Administrative case No eI2-2361-860/2020
Judicial proceedings No. 3-61-3-00500-2020-2
Category of procedural decision: 34.1; 55.1.3 (S)

/*Coat-of-arms*/

VILNIUS REGIONAL ADMINISTRATIVE COURT
JUDGMENT
ON BEHALF OF THE REPUBLIC OF LITHUANIA

15 September 2020
Vilnius

Saulius Jakaitis, Judge of Vilnius Regional Administrative Court,
with secretary Kristina Račkaitė,
in the presence of the representatives of the Claimant, attorney-at-law Lina Darulienė and assistant attorney-at-law Indrė Barauskienė,
and the representative of the Respondent Jurgitai Diržytė-Venslovienė,

at the public hearing, by way of verbal procedure heard the administrative case according to the claim of the Claimant, private limited liability company Philip Morris Baltic, made against the Respondent, The Drug, Tobacco and Alcohol Control Department, regarding the annulment of the resolution.

The Court

e s t a b l i s h e d :

1. The Claimant, the private limited company Philip Morris Baltic, made a court claim requesting the annulment of Resolution No ATK2-08/20 "To impose economic sanctions for the violations of the Law on Control of Tobacco, Tobacco Products and Related Products" *(hereinafter – the Resolution)* of 9 January 2020 of the Drug, Tobacco and Alcohol Control Department (*hereinafter – the Department*).

The claim alleges that on the basis of the contested Resolution an economic sanction in the amount of EUR 2,896 was imposed on the Claimant due to the fact that within its educational-social campaign *Lemiamas Metimas* (*hereinafter – the Campaign*) the Claimant had unlawfully advertised tobacco and related products, unlawfully supported activities and individuals and such support encouraged the acquisition and consumption of tobacco and related products, and disseminated surreptitious advertising of tobacco and related products. The said Resolution found the Claimant guilty of infringing three articles of the Law on Control of Tobacco, Tobacco Products and Related Products of the Republic of Lithuania (*hereinafter – the Law*), i.e. Articles 17(1), 17^1 (1) and 18(2). The Claimant contests the said Resolution. It explains that the Campaign was aimed at strengthening the message that public health authorities, government agencies and NGOs have long been disseminating internationally, and the essence of which is that quitting smoking and using nicotine is the best option a smoker can make; an adult smoker, who decides to keep smoking is entitled to the information about smoking alternatives. The Claimant notes that the Campaign was inspired by the global initiative of Philip Morris International, yet it was independent social advertising exclusively targeted at Lithuania. The main message of the

Campaign was that giving up cigarettes and nicotine was the best solution (choice) smokers could make for their health. The Campaign also had a holistic aspect communicated on the Campaign website www.lemiamasmetimas.lt (*hereinafter – the Website*) until 26 September 2019. In principle, it was admitted that many smokers did not quit smoking, so the second element of the Campaign was introduced – to provide adult smokers with an opportunity to obtain accurate information on smoke-free alternatives as better alternatives than continuing to smoke. The Claimant provided only general information about the available alternatives to cigarettes, i.e. only about product categories, but not the specific brands. The Claimant emphasises that the Respondent's actions prior to the investigation procedure of the alleged infringement were unlawful. The Claimant insists that the Campaign cannot be classified as advertising, because its main purpose was to disseminate the message that giving up nicotine in any form was the best solution. The Law does not prohibit the dissemination of information on the subject. The Claimant states that the Campaign must be classified as social advertising supported by the Law. The concept of social advertising in the contested Resolution was completely omitted. The Claimant has the right to inform smokers that smoking is harmful to health; that the best solution is to stop smoking or using nicotine products altogether; and to provide general information about cigarette alternatives that are a better choice than to continue smoking. Smokers have the right to receive such information. This is their freedom to express their convictions enshrined in Article 25 of the Constitution of the Republic of Lithuania. The fact that social advertising is a legitimate way for everyone (including economic entities directly involved in the matter) to contribute to the public interest debate has been repeatedly stressed and confirmed by the Court of Justice of the European Union and the European Court of Human Rights. The Claimant states that provision of information that only encourages the purchase and consumption of tobacco products can be classified as advertising of tobacco products. And that the material of the Campaign does not meet the two advertising criteria set out in the Law (Article 2[46] of the Law), because it does not encourage the purchase of tobacco products and/or related products; the Campaign is counter-advertising of tobacco products and related products, furthermore, in addition to the main idea of encouraging quitting smoking, the Campaign provided only general information about the existing categories of alternatives to cigarettes for smokers who do not want to quit, without any reference to specific products. The Campaign is not a surreptitious advertising of tobacco products or related products as stated by the Respondent. The Claimant emphasises that the use of its (Claimant's) name and contact information does not constitute advertising of tobacco and related products. The Claimant must indicate its name and contact information on the Website owned or controlled by the Claimant. This obligation is provided for in legal acts. Furthermore, the use of the Claimant's name cannot be considered as a violation of advertising of tobacco products because it does not comply with the conditions of Article 2(46) of the Law. The Claimant disagrees that it has also violated Article 18(2) of the Law because by organizing the Campaign it did not make a contribution or provide sponsorship. The argument of the Department regarding this violation is vague and distorts the essence of sponsorship prohibition – the Department is trying to see sponsorship where it is absent. Furthermore, the Department has unlawfully concluded regarding the existence of aggravating circumstances. In the case in question, there was no decision in force issued by the Respondent concerning unlawful acts or any legitimate request to discontinue unlawful acts (the letter to the Claimant from the Department dated 20 September 2019 cannot be considered to be such a decision, because it is illicit); therefore there are no circumstances aggravating the Claimant's liability. By insisting to discontinue certain acts, the Respondent acted in excess of its powers; it did not establish any infringement by the Claimant and therefore could not request the

cessation of some unlawful acts. Moreover, the measures taken by the Department were clearly disproportionate, the Department abused its powers as a public administrator. Despite this, the Claimant corrected the Campaign by taking into account the comments of the Department. In addition, when determining the amount of the fine, the Respondent unlawfully used the criteria other than those laid down by legal acts, thus abusing its powers, e.g. claiming that the Claimant was "negatively characterised/described". The Claimant maintains that the Law establishes an exhaustive list of circumstances to be assessed when determining the amount of the fine, and the circumstances that characterize the offender negatively are not included in this list. Violations of the law committed by the Claimant in the past may be assessed when determining the amount of the fine only if the infringement is committed repeatedly within one year, but in the present case the Department did not establish such circumstances.

2. The Respondent, The Drug, Tobacco and Alcohol Control Department, provided a reply in which it disagrees with the Claimant's claim; and asks to reject it as unfounded and to uphold the contested Resolution of the Department.

In its reply, the Respondent states that the Claimant distributes, inter alia, tobacco products HEETS in the Republic of Lithuania, which are heated tobacco units intended for use with a special device *(hereinafter – Tobacco Products)*; and tobacco heating devices IQOS of various models, intended for use only with heated tobacco products *(hereinafter – Systems)*. The Claimant's claim emphasizes the humane purpose of the Campaign to change the behaviour of smokers, which is not the true purpose. As a business entity it has a commercial purpose and interest – to promote its tobacco products. This is revealed in the second part of the Campaign slogan "<...> if you don't quit, change." Even if one believes that the Claimant purports to make consumers essentially quit smoking, it is undeniable that the Campaign information concerning the alternatives encouraged supposedly better alternatives, thus providing prohibited advertising. The Respondent notes that the concept of social advertising does not include offering other alternatives for those who do not intend to quit smoking. It further maintains, that the Claimant ignores the fact that the ban on advertising and surreptitious advertising of tobacco products and related products is absolute. The Supreme Administrative Court of Lithuania (*hereinafter – the Supreme Administrative Court*) has established a consistent case law regarding strict prohibition of advertising of tobacco products. Such position is justified by the aim of protecting the health of individuals and the public, since tobacco products are generally known to be harmful to health. The legislator essentially imposes a similar absolute ban on tobacco products, electronic cigarettes and their refill containers and identically defines the concept of advertising; exceptions are provided for only in Article 17(2) and (3) and Article 17^1 (2) of the Law. The Claimant is not eligible for exemptions. The Respondent emphasises that certain exceptions to the general rule cannot be interpreted in such a way as to rule out the general rule. The Claimant's claims that it was deprived of the freedom of expression and that the consumers of tobacco products have the right to receive information are unsubstantiated, because tobacco products are subject to special legal regulation. Regarding surreptitious advertising, the Respondent indicates that the legislator distinguishes two conditions necessary to determine whether the information is surreptitious advertising of tobacco products and related products (Article 2[23] of the Law). The first condition is that the information is disseminated about tobacco products and/or products related to tobacco products, manufacturers, importers or sellers, their trade names, trademarks or activities. The second condition is that the disseminated information may confuse advertising consumers as to the actual purpose of presentation of such information. The actions taken by the Claimant fulfil both conditions: (1) information about tobacco products, electronic cigarettes and refill containers was disseminated to

consumers; 2) the Claimant communicated the main aim of the Campaign – a social aim, i.e. to encourage people to quit smoking, to encourage non-smokers not to start smoking, and to encourage those who do not intend to quit, to opt for better alternatives, thus failing to disclose its commercial purpose, i.e. the Claimant, as an economic operator distributing tobacco products, is interested in increasing the distribution of tobacco products. The Claimant also failed to disclose that the commercial interest of the Philip Morris International company group (*hereinafter – the Company Group*), to which the Claimant belongs, is to form the habits of consumers when buying and using electronic cigarettes and their refill containers. The Claimant provided details of the Company Group and the company on the Website, so the average consumer would associate the general information about tobacco products and electronic cigarettes with the products produced and distributed by these companies. The Respondent disagrees that when it identified the violation it had to prove the fact of misleading consumers as to the actual purpose of the Claimant's information. It is sufficient to establish that such information was disseminated and that the information had an encouraging effect on the average consumer; this has been done in this case. The Respondent also notes that the Claimant paid advertising agencies, public opinion leaders, and the individuals who shared their stories via online media. It further claims that advertising of tobacco products is considered provision of information about tobacco products that is not permissible in terms of its content and that it fails to meet the minimum requirements of the Law in terms of the form in which it was presented. The same interpretation should also apply to the advertising of electronic cigarettes and electronic refill containers. Article 17^1 of the Law does not provide for exceptions regarding the publication of the name of the Claimant, manufacturer and distributor of electronic cigarettes and their refill containers. The Claimant provided the name of the company Philip Morris International, which produces and distributes tobacco products and related products, and the name and contact details of UAB Philip Morris Baltic on its Website using all means of communication to increase its awareness, and also in the newsletter, thus providing information in the place not permitted by the Law and therefore advertising tobacco products and electronic cigarettes. That is, it violated the requirements of Article 17(1) and Article 17^1(1) of the Law. The Respondent also emphasized that by joining the international UNSMOKE campaign organized by the representatives of the tobacco industry, which allegedly aims to encourage people to quit smoking, and by financing the campaign in the Republic of Lithuania (paying for the organization, creation, and publication of advertising and paying people who published their stories during the company), the Claimant joined and supported this international campaign financially thus violating the requirement of Article 18(2) of the Law. Even if the international campaign did not exist and the Claimant would only carry out a local campaign organized in the territory of the Republic of Lithuania, it would still violate the aforementioned provisions, because it would join activities prohibited for the representatives of the tobacco industry. The prohibition laid down in Article 18(2) of the Law is absolute and covers all forms and methods. In the Respondent's opinion, the forms and methods may be not only of a financial nature, but also of another type, e.g. the organization of a project. The Respondent notes that the Claimant financially supported the Campaign *Lemiamas Metimas*, presenting it as a social campaign, published its own name in the context of this Campaign, thus violating the requirements of Article 18(2) of the Law. By presenting itself as the organizer of this social campaign in the communication of the Campaign, the Claimant formed a favourable attitude about itself as a socially responsible business. Such formation of a favourable attitude and image about the company creates a commercial advantage. In this way, the consumer is encouraged to choose the products distributed by the Claimant and the Company Group (tobacco products or related

products). The Respondent notes that following the notification of the violation, the Respondent initiated an investigation which provisionally established the violations of the law. Then the Respondent sent a request to the Claimant to discontinue the potentially illicit activity: to close the Website (make it inaccessible to users), to remove external advertising of the Website, and to delete posts and accounts on social networks. The Claimant did comply with all the requests, therefore after recognising that its actions were in breach of the requirements of the Law, its failure to comply with the order to discontinue the illicit acts may be considered as an aggravating circumstance, which is significant in the judicial individualization process of the fine for the violations. The amount of the fine was determined on the basis of the criteria not established in legal acts.

The Court

holds:

3. In the present case, the dispute arose regarding the legitimacy and reasonableness of Resolution No ATK2-08/20 "To impose economic sanctions for the violations of the Law on Control of Tobacco, Tobacco Products and Related Products" of 9 January 2020 of the Drug, Tobacco and Alcohol Control Department, which imposed a fine of EUR 2,896 on the Claimant, UAB Philip Morris Baltic.

4. The contested Resolution states that the Claimant, UAB Philip Morris Baltic:

1) until 26 September 2019, on the Website www.lemiamasmetimas.lt created and administered by the company and in the newsletters distributed by the company provided the highlighted information; at the request and in the interests of the Claimant, in the Facebook accounts *Lemiamas Metimas* and *Motyvuoti Atletai* and in the online media websites the Claimant placed advertising banners with a link to the Website; at the request and in the interests of the Claimant, the Claimant placed advertising stickers with the information about the Website on public transport vehicles; at the request and in the interests of the Claimant, the Claimant placed outdoor advertising hoardings with the information about the Website; provided information about the Systems and displayed the name of the UNSMOKE campaign, and the advertising slogan of the Campaign; and therefore distributed prohibited surreptitious advertising of tobacco products and surreptitious advertising of electronic cigarettes in breach of the requirements of Article 17(1) and Article 17^1 (1) of the Law;

2) until 26 September 2019, on the Website and in the newsletters displayed the name of Philip Morris International, the manufacturer and distributor of tobacco products and related products, and therefore provided advertising of tobacco products and electronic cigarettes in breach of the provisions of Article 17(1) and Article 17^1 (1) of the Law;

(3) from 26 September 2019, on the Website displayed the name and contact details of the Claimant, the wholesaler of tobacco products, and therefore provided advertising of tobacco products in breach of Article 17(1) of the Law;

4) in addition, the actions of the company, whereby the information about the Campaign initiated and carried out by the Company Group was disseminated in the form specified in paragraphs 1–6 of the Resolution, and the name of the UNSMOKE campaign and the Campaign slogan "If you don't smoke, don't start. If you smoke, quit. If you don't quit, change" were published on the Website are seen as a support for the Campaign that encourages the purchase

and/or consumption of tobacco products and related products, i.e. the Claimant violated the requirement of Article 18(2) of the Law.

5. It has been established in the case that the Claimant distributes, inter alia, tobacco products HEETS in the Republic of Lithuania, which are heated tobacco units intended for use with a special device (tobacco products classified as smokeless tobacco products); and also distributes tobacco heating devices IQOS of various models, intended for use only with heated tobacco products.

The activity of Philip Morris International Company Group is the manufacturing and distribution of tobacco products, related products (electronic cigarettes, refill containers), and Systems.

6. The actions carried out by the Claimant and the information disseminated (provided) by the Claimant are specified point by point in detail on pages 1–4 of the Resolution. It should be noted that the actions of the Claimant established and indicated by the Respondent are not contested in principle, only the assessment and classification of the actions are contested.

7. The actions carried out by the Claimant shall be classified as a breach of the requirements of Article 17(1), Article 17^1 (1) and Article 18(2) of the Law.

Article 17(1) of the Law provides that advertising of tobacco products, except for the cases specified in paragraph 2 of this Article, and also surreptitious advertising of tobacco products shall be prohibited in the Republic of Lithuania.

Article 17^1 (1) of the Law provides that advertising of electronic cigarettes, refill containers of electronic cigarettes and herbal products for smoking as well as surreptitious advertising of electronic cigarettes, refill containers of electronic cigarettes and herbal products for smoking shall be prohibited in the Republic of Lithuaniain.

Article 18(2) of the Law provides that legal persons or branches of foreign legal persons manufacturing tobacco products and/or related products or whose principal activity is the sale of tobacco products and/or related products shall be prohibited from contributing in any form and by any means to any event, activity, person or means of the provision of information to the public in the Republic of Lithuania.

8. The Supreme Administrative Court of Lithuania has repeatedly emphasized that when interpreting the prohibitions laid down in the Law, it is first necessary to pay attention to the purpose of the Law, e.g. the ruling in the Administrative Case No a-556-433/2009 of 1 April 2009, stated that, according to Article 1(1) of the Law, this Law shall regulate relations incidental to the manufacture, trade, storage, transportation, entry, import, advertising, consumption, promotion and sponsorship of the purchase and/or consumption of tobacco products, and shall establish the framework for state control of tobacco, tobacco products and related products in the Republic of Lithuania; since individual and public health constitute one of the most important values of society, the provisions of this Law shall aim to reduce the consumption of tobacco products and related products in the Republic of Lithuania, their accessibility (particularly to minors) and harmful effects of the use of tobacco products and related products on human health and the economy (Article 1[2] of the Law); the prohibitions laid down in the Law on the basis of these provisions, according to the Panel of Judges, should normally be interpreted in a broad sense, taking into account the purpose of maximising the protection of individual and public health, reducing the consumption of tobacco products, and in general, *inter alia*, reducing the consumption of cigarettes of the same type.

Re the prohibition of the surreptitious advertising of tobacco products and surreptitious advertising of electronic cigarettes, refill containers and herbal products for smoking

9. Article 2(23) of the Law provides that "surreptitious advertising of tobacco products and/or products related to tobacco products" means information disseminated in any form and by any means about tobacco products and/or products related to tobacco products, manufacturers, importers or sellers of tobacco products or products related to tobacco products, their trade names, trademarks or activities in a way that may confuse advertising consumers as to the actual purpose of presentation of such information. Such presentation of information shall be considered as surreptitious advertising in all cases if it is done in return for payment or for similar consideration.

As it is evident from the above provision, the legislator essentially distinguishes two conditions necessary to determine whether the information is surreptitious advertising of tobacco products and related products. The first condition is that the information disseminated must be related to tobacco products and/or related products, manufacturers, importers or sellers of tobacco products or related products, their trade names, trademarks or activities. The second condition is that the information provided may confuse advertising consumers as to the actual purpose of presentation of such information.

10. Having assessed the information disseminated by the Claimant and its content, the Court fully agrees with the findings made by the Respondent that the information disseminated by the Claimant was about tobacco products and related products, electronic cigarettes, their refill containers, other devices, liquid, heated tobacco and its products, etc., in addition, the information on the manufacturer and seller of tobacco products and/or related products, i.e. information about the Claimant, was provided (first condition).

With regard to the second condition, the Claimant specified that the main purpose of the Campaign was social, i.e. the desire to encourage people to quit smoking. However, the Claimant, whose activities include the sale of tobacco products and devices, did not actually reveal its commercial purpose to consumers, i.e. that it was interested in increasing the dissemination of Tobacco Products and Systems. The Claimant also failed to disclose that the commercial interest of Philip Morris International, of which it is part, was to shape the habits of consumers when purchasing and using electronic cigarettes and their refill containers. The Respondent properly assessed and qualified these circumstances in the Resolution.

In terms of the purpose of the Campaign, the Claimant's representatives could not explain clearly and logically at the court hearing why the Claimant carried out the Campaign aimed at encouraging people to quit smoking, as in principle it is contrary to the main business objective of a private operator, namely to make profit, because it is natural that the more people quit smoking, the fewer people will purchase tobacco products and related products, thus reducing the Claimant's profit. At the beginning, the Claimant's representatives were unable to answer this question, but later claimed that the purpose of the Campaign was purely social and was commercially disadvantageous. Such explanations, however, are illogical, because this would mean that a private operator was acting against its primary business objective. On the other hand, there is evidence in the case that the Claimant's representative, N. Gražinytė, when examining the alleged violations committed by the Claimant at the Department, acknowledged that the Campaign nevertheless had a commercial purpose. Thus, essentially both conditions laid down in the Law as to whether the information provided by the Claimant was surreptitious advertising of tobacco products and related products are met.

It should further be noted that the Claimant paid advertising agencies, public opinion leaders, online media and natural persons who shared their stories for the dissemination of information. In accordance with Article 2(23) of the Law, this is considered surreptitious advertising.

11. The Claimant submits that the disseminated communication contained only general information and did not contain references to specific tobacco products and electronic cigarettes. The Court notes, however, that the Law does not state that surreptitious tobacco advertising is limited to indicating specific tobacco products and related products. In order to establish the breach committed by the Claimant the information provided during the campaign is sufficient. Taking into account the context, general information is sufficient for consumers to link it to the Claimant and the Company Group, and the alternative products they manufacture and distribute. 12. The Claimant further submits that the Department, which has the obligation to prove that the consumer was misled, does not provide any evidence that at least one consumer was misled as to the true purpose of the Campaign.

In the present case, proof of the consequences is not necessary. The dissemination of surreptitious advertising of tobacco products and related products is of an imperative and absolute nature, and the surreptitious advertising of tobacco products and related products, regardless of the form and place it has been provided, is prohibited. The Respondent absolutely correctly claims that in order to determine a breach of the law (surreptitious advertising of tobacco and related products), an analysis is carried out as to how the information could have been perceived by the average consumer, rather than by collecting evidence whether at least one consumer was truly and actually misled.

13. To sum up, the Claimant was reasonably found to have violated the provisions of Article 17(1) and Article 17^1 (1) of the Law concerning the prohibition of surreptitious advertising.

Re Prohibition of advertising of tobacco products and/or related products

14. The Claimant is accused of disseminating advertising of tobacco products and related products, because the name of Philip Morris International and the name and contact details of the Claimant's company, the manufacturer and distributor of tobacco products and related products, was provided on the Claimant's Website using various means of communication to raise awareness of the Website, and in the newsletter.

The Claimant disagrees with such statements of the Respondent and submits that the use of its name and contact details does not constitute advertising of tobacco and related products; the provision of this information is mandatory in accordance with the requirements of legal acts. According to the Claimant, the assessment of the provision of contact details as advertising of tobacco products is an extended interpretation of Article 2(46) of the Law, however such interpretation is impossible. According to the Claimant, the Department violated the principle of *non bis in idem* (double punishment), since it treated the provision of the name both as advertising of tobacco products and as surreptitious advertising of tobacco products.

15. Article 2(46) of the Law provides that "advertising of tobacco products and/or related products" means information about tobacco products and/or related products disseminated in any form and by any means with the aim of direct or indirect effect of promoting tobacco products and/or related products and/or encouraging their consumption.

In its ruling in Administrative Case No EA-1815-143/2015 of 24 November 2015, the Supreme Administrative Court clarified that in assessing whether the information about tobacco

products is permissible within the meaning of the Law, it is necessary to determine on a case-by-case basis whether such information is permissible in terms of its content (Article 17[3] of the Law) or whether it complies with minimum requirements set out in Article 17(2), (3) and (5) of the Law in terms of the form in which the information is provided (place, form, etc.). Where it is established that at least one of the above-mentioned requirements is violated in a given situation, it shall be considered that public information on tobacco products (advertising of tobacco products) within the meaning of Article 17 of the Law is prohibited; the Court noted that, given that the prohibition of advertising of tobacco products is imperative in the Law and given the main purpose of that Law as referred to in Article 1(2) thereof, all ambiguities and uncertainties arising when assessing the circumstances of a particular situation must be considered in favour of the public interest to prohibit tobacco advertising.

16. Article 17 (2) of the Law provides that the prohibition on advertising shall not apply to: (1) information referred to in paragraph 3 of this Article, which is presented at retail outlets where tobacco products are sold to the consumer; (2) publications intended exclusively for specialists (professionals) in the tobacco trade, and also publications printed and published in the countries other than the contracting parties to the Agreement on the European Economic Area, where such publications are not intended for the European Community market; (3) registered names and trademarks of legal persons or branches of foreign legal persons manufacturing or marketing tobacco products (if the brand name of a tobacco product, name of the tobacco product manufacturer or trademark constitutes an integral part of the registered name of such legal persons or branches of foreign legal persons) where such names and trademarks are displayed on buildings wherein the head offices or subdivision of the said legal persons or branches of foreign legal persons are located. Only the registered names of legal persons or branches of legal persons manufacturing or marketing tobacco products may be displayed on the motor vehicles managed by the legal persons or branches of the foreign legal persons.

Article 17(3) of the Law provides that only the following information may be presented on showcases used to display tobacco products at retail outlets: (1) the name of a manufacturer or seller and the address of its head office, (2) the words “We trade in” or “We sell”; (3) the indication of prices of tobacco products.

17. In the light of the foregoing and taking into account the existing legal regulation, the systematic interpretation of the norms of the Law, and the case-law, it shall be concluded that the registered names and trademarks of legal persons or branches of foreign legal persons manufacturing or marketing tobacco products may be provided only at the places indicated in Article 17(2)(1) and (3) of the Law, i.e. at retail outlets, also, on the buildings where the head offices or subdivisions of the said legal persons or branches of foreign legal persons are located; only the registered names of legal persons or branches of foreign legal persons manufacturing or marketing tobacco products may be placed on the vehicles of legal persons or branches of foreign legal entities; and provision of such information in any other place shall be deemed to be prohibited advertising of tobacco products and/or related products.

Such an interpretation of the legal norms, contrary to what the Claimant claims, is not extended, it is adequate and based on a systematic interpretation of legal norms and taking into account the aims and purpose of the Law as laid down in Article 1(2) of the Law.

Thus, in the present case, the Claimant provided the name of Philip Morris International and the name and contact details of own company, UAB Philip Morris Baltic, the manufacturer and distributor of tobacco products and related products, on the Website using various means of communication to raise awareness of the Website, and in the newsletter, i.e. in the places not

permitted by the Law. Therefore, the Respondent quite rightly stated that the Claimant disseminated advertising of tobacco products and related products, i.e. committed a breach as set out in Articles 17(1) and 17^1(1) of the Law.

The Court disagrees with the Claimant's argument that the provision of contact information by an economic entity that manufactures and distributes tobacco products and/or related products does not affect consumers. There is no doubt that the dissemination of such information increases the awareness of such entities and encourages the purchase of products manufactured and distributed by them. All the more so, since the Campaign carried out by the Claimant included information not only on the Website, but also various means of communication used to increase the awareness of the Website (outdoor advertising, online media, etc.). The fact that this information was *not* provided on the landing or main pages of the Website, i.e. in less prominent places, does not substantially change the conclusions made in the present case, because by entering the Website and getting acquainted with the information contained therein, the information about the Claimant would become known to the consumer. On the other hand, the Law considers provision of such information in places other than the designated places to be prohibited advertising, so the consideration of whether the provision of such information in unauthorized places affects or does not affect consumers is essentially worthless.

18. The Claimant's claims that the provision of the said information is mandatory in accordance with other legal requirements (Article 2[6] of the Law on Companies, Articles 13 and 14 of the General Data Protection Regulation, etc.) and therefore the Claimant could not have acted differently because it would have violated these provisions are unsubstantiated. It should be noted that the provisions of the laws indicated by the Claimant are general and cannot be interpreted in such a way that would breach special legal regulations relating to the mandatory prohibition of advertising of tobacco products and/or related products.

19. The Claimant's claims regarding the violation of the principle of *non bis in idem* (double punishment) shall also be rejected as unfounded, since, as the Claimant claims, the Respondent treated provision of the name as both advertising of tobacco products and as surreptitious advertising of tobacco products. It should be noted that the mere fact that the actions carried out by the Claimant were classified as a violation of the prohibition of advertising of tobacco products and related products and surreptitious advertising of tobacco products and related products, and that an economic sanction was imposed on the Claimant, do not lead to the conclusion that the Claimant was punished twice for the same violation. It is clear that the Claimant committed several violations for which a single sanction was imposed. The principle mentioned by the Claimant was therefore not violated.

Violation of Article 18(2) of the Law

20. Claimant also violated Article 18(2) of the Law, which provides that legal persons or branches of foreign legal persons manufacturing tobacco products and/or related products or whose principal activity is the sale of tobacco products and/or related products shall be prohibited from contributing in any form and by any means to any event, activity, person or means of the provision of information to the public in the Republic of Lithuania.

The Claimant disagrees that it made a violation claiming that it did not provide support or sponsorship by organizing the Campaign; it disseminated information about its own Campaign and therefore did not perform the prohibited sponsorship, because it cannot sponsor itself. Although the Campaign was inspired by a global campaign, it was created and controlled entirely

by the Claimant, and the content of the Campaign was exclusively intended for the Lithuanian market; so the Respondent wrongly concluded that it joined the international campaign, etc.

21. First of all, it should be noted that the purpose of Article 18(2) of the Law is to prevent representatives of the tobacco industry from supporting any activities by publicizing themselves as socially responsible companies.

Article 2(29) of the Law provides that "sponsorship" means financial or other support to an event, activity or person with the aim of promoting tobacco products and products related to tobacco products and/or encouraging their consumption.

Thus, both Article 2(29) of the Law and Article 18(2) of the Law provide sufficiently clearly and in detail the prohibition for such entities as the Claimant to support events, activities, persons, etc. in any form and by any means. In this case, the disclosure of the sponsorship content does not require application of the sponsorship content defined in the Law on Charity and Sponsorship; the Claimant's proposal to abide by the provisions of this law in this case is unfounded.

22. Having assessed the case material, the Court concludes that the Respondent reasonably stated that, in the sense of Article 18(2) and Article 2(29) of the Law, the Claimant essentially sponsored, i.e. contributed to the UNSMOKE campaign initiated by the Company Group and implemented internationally, which, inter alia, encