favouring a ban was the Parliamentary amendment on 12 November 2009: there was no new analysis or evidence to support this change, apart from the afterthought of adult quitters.

226. Retaining TVMs, but with the use of ARMs, would plainly be considerably "less onerous" than the ban: if it had any adverse effect on the businesses of owners and operators of TVMs, and on the trade in such machines, it would be far less significant than the proposed ban. Further, there is some evidence that a voluntary code, whereby all TVMs are fitted with ARMs, would be effective. ARMs have been installed on some 600 TVMs in anticipation of the introduction of a regulatory scheme as contemplated until 12 November 2009. The impact of this trial has not yet been fully assessed, but uncontradicted evidence before us suggests that the feedback from pub landlords and Trading Standard Officers has been generally positive.

227. Nonetheless, it is likely, at least on the face of it, that such an arrangement would be less effective than a ban so far as deterring underage smokers is concerned. It seems plain that some controllers would be deceived, negligent or uncaring about the age of the potential user. As a result of the trials to which I have referred, there is some real evidence on this aspect, and it suggests that this would occur on a significant number of occasions, so that the introduction of ARMs on every TVM would reduce the use of TVMs by those under 18 by around 80% from its present level. However, the appellants suggest that there is nothing in this point as those unable to use ARM-controlled TVMs would equally well be able to find over-the-counter suppliers, who would be similarly deceived, negligent or uncaring as to whether they were under 18.

228. In these circumstances, runs the appellants' argument, the Secretary of State should have withheld promulgating the Regulations until such time as it became clear that the use of ARMs under a voluntary code was less effective than a ban would be, and that the extent of the difference rendered it proportionate to introduce a ban. At the very least, it is said that he should have considered adopting the course the Minister had previously approved, namely trialling a voluntary code for a period to see how it worked before deciding to introduce a ban.

229. The appellants sought to bolster their argument by contending that, in deciding on a ban, the Secretary of State was guilty of a *volte-face* on the use of ARMs, in that, having been initially in favour, he unreasonably changed his stance, without even considering a voluntary code.

Discussion

230. legislature's decision to reject regulation as a "third way" and to give the Secretary of State the choice between ban or no ban of TVMs. The appellants' attack effectively accepts the validity of section 3A, and challenges the Secretary of State's decision to impose a ban without at least contemplating a voluntary code.

231. Particularly given the relative breadth of the margin of appreciation which should be accorded to the Government as discussed above, there is obvious attraction in the notion that, given the prevailing state of expert evidence and public opinion as to the dangers to health of tobacco smoking, virtually any measure which a government

takes to restrict the availability of tobacco products, especially to young people, is almost self-evidently one with which no court should interfere (unless it could be shown to have some ulterior motive, which has not been suggested by the appellants in this case).

232. Nonetheless, this point only gets the ban in this case over the first of the two hurdles identified in *Rosengren* [2007] ECR I-4071, paras 49-50, and then merely in terms of its aim. There still remain the questions of whether the aim of the ban is achieved, at least arguably and at least to some extent, and whether the ban is in all the circumstances proportionate.

233. As already mentioned, in considering such issues, particularly where they involve public health and value judgments, the court should be careful to avoid substituting itself for the decision-maker or being over-particular about the reasoning or evidence relied on by the decision-maker. But that does not absolve the court from considering whether the ban is disproportionate.

234. The appellants' first two propositions are (i) the fact that the ban would undoubtedly shut off the import of TVMs into the UK and put companies with over 500 employees and a turnover of over £400m out of business, with no realistic prospect of redeployment or compensation, and (ii) the weakness and subjectivity of the evidence and analysis justifying the ban in the FIA. Particularly when taken together, these two factors give rise to obvious cause for concern, but I nonetheless share the view of both Laws and Arden LJJ that, if they stood alone, they would not justify overturning the ban.

