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**ECLI: NL: GHDHA: 2020: 1047**

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## Authority

The Hague Court of Appeal

### Date of judgment

30-06-2020

### Date of publication

06-07-2020

### Case number

200.269.353 / 01

### Formal relationships

First instance: [ECLI: NL: RBDHA: 2019: 8534](#) , Ratification / confirmation

### Jurisdictions

Civil rights

### Special characteristics

Appeal

### Content indication

Further packaging requirements for tobacco products are not incompatible with the Tobacco Products Directive and Union law on the free movement of goods.

### Locations

Rechtspraak.nl

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## Statement

### COURT OF THE HAGUE

Civil Law Department

Case number: 200.269.353 / 01

Case number / court number of court: C / 09/557201 / HA ZA 18-824

### judgment of 30 June 2020 (if brought forward)

on

**Cubacigar Benelux NV** ,

established in Overijsse, Belgium,

appellant,

hereinafter referred to as: Cubacigar,

lawyer: KJ Defares in Amsterdam,

against

**State of the Netherlands (Ministry of Health, Welfare and Sport)** ,

based in The Hague,

intimidated,

hereinafter referred to as: the State,

lawyer: mr. ML Batting in The Hague.

## **1 Appeal procedure**

### 1.1

By subpoena of October 22, 2019, Cubacigar appealed against a judgment of 24 July 2019 (hereinafter referred to as: the judgment) issued by the court of The Hague between the parties. In a statement of appeal with productions, Cubacigar raised four complaints. The State contested the complaints in its response with productions.

### 1.2

The parties subsequently requested judgment.

## **2 Facts and legal framework**

### 2.1

Cubacigar is an indirect subsidiary of the company to Cuban right Corporación Habanos SA, Havana, Cuba (hereinafter referred to as "Habanos"). As a company, Habanos focuses on the worldwide sales, marketing and distribution of Cuban handmade premium cigars.

### 2.2

Cubacigar is the exclusive distributor in the Benelux of Habanos cigars. Cubacigar handles the import of cigars into the European Union. The products prepared and packaged in Cuba arrive by air freight and are stored in a customs warehouse in Belgium and administratively processed there with a view to placing the cigars on the market in the Benelux.

### 2.3

Cubacigar distributes and sells more than 20 brands and 438 brand variants of the cigars in the Netherlands.

### 2.4

In this procedure, Cubacigar challenges certain requirements imposed on the packaging of tobacco products in the Regulation amending the Tobacco and smoking regulations ( *Stcrt* . 2018, no. 23779, hereinafter referred to as: the Amendment Regulation). In these proceedings, it is requesting various declarations of justice that these requirements are non-binding, at least with regard to Cubacigar cigars, which should be disregarded.

### 2.5

The Amendment Scheme is part of the legal framework described below.

### 2.6

The Netherlands is a party to the WHO Framework Convention on Tobacco Control ( *Trb* . 2004, 269, hereinafter referred to as: the WHO Framework Convention). Article 11 of the WHO Framework Convention deals with the packaging and labeling of tobacco products. The guidelines for the implementation of Article 11 ( *Guidelines for Implementation of Article 11, packaging and labeling of tobacco products* ) include the following:

#### **" Plain Packaging**

*46. Parties should consider adopting measures to restrict or prohibit the use of logos, colors, brand images or promotional information on packaging other than brand names and product names displayed in a standard color and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others . "*

### 2.7

Article 13 of the WHO Framework Convention deals with tobacco advertising, promotion and sponsorship. The guidelines for the implementation of this article ( *Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control* ) include the following:

**" Packaging and product features**

15. *Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colors, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.*

16. *The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white or two other contrasting colors, as prescribed by national authorities; nothing other than a brand name, a product name and / or manufacturer's name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.*

17. *If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers, such as animal or other figures, "fun" phrases, colored cigarette papers, attractive smells, novelty or seasonal packs. "*

2.8

The Tobacco Products Directive (Directive 2014/40 / EU of the European Parliament and of the Council of 3 April 2014, *PbEU* According to recitals 1 to 7 in its preamble, L 127/1 of 2014 aims to harmonize Member States' legislation on the production, presentation and sale of tobacco products and to implement the WHO Framework Convention. The Tobacco Products Directive does not provide for full harmonization. In principle, tobacco products that comply with the requirements of the Directive are subject to the free movement of goods, but Member States may impose additional requirements in order to protect public health, including in the field of the presentation and packaging of tobacco products, such as rules for the further standardization of the packaging of tobacco products (see recital 53 in the preamble). Member States shall comply with the requirements of Article 24 of the Tobacco Products Directive when making such additional requirements. To the extent relevant here, this provision reads as follows:

" 1. *Member States may not, for reasons relating to aspects covered by this Directive and subject to paragraphs 2 and 3 of this Article, prohibit the placing on the market of tobacco or related products which comply with this Directive or limit .*

2. *This Directive is without prejudice to the right of a Member State to maintain or introduce further requirements regarding the standardization of the packaging of tobacco products for all products placed on the market in that Member State, provided that this is justified on the basis of public health, taking into account the higher level of public health protection provided for in this Directive. These measures must be proportionate and must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.... '*

2.9

The Tobacco Products Directive has been implemented in the Netherlands through amendments to the Tobacco Act ( *Stb . 2016, 175* ) and the Tobacco and Smokers 'Order ( *Stb . 2016, 176* ), and the Tobacco and Smokers' Order ( *Stcrt . 2016, no. 25446* ). These regulations entered into force on May 20, 2016. Pursuant to Section 3 of the Tobacco and Smoking Products Decree (as amended), certain packaging requirements apply to tobacco products. Article 3.2, paragraphs 1 and 2 read as follows:

" 1. *A unit pack and an outer package of tobacco products for smoking contain a general warning, an information message and a combined health warning .*

2. *The first paragraph does not apply to a packaging unit and an outer packaging of a cigar that is not a cigarillo, if it was immediately on the market before 20 May 2016, this product was notified to Our Minister before 20 May 2016 and the outer packaging and packaging unit thereof. include a general warning and the cautionary text and a reference to smoking cessation information from a combined health warning. "*

2.10

In the explanatory memorandum to the Tobacco and Smokers' Order, the following is noted in this respect:

*" (...) In principle, these labeling rules apply to all tobacco products for smoking. However, the Tobacco Products Directive provides for the possibility of exempting smoking tobacco products other than cigarettes, roll-your-own tobacco and hookah tobacco from the information message and the combined health warning. The government is making use of this exemption for brands and types of (large) cigars that have been placed on the market by 20 May 2016. An important consideration here is that these cigars are mainly used by a small group of older consumers. (...) The exception will be withdrawn if there is a change and the number of (large) cigars sold by young people or the elderly increases substantially. (...)*

*Cigar manufacturers may develop new products in the future that are more attractive to young people. To protect young people from this, the government considers it necessary to apply an obligation for new products to place a combined health warning on the packaging. New products are brands or types that are placed on the market after the entry into force of this Decree. The government considers this proportional because new products can take into account the implementation requirements for the application of the combined health warning when developing the packaging . "*

2.11

In 2018, Article 3.4 of the Tobacco and Smoking Products Decree included a delegation basis to impose further requirements on packaging by ministerial regulation, in order to prevent packaging from leading to extra attention (especially by young people) for the product ( *Stb* . 2017, 358 ). This article entered into force on July 1, 2018. The further packaging requirements to be set on this basis cannot be applied to cigars as referred to in Article 3.2 (2) of the Tobacco and Smokers' Order (cigars that were on the market before 20 May 2016 and to the other requirements of Article 3.2 (2). meet). The explanatory note includes the following.

*"The government notes that in recent years there has been an increase in different types of packaging for smoking tobacco products that contain special characteristics. Examples include packaging with holograms, shimmers, shiny and glamorous colors, relief or expressions with references to a specific theme, such as for a football World Cup or for King's Day. It is also not inconceivable that packaging contains elements that lead to sound, light, odor and taste effects, such as a characteristic odor or ink that lights up when the packaging is opened. These elements can generate extra attention for the tobacco products, especially among young people. This increases the chance that young people will purchase and use these products, which can cause them serious health damage. Young people should be protected against this.*

*(...)*

*The government therefore intends to establish further packaging requirements for packaging of tobacco products for smoking by ministerial regulation.*

*(...)*

*In the government's view, the measure proposed here, if it would be a barrier to trade, is justified with a view to protecting public health. Article 36 of the TFEU explicitly identifies health protection as a*

possible justification. (...) Scientific research shows that the packaging of tobacco products can draw attention to these products and thereby increase their attractiveness, especially among young people. This allows young people to start using tobacco products. The brains of young people are very sensitive to the addictive effect of nicotine and smoking is often an unconscious process. The use of tobacco products can lead to serious health damage and even premature death. The government has a duty of care to protect citizens against this. The packaging requirements contained in the Tobacco Products Directive are not sufficient to achieve this goal. Since elements on packaging that attract extra attention from young people in particular, such as glitter and limited editions, are not regulated by the Directive, the government is taking additional measures. By prescribing by ministerial regulation that packages of tobacco products for smoking must not contain certain elements that are especially attractive to young people, young people are protected against the temptation to use the product, which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health. The packaging requirements contained in the Tobacco Products Directive are not sufficient to achieve this goal. Since elements on packaging that attract extra attention from young people in particular, such as glitter and limited editions, are not regulated by the Directive, the government is taking additional measures. By prescribing by ministerial regulation that packages of tobacco products for smoking must not contain certain elements that are especially attractive to young people, young people are protected against the temptation to use the product, which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health. The packaging requirements contained in the Tobacco Products Directive are not sufficient to achieve this goal. Since elements on packaging that attract extra attention from young people in particular, such as glitter and limited editions, are not regulated by the Directive, the government is taking additional measures. By prescribing by ministerial regulation that packages of tobacco products for smoking must not contain certain elements that are especially attractive to young people, young people are protected against the temptation to use the product, which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health. Since elements on packaging that attract extra attention from young people in particular, such as glitter and limited editions, are not regulated by the Directive, the government is taking additional measures. By prescribing by ministerial regulation that packages of tobacco products for smoking must not contain certain elements that are especially attractive to young people, young people are protected against the temptation to use the product, which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health. By prescribing by ministerial regulation that packages of tobacco products for smoking must not contain certain elements that are especially attractive to young people, young people are protected against the temptation to use the product, which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health. By prescribing by ministerial regulation that packages of tobacco products for smoking should not contain certain elements which are especially attractive to young people, young people are protected against the temptation to use the product which protects the health of these young people. The requirements to be set by ministerial regulation are therefore a suitable means of protecting public health.

*The further packaging requirements to be prescribed by ministerial regulation are proportional because they relate to packaging of cigarettes, roll-your-own tobacco, (water) pipe tobacco and cigarillos and these products are used more often by young people than other tobacco products. For brands and types of cigars that have been placed on the market in the Netherlands after May 20, 2016, the packaging requirements are also considered proportional, because the new requirements can be taken into account when developing them . "*

2.12

Through a public internet consultation, the State held from 6 July 2017 to 3

September 2017 the draft of the Amending Scheme was presented to the public. 77 responses were received to the design. The contribution led to changes in the design in parts. Cubacigar has not taken the opportunity to submit a comment.

2.13

The State notified the draft to the European Commission on 19 July 2017 under the Notification Directive (Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 on an information procedure in the field of technical regulations and rules on the information society services, *OJ EU L 241/1* of 2015). The purpose of this notification is to enable the European Commission and the Member States to comment on the compatibility of certain national rules with Union law. The European Commission has not commented on the draft. Bulgaria is the only Member State to comment. These have not led to changes in the design.

2.14

Pursuant to the Amendment Regulation, a new Article 3.7a has been included in the Tobacco and tobacco products regulation, which reads as follows:

*" 1. The material of a unit packet and any outer packaging of tobacco products for smoking is contiguous and does not contain transparent parts.*

*2. The part of a unit packet and an outer carton of smoking tobacco products not occupied by the health warning shall have a matt and smooth finish and not contain:*

*a. sound, odor or taste effects;*

*visual effects; and*

*shiny elements.*

*3. A packaging unit and an outer packaging of tobacco products for smoking do not contain any statements or other elements that refer to a specific theme or which indicate that this is a limited edition.*

*4. Without prejudice to the provisions of Article 3.3, third paragraph, the inside of a packaging unit and an outer packaging of tobacco products intended for smoking is unprinted.*

*5. A unit packet of tobacco products other than cigars for smoking contains only those products and, if applicable, unprinted foil paper which envelops the products to preserve freshness.*

*6. A cigar packaging unit contains only cigars and, if applicable, unprinted tissue paper, foil paper, cellophane, metal tubes and cardboard bumpers. "*

2.15

The Explanatory Memorandum to the Amendment Regulation states, among other things, that these additional packaging requirements (hereinafter also referred to as: the further packaging requirements) provide certain elements of packaging with which extra attention can be drawn to the product and with which the product becomes especially attractive for young people , are no longer allowed. Furthermore, the explanatory note contains a repetition of the justification of the further packaging requirements with regard to the protection of public health, cited in 2.11 above.

2.16

The Amending Scheme also entered into force on 1 July 2018. For cigars, other than cigarillos, a transitional arrangement has been included in Article 7.3, paragraph 5 of the Tobacco and Smoking Articles Regulation. Pursuant to this transitional arrangement, Article 3.7a of the Tobacco and Smoking Regulations does not apply to cigars other than cigarillos until 1 July 2019. In addition, cigars, other than cigarillos that comply with the Tobacco and Tobacco and Tobacco and Tobacco Regulations as they were dated 30 June 2019 and that were produced or released for free circulation before 1 July 2019, may continue up to one year after 1 July 2019. be placed on the market.

### **3Procedure at first instance**

#### 3.1

In the first instance, Cubacigar has, in addition to a court order for costs, claimed several statements of justice, which amount to the fact that, primarily, Article 3.7a of the Tobacco and Smoking Regulations as a whole, and in the alternative, the separate members of Article 3.7a of the Tobacco and Smoking Regulations, are non-binding, should be left out of use at least in relation to Cubacigar.

#### 3.2

In the judgment, the court dismissed Cubacigar's claims and ordered Cubacigar to pay the costs of the proceedings (enforceable on stock). In summary, the court's considerations boil down to the following. The further packaging requirements included in Article 3.7a of the Tobacco and Smoking Regulations are closely related to aspects that are regulated by the Tobacco Products Directive. That is why the Tobacco Products Directive forms the primary assessment framework. The further packaging requirements restrict the free movement of tobacco products within the meaning of Article 24 (1) of the Tobacco Products Directive. However, they fall under the exception of Article 24 (2) because they are justified for the protection of public health and do not go beyond what is necessary to achieve that objective. Research by the Trimbos Institute has shown that the packaging of tobacco products can increase their attractiveness. The further packaging requirements are aimed at reducing that attractiveness and thus contribute to the protection of public health. This goal is difficult to achieve in a way that would be less restrictive of free movement. This does not alter the fact that the research by the Trimbos Institute relates to cigarettes. Cubacigar has not sufficiently substantiated that the mechanisms described in that study would not also apply to cigars. Furthermore, research by Cochrane has shown that neutral packaging decreases the appeal of tobacco products in general, including cigars. The State has also taken into account the importance of free movement, by applying a later date of entry into force and a longer sales period for cigars. In addition, the further packaging requirements do not go as far as prescribing completely neutral packaging and brand mentions and cigar bands remain possible. There is no arbitrary discrimination or a disguised restriction on interstate trade because the detailed packaging requirements apply regardless of the origin of the products and the objective of pursuing a high level of protection of public health has been sufficiently established.

### **4The claim on appeal**

#### 4.1

On appeal, Cubacigar seeks the annulment of the judgment and the award of its claims at first instance, with the State being ordered to pay the costs in both instances. Cubacigar's complaints can be summarized as follows. Grievances 1 and 2 are directed against the court's judgment that the further packaging requirements are suitable and necessary to protect public health. According to Cubacigar, the court wrongly accepted the investigations by the Trimbos Institute and Cochrane as evidence that the further packaging requirements are proportionate, as these investigations relate only to the effects of neutral and generic cigarette packaging on the average consumer's tobacco use. The court should have checked whether the further packaging requirements, individually and in conjunction, meet these requirements. Furthermore, the court has denied that cigarettes and (handmade premium) cigars are different products in the eyes of an average consumer, and are also

treated differently in EU law. It has thus not been established that the further packaging requirements are suitable and necessary for the protection of the average consumer of handmade premium cigars. With complaint 3, Cubacigar claims that the further packaging requirements go beyond what Article 24 of the Tobacco Products Directive allows and must therefore be assessed under Article 34 of the Treaty on the Functioning of the European Union (TFEU), and that in case of doubt as to whether the further packaging requirements to pass this test, preliminary questions should be referred to the Court of Justice. Complaint 4 is directed against the dismissal of Cubacigar's claims in general and against Cubacigar's costs.

4.2

The State puts up a defense and concludes that the judgment is ratified, with Cubacigar being ordered to pay the costs of the appeal on appeal (enforceable against stock).

## **5 Review**

### *Assessment framework*

5.1

The court will first discuss complaint 3 by Cubacigar, insofar as it discusses the assessment framework. According to Cubacigar, Article 24 (2) of the Tobacco Products Directive only relates to the possibility of prescribing generic packaging (so-called *plain packaging*), and not to detailed packaging requirements as included in Article 3.7a of the Tobacco and Smoking Regulations. Therefore, if Member States introduce such packaging requirements, they should be assessed under Article 34 TFEU, Cubacigar said.

5.2

The court does not follow Cubacigar in this argument. Article 24 (2) of the Tobacco Products Directive must also be interpreted in the light of the preamble. According to recital 53 in the preamble, Member States retain the option of imposing additional requirements on the presentation and packaging of tobacco products, including colors, to protect public health. As an example, regulations are mentioned for the further standardization of the packaging of tobacco products. It follows that, under Article 24 (2) of the Tobacco Products Directive, Member States cannot only prescribe the use of generic or neutral packaging, but may also opt for the less far-reaching measure of further packaging requirements that prohibit certain distinguishing features and thus lead to a further (but not yet complete) standardization of packaging. Such rules also fall under Article 24 (2) of the Tobacco Products Directive. This explanation of Article 24 (2) is in line with the WHO Framework Convention, which the Tobacco Products Directive also implements. Indeed, the guidelines transposing Article 13 of the WHO Framework Convention instruct the contracting parties to prohibit specific packaging elements intended to make tobacco products more attractive as long as generic packaging has not yet been prescribed (see above under 2.7). The further packaging requirements included in Article 3.7a of the Tobacco and Tobacco Products Regulation must therefore be assessed under Article 24 (2) of the Tobacco Products Directive. Since it applies the scheme of secondary EU law derived from the Tobacco Products Directive specifically given for this situation, the direct application of primary Union law of Articles 34 and 36 TFEU will no longer be relevant (cf. ECJ 26 September 2018, C -137/17, ECLI: EU: C: 2018: 771, *Van Gennip*, point 51).

5.3

It does not make any difference to the outcome whether the assessment is based on Article 24 (2) of the Tobacco Products Directive or Article 34 TFEU (or more specifically, the exception to Article 34 TFEU included in Article 36 TFEU). Under Article 36 TFEU, measures taken by Member States which restrict trade between Member States are also permitted if they are justified on grounds of the protection of (inter alia) public health and not a means of arbitrary discrimination or a disguised restriction on interstate trade. form. Article 24 (2) is therefore no more than an application of Article



36 TFEU, which specifically focuses on requirements imposed on packaging of tobacco products. It follows from the wording of Article 24 (2) that, with regard to the substantive standard, the Union legislature, under that legislation, one on one wanted to align with the standard of Article 36 TFEU. Therefore, the Court will hereafter take into account the case law of the Union judge on the application of the latter provision in the application of Article 24, paragraph 2 Tobacco Products Directive.

*Arbitrary discrimination / disguised restriction*

5.4

Cubacigar's argument under complaint 3 that preliminary questions should or should have been put to the Court of Justice will be discussed by the court after first examining complaints 1 and 2 of Cubacigar. They raise the question whether the court has correctly ruled that the further packaging requirements of Article 3.7a of the Tobacco and Smoking Regulations are justified on grounds of the protection of public health and are proportionate. Cubacigar has not filed a complaint against the judgment of the court in rov. 4.14 of the judgment that there is no arbitrary discrimination or a disguised restriction on interstate trade. As far as Cubacigar with her against rov. 4. 9 of the judgment, which was directed at complaint 1, has also sought to challenge the recital contained therein that there is no question of a means of arbitrary discrimination or a disguised restriction on interstate trade, Cubacigar has insufficiently substantiated that complaint. In discussing grievances 1 and 2, the court will therefore limit itself to the question whether the further packaging requirements are justified on grounds of the protection of public health and are proportional, within the meaning of Article 24 (2) of the Tobacco Products Directive.

*Proportionality*

5.5

The court has stated in para. 4.11 of the judgment sets out the standard of assessment to be used in this respect, with reference to the judgment of the Court of Justice of 23 December 2015, C-333/14, *The Scotch Whiskey Association*(ECLI: EU: C: 2015: 845, points 51-59). This benchmark means that it is, in principle, for the State to determine the level of public health protection it wishes to pursue, as long as it takes into account the requirements of the free movement of goods within the Union. The State must demonstrate that the additional packaging requirements comply with the principle of proportionality, which implies that they are necessary to achieve the stated objective and that this objective cannot be achieved by measures that are less restrictive of the free movement of goods. The grounds of justification put forward by the State in that regard must be accompanied by adequate evidence or an examination of the suitability and proportionality of the further packaging requirements, as well as specific evidence to support its arguments. However, the burden of proof on the State does not go so far as to demonstrate that the protection of public health cannot be achieved by other conceivable measures. Against this background, it is for the national court to assess whether the evidence presented by the State can reasonably lead to the conclusion that the further packaging requirements are necessary for the protection of public health and do not unnecessarily restrict the free movement of goods.

5.6

It has been established that tobacco products, including cigars, are harmful to health. The further packaging requirements aim to protect public health by making packaging less attractive. The further packaging requirements can therefore be justified on grounds of the protection of public health. That is not in dispute between the parties. The dispute focuses on the proportionality of the requirements: are the further packaging requirements necessary for the protection of public health and can this aim be achieved with measures that restrict free movement less?

5.7

According to the State, the further packaging requirements meet the proportionality requirement, because the “glitter and glamor” elements prohibiting these requirements can increase the attractiveness of tobacco products, thereby encouraging consumers to purchase these products. Prohibiting these elements can therefore discourage the use of tobacco products. The State has substantiated this with references to scientific research.

5.8

Cubacigar has contested the proportionality of the further packaging requirements with various arguments. Her most far-reaching argument is that the vast majority of smokers and non-smokers are not affected by the attractiveness of tobacco product packaging. In this context, it referred to investigations by the European Commission from 2012 and 2015. However, the 2015 investigation by the European Commission, to which Cubacigar refers only in a general sense, shows (also) that in the Netherlands 24% of (ex-) smokers consider the packaging of tobacco products important when choosing a particular product. That is a not insignificant percentage. According to the 2012 European Commission survey, no more than 1% of smokers list the attractiveness of packaging as main reason to start smoking (emphasis added by court). However, this does not exclude that the attractiveness of packaging may lead to more tobacco products being sold.

5.9

Cubacigar has further argued that the scientific studies on which the State relies relate to the effects of prescribing generic packaging ( *plain packaging* ). What the further packaging requirements prohibit, however, are specific elements of the packaging. According to Cubacigar, the proportionality of banning those specific elements has not been demonstrated.

5.10

It is true that the studies of the Trimbos Institute and Cochrane relate to the effects of generic packaging. However, if generic packaging can reduce the attractiveness of tobacco products, it is reasonable to assume that banning specific packaging elements that aim to make tobacco products more attractive will have the same effect. This effect may be less, because distinguishing features are not completely prohibited. At the same time, such measures also have less far-reaching consequences for the ability of tobacco product suppliers to differentiate their products. That banning specific elements of packaging has less effect than prescribing generic packaging,

5.11

In this context, the Court also considers important what is said in the guidelines for the implementation of the WHO Framework Convention on the packaging of tobacco products. In these guidelines, the Contracting Parties are called upon to prescribe generic packaging for tobacco products, because this can increase the visibility of health warnings and prevent them from diverting attention from those warnings or put the harmfulness of tobacco products into perspective (see above under 2.6 ). As long as generic packaging is not yet prescribed, the contracting parties are called upon to prohibit “glitter and glamor” elements (see 2.7 above: “*If plain packaging is not yet mandated, the restriction should cover as many as possible of the design features that make tobacco products more attractive to consumers, such as animal or other figures, “fun” phrases, colored cigarette papers, attractive smells, novelty or seasonal packs.*”) In the context of the WHO Framework Convention, it is therefore also assumed that the prohibition of “glitter and glamor elements” of packaging can contribute to the protection of public health.

5.12

Cubacigar has also argued that the State has not demonstrated the proportionality of the application of the further packaging requirements to handmade premium cigars. To this end, Cubacigar points out that handmade premium cigars are used by a small group of predominantly older consumers, who are able to form their own opinion about the products for sale, partly due to the extensive health warnings

on the packaging. The users of handmade premium cigars cannot therefore be harmed by the attractiveness of packaging in their health interests, says Cubacigar.

5.13

Cubacigar has not disputed that the “glitter and glamor” elements prohibited by the further packaging requirements are intended to make tobacco products more attractive to the consumer and to increase the sales of these products. On this basis, it is reasonable to assume that banning these elements could lead to fewer tobacco products being sold. That this also applies to Cubacigar products is evident from its statement that the further packaging requirements will lead to a significant decrease in the sales of its products (see margins 3.11 and 3.13 of the summons at first instance). Her argument is already breaking up.

5.14

The veracity of this assumption is further confirmed by the studies by the Trimbos Institute and Cochrane. The court has stated in para. 4.12 of the judgment pointed to the mechanisms described in the cited studies of the Trimbos Institute and Cochrane, such as the reduced attractiveness of generic packaging compared to branded packaging, the increased visibility of health warnings on generic packaging, the reduced intention to use the product to buy or try with generic packaging and the indications that generic packaging has an effect on smoking behavior. The court agrees with the court that it is reasonable to assume that these mechanisms will also occur with (packaging of) cigars.

5.15

In the response, Cubacigar elaborated on Union and Dutch regulations in which cigarettes and cigars are seen as different products that are treated differently for the purposes of EU law. However, these schemes have a different purpose than the further packaging requirements. What matters here is whether the further packaging requirements can reduce the attractiveness of packaging of tobacco products, including cigars. The distinction made between cigarettes and cigars in the context of the arrangements mentioned by Cubacigar is irrelevant to that question. Incidentally, in this context Cubacigar incorrectly cites the draft for the amendment of the Tobacco and Smokers' Regulations, which prescribes generic packaging of tobacco products. Cigarettes and cigars are not treated differently in this design, apart from the fact that cigars have a longer transition period. Such a longer transition period is also included in the further packaging requirements.

5.16

In addition, the State has referred to research into the effects of the introduction of *plain packaging* in Australia on cigar sales, in the study by Miller et al. Mentioned in the Cochrane report. According to this study, the introduction of *plain packaging* resulted in health warnings being better perceived, packaging perceived as less attractive and fewer cigars being smoked (cf. production 12 of the State on appeal, p. 58: “*Online survey participants reported increased noticeability of GHWs (33%), decreased appeal of packaging (53%) and reduced consumption of cigars (42%) and cigarillos (44%) since PP implementation*”). Contrary to Cubacigar's assertion, the relevance of this study cannot be called into question on the ground that it was only conducted in Australia among 268 participants. At the time, Australia was the only country with *plain packaging* was introduced, and the group of 268 participants is apparently seen by the researchers as sufficiently representative to assign meaning to the results. It is also not correct that the research shows that the effect of generic packaging is not noticeable among users of (handmade premium) cigars. First, this is contradicted by the reported 42% decrease in cigar consumption. At the time of the investigation, many cigars were still available in non-generic packaging, including tax-free products. Insofar as cigars were sold in generic packaging, this did have an effect, according to the researchers, especially with incidental smokers of cigars (cf. production 12 of the State on appeal, p. 58: “*Premium cigar smokers had limited exposure to PP, with many purchasing fully branded cigars in boxes duty free or online and singles in non-compliant packaging. Those who were exposed noticed and were concerned by the warnings, tried to*”).

*avoid them and felt more like 'dirty smokers'. Changes in perceived taste, harm and value were minimal for experienced premium cigar smokers. Occasional premium cigar and premium cigarillo smokers with higher PP exposure (gained by purchasing boxes rather than singles) perceived cigar / package appeal had declined and noticed the GHWs . ")*

5.17

As the Court has correctly considered, the assessment of the proportionality of the further packaging requirements may take into account possible scientific uncertainty about the effects of these requirements. It is not therefore certain that the further packaging requirements will lead to a reduction in the use of cigars. Cubacigar, referring to the judgment of the General Court of 17 May 2018 in Cases T-429/13 and T-451/13, *Bayer Crop Science Eat Commission* (ECLI: EU: T: 2018: 280) objected that a preventive measure cannot be justified on the basis of a purely hypothetical approach. However, this is not the case in this case, given the investigations cited by the State.

5.18

Cubacigar has also pointed out that the further packaging requirements are primarily aimed at preventing young people from smoking. From the passages from the explanatory notes quoted in 2.10 and 2.11 above, it can indeed be deduced that the protection of young people has been the primary focus of this measure. However, the state's tobacco discouragement policy aims to discourage the use of tobacco products in general. It is based on three pillars, of which preventing young people from smoking is one. The other pillars are preventing passive smoking and encouraging smokers to quit. The policy is therefore also aimed at encouraging smokers of (handmade premium) cigars to quit and preventing passive smoking of cigars. It is part of that policy that measures taken to combat smoking apply to all tobacco products. The evidence provided by the State can reasonably lead to the opinion that the predominantly older users of cigars may also be exposed to the temptation that can arise from attractive packaging. Cubacigar itself has also emphasized the importance of certain packaging elements, such as the use of limited editions, to promote its sales, which it claims is aimed in particular at an older, imported public (see marginal 3.13 of the writ of summons in first instance). In addition, the State has considered the interests of the cigar manufacturers by declaring the further packaging requirements to apply only to brands and types of cigars placed on the market after 20 May 2016, based on the consideration that cigars are mainly used by a small group of older consumers. In addition, transitional measures have been taken for cigars, so that the application of the further packaging requirements to cigars has been postponed until 1 July 2019, with a one-year delay for cigars placed on the market before 1 July 2019.

5.19

Cubacigar has also argued that the State has failed to substantiate that the further packaging requirements, individually and in conjunction, comply with the principle of proportionality. The court cannot follow Cubacigar in this position. The elements referred to in Article 3.7a of the Tobacco and Smoking Products Regulations are all intended to increase the attractiveness of packaging. Prohibiting these elements can therefore help to reduce the number of tobacco products sold. This applies to all elements individually as well as to these elements in conjunction. Cubacigar has not substantiated this statement either. In particular, it has not given any reasons why this would not apply to one or more specific elements referred to in Article 3.7a of the Tobacco and Smoking Regulations.

5.20

The case-law of the Court of Justice relied on by Cubacigar in marginal 179 et seq. Of the statement of appeal does not lead to a different opinion (CJEU 10 April 2008, C-265/06, ECLI: EU: C: 2008: 210, *Commission / Portugal* , CJEU (Grand Chamber) 18 June 2019, C-591/17, ECLI: EU: C: 2019: 504, *Austria / Germany (Tolvignet)* and CJEU (Grand Chamber) 5 June 2007, C-170 / 04, ECLI: EU: C: 2007: 313, *Rosengren and others*). In these judgments, the Court of Justice concluded that the proportionality requirement was not met on the basis of considerations which do not hold in the

present case. In the first case, the Portuguese measure failed because the objective pursued was not pursued in a coherent and systematic way, as the measure applied only to certain products. This is not the case in the present case. The further packaging requirements prohibit certain packaging elements for all tobacco products, with some special rules for cigars due to the fact that they are mainly used by a small group of older consumers. The German case concerned a levy that is *de facto* imposed solely on owners and drivers of vehicles registered abroad. The further packaging requirements, however, apply regardless of the origin of the tobacco products. And the *Rosengren* case related to a ban on private individuals to import alcoholic beverages, which was not effective because individuals could obtain the alcoholic beverages through other channels. This does not apply to the further packaging requirements, which apply to all tobacco products regardless of origin. In addition, the Swedish government had argued that the ban was intended to protect young people. According to the Court of Justice, this justification did not apply because the ban applied to everyone, regardless of age. Contrary to Cubacigar's contention, there is no parallel here with the present case, since the further packaging requirements are also intended to protect the elderly.

5.21

It is concluded that the State has submitted sufficient evidence to conclude that the further packaging requirements are justified on grounds of public health protection and are proportionate. So grievances 1 and 2 do not succeed.

*Preliminary rulings*

5.22

The court may ask questions for a preliminary ruling in case of doubt about the interpretation of Union law, but it is not obliged to do so. The same applies to the court, whose decisions are subject to appeal in cassation (cf. Article 267 TFEU). Cubacigar argues that a reference for a preliminary ruling by the judge of fact may be appropriate in some cases. It may, however, at the discretion of the court is not, contrary to the scheme of Article 267 TFEU, a reference duty can be derived. There is no reason to ask questions for a preliminary ruling, because there is no doubt about the assessment criterion (identical with Article 24 (2) of the Tobacco Products Directive and Article 36 TFEU) and whether the further packaging requirements meet this assessment criterion. Grief 3 also fails.

*Litigation costs*

5.23

Complaint 4, in which Cubacigar challenges the dismissal of its claims in general and the condemnation of the costs of the proceedings, also fails. It follows from the foregoing that Cubacigar has been rightly unsuccessful in court, and as such has been ordered to pay the costs of the proceedings. As the unsuccessful party, the court will also order Cubacigar to pay the costs of the appeal.

## **6 Decision**

The Council:

- upholds the judgment which is the subject of an appeal;
- orders Cubacigar to pay the costs of the appeal on appeal, estimated on the part of the State at € 741 in court fees and € 1,074 in salary for the lawyer, and stipulates that these amounts must be paid within fourteen days of the date of this judgment. have been paid, failing which the statutory interest as referred to in Section 6: 119 Dutch Civil Code is payable from the end of the aforementioned term until the day of full payment;
- declares the legal costs order enforceable on stock.

This judgment was given by mrs. P. Glazener, JJ van der Helm and HMH Speyart van Woerden and signed and pronounced in public by JEHM Pinckaers, role councilor, on 30 June 2020 in the presence of the registrar.