235. As Sir Anthony May P said at [2010] EWHC 3112 (Admin), para 1, "Government policy in recent years has consistently been to discourage people from smoking tobacco and to take progressive measures to reduce its harmful and destructive effect." This policy is plainly unobjectionable and in many, probably most, people's view it is laudable, for the reasons canvassed by Arden LJ at paras 87 to 92 above. It is inevitable that, in pursuing virtually any aspect of that policy, the Government will cause financial loss, sometimes of a severe or crippling nature, to businesses directly or indirectly concerned with selling tobacco products. Provided that that loss is fairly taken into account when reaching the decision to implement an aspect of such a policy, it will require unusual or extreme facts before the court will interfere.

236. The justification for the ban as explained to the legislature is contained in the Explanatory Memorandum referred to in para 15 above (much of which is set out in para 91 above) and accompanying FIA. The evidence and analysis in those documents, which seek to quantify the justification for the ban, is weak. It is neither very convincing (for the reasons given by the RPC, namely the absence of any evidence to suggest that the ban will have any effect) nor very telling (not least because of its reliance on adult quitters for a positive result).

237. However, while not very convincing, the justification in the memorandum and FIA is not so weak nor so illogical as to justify a court interfering with the ban, at least in the absence of some other consideration. It is true that the figures appear, ultimately, to be based on little more than guesses as to how many people (whether under-18s or adults) who purchase cigarettes from TVMs will find alternative sources and,

even then, the positive cost/benefit effect of the ban is justified only because of the ancillary benefit of adult quitters. But careful thought has gone into the calculations, the assumptions do not appear to be fanciful, and the exercise is self-evidently difficult.

238. Quite apart from this, the decision to impose the ban cannot, as a matter of law, be required to be supported by a net positive cost/benefit figure in a quantitative analysis of the sort contained in the FIA. Particularly when it comes to an issue such as health or curbing early death, neither principle nor common sense, nor the Court of Justice's jurisprudence supports the notion that the assessment of proportionality must involve such an arithmetical or relatively mechanistic approach.

239. The Secretary of State's overall assessment (or perhaps it should be characterised as a belief) that the ban will lead to some reduction in smoking among both adults and those under 18, does not seem unreasonable (even if, as I accept, it is by no means certain to occur). The unsatisfactory basis for the figures and analysis in the FIA does not, in the absence of any other factor, justify concluding that the ban is disproportionate, given the wide margin of appreciation to be accorded. If one takes away one source of cigarettes, particularly one that involves no control over the identity of the purchaser, it is scarcely unreasonable to conclude that it will reduce consumption of cigarettes to some extent, although, as the RPC effectively said, that conclusion is not one which necessarily follows ineluctably.

240. It follows that the determinative question is whether the appellants' third ground of attack on the ban tips the balance in favour of the conclusion that it is disproportionate.

241. Both the evidence (and in particular the contents of the Explanatory Memorandum, the 2010 consultation document, and the letter, quoted from in 91, 92 and 103 above) and common sense suggest that there are four possible disadvantages of a voluntary code over a ban.

242. First, as already mentioned, it is likely that there will simply be fewer sources of supply of tobacco if TVMs are outlawed. It is possible that at least at some locations where a TVM existed, a new source of supply (a legal over-the-counter, or an illegal, supplier) will start up, but it seems unlikely in the extreme that this will occur in all, or even virtually all, locations. As a matter of elementary economic logic, it is not really possible to stigmatise as unreasonable the notion that fewer children, and indeed fewer adults, will have access to tobacco if one source of supply, namely every TVM, is removed. In addition to the FIA, there is the evidence in these proceedings referred to in para 172(l) above that many under 18-year olds will not switch from TVMs to other sources of cigarettes if TVMs are banned.

243. Secondly, under a voluntary code, there would be controllers who might be persuaded to unlock a TVM because they were deceived, negligent or uncaring. As already mentioned, this is answered by the appellants' point that there will equally be over-the-counter retailers who are deceived, negligent or uncaring, and would sell cigarettes to under-18 year olds who were unable to purchase from TVMs. Thus, it is conceivable that any potential purchaser under the age of 18, who would have been able to persuade a controller to unlock an ARM-controlled TVM would,

if TVMs were banned, be equally well able to purchase cigarettes over the counter in the event of a ban.

244. However, one does not know whether the controllers of ARM-controlled TVMs would be the same people as those who sell over the counter. Common sense suggests that not all those who would be controllers if there was a voluntary code, would be over-the-counter retailers if there was a ban. It seems to me to be by no means fanciful to think that a person selling tobacco over the counter will be more careful to check on a customer's age than a person controlling an ARM-controlled TVM. The former person's job would normally require him or her to concentrate on customers in a shop or supermarket, whereas the latter person would often, no doubt, have many functions, which did not involve retail customers at all.

245. Thirdly, a voluntary code would probably be more difficult to enforce than a ban (or indeed than a regulatory code based on the use of ARMs, which was the Secretary of State's preferred approach before 12 November 2009). It would presumably be easier to check whether an unlawful TVM was present, than to see whether a TVM was ARM-controlled effectively. A voluntary code would, almost by definition, carry no sanctions, whereas a ban obviously could and would. A ban would, by definition, apply to everyone, whereas a voluntary code would only apply to those who accepted it: thus, if, as anticipated, it would be operated by NACMO, it would not, at least necessarily, apply to TVM operators who are not NACMO members.

246. The trial on the effectiveness of voluntary use of ARMs is of very limited persuasive value for the reasons given by Arden LJ in para 106 above. However, if a voluntary code was introduced, there must be reasonable prospect that it would be strictly adhered to, given that, if it did not work, a ban would be likely to follow. Nonetheless, I find it hard to quarrel with the rationality of the Secretary of State's statement in the letter quoted at para 103 above that "[p]rohibition would be easier and cheaper to enforce than imposing restrictions", particularly if those restrictions are voluntary.

247. Fourthly, a voluntary code would have no benefits for adult smokers. They would be as easily able to purchase cigarettes from a TVM as they are currently (save that they would have to ask the controller to unlock the TVM). Whereas, under a ban, adult smokers would, of course, be unable to purchase cigarettes from TVMs. Again the extent of the benefit of a ban on adult smokers is a matter of speculation, but it is not unreasonable for the Secretary of State to take the view that there would be some reduction in adult tobacco consumption simply because one source of supply, namely every TVM, has been eliminated.

248. Accordingly, I cannot accept that it was irrational for the Secretary of State to have formed the view, effectively expressed in paras 3.17 and 3.18 of the Explanatory Memorandum, that he should proceed with a ban, even in the light of the possibility of a voluntary code.

249. I do not consider that there is anything in the suggestion that the Secretary of State was guilty of an irrational *volte-face*, because the reason for his change of stance is plain and understandable. He initially favoured ARM-controlled TVMs rather than a ban, but that was a provisional view adopted when the draft section 3A would have permitted regulation; the favouring of a ban only occurred after the draft section had

been amended to exclude regulation. The difference between regulation and voluntary code is well described by Arden LJ at paras 98 and 99 above.

250. There is rather more in the appellants' point that the Secretary of State did not directly consider a voluntary code as an alternative to a ban. However, it seems to me that that point is only of limited value. First, the Secretary of State was plainly dissatisfied with a previous voluntary arrangement, which involved locating TVMs so as to minimise access to those under 18. Secondly, in the context of these proceedings, there has been considerable debate as to the merits of a voluntary code, and the Secretary of State expressed his reasons for rejecting a voluntary code in February 2010 in the letter quoted in para 103 above. Thirdly, as this is a case involving EU law rather than domestic judicial review, the court should concentrate on the substantive merits rather than on the procedural aspects. So the centrally relevant question is whether the Secretary of State has established to the court's satisfaction that a voluntary code is not an acceptable alternative to the ban, not whether the Secretary of State's decision was defective because he failed to consider that issue when deciding on the ban.

251. So the issue comes down to deciding whether the Regulations imposing a ban are disproportionate because the Secretary of State failed to consider or adopt an alternative measure, namely a voluntary code, which would undoubtedly be substantially less onerous, but which would, to put it at its lowest, quite conceivably be less effective in achieving the aim of the ban. That issue must be decided by reference to the various circumstances and principles discussed above.

252. At least on the face of it, particularly in the light of the margin of appreciation afforded to the Government in the light of the nature of the decision in this case, it seems to me that it would be wrong for the court to overturn the ban simply on the basis that the Secretary of State should have addressed the possibility of, or tried out, a voluntary code before opting for a ban. It would be taking the law further than it has been taken by the Court of Justice if we were to hold that a Government measure infringed proportionality simply because another, less onerous, alternative was not considered, in circumstances where it is apparent that the Government reasonably took the view that that alternative would significantly fall short of the measure in terms of achieving the aim sought to be achieved.

253. However, that is not necessarily the end of the appellants' case. It seems to me that there is a real argument for saying that, in the light of a combination of circumstances, the ban is disproportionate. In summary terms, those circumstances are (i) it does not appear that the alternative measure of a voluntary code was, at least specifically, considered before the Regulations were adopted, (ii) a proposal close to the alternative measure was preferred, after careful consideration, by the Secretary of State as recently as early November 2009, (iii) the efficacy of a voluntary code could well be very close to that of the Regulations, (iv) such a code would avoid the serious commercial consequences to the appellants, and the interference with trade, which would result from the Regulations, and (v) the Secretary of State decided on a ban after being told by the RPC that the justification for it was weak and flawed.

254. In my view, these arguments give rise to a serious argument for allowing this appeal, but, in the end, I do not think that they should prevail. To recapitulate, (i) it

was open to the legislature under articles 34 and 36 to enact section 3A(1) in the terms that it was expressed, thereby to give the Secretary of State the option of imposing a ban on all TVMs, and no option to regulate the use of TVMs, (ii) the purpose of the ban was to improve public health, which is an area where a relatively broad margin of appreciation should be accorded to the Government, (iii) the notion that the ban would have the beneficial effect on public health intended and alleged by the Secretary of State is, to put at its lowest, rational and, indeed, it seems likely to be achieved to some extent, and (iv) the only alternative measure suggested, while undoubtedly less intrusive, could, again to put it at its lowest, be rationally be said to be less effective than the ban, and the Secretary of State believes it to be so.

255. In those circumstances, it seems to me that the appellants would have to come up with a very strong case indeed on lack of proportionality to justify the court overturning the ban on the ground that it infringed articles 34 and 36. In my view, the court could not interfere in such circumstances unless satisfied that no reasonable Secretary of State could have concluded that it was right to impose the ban. Otherwise, in overturning the ban, the court would be trespassing into the realm of policy-making. While I have concerns about the quality of the quantitative assessment and assumptions, as opposed to evidence, on which the ban was based, I cannot say that it was unreasonable of the Secretary of State to come to the conclusion that a ban was appropriate, or to reject the possibility of a voluntary code.

256. The decision of the Court of Justice in *Rosengren and others* [2007] ECR I-4071 initially seemed to me to assist the appellants, but, on reflection, I do not consider that it does. (i) In so far as the purpose of the ban in this case is reasonably intended to reduce smoking among those under 18, the reasoning of the court would suggest that it is *prima facie* lawful; (ii) The reason the ban in that case failed was that the court concluded that there was a less intrusive alternative means of achieving the same end, which was as effective as the ban, whereas in this case, the less intrusive alternative means would be likely to be significantly less effective than the proposed ban; (iii) The effect on trade of the ban on trade in that case was direct, intentional, and substantial as it applied to all alcohol imports into Sweden by private concerns, whereas the impact on trade of the ban in this case would be a relatively slight "incidental and unintended consequence" .

Conclusion

257. For these reasons, I consider that the ban is lawful, and, accordingly, I would dismiss this appeal.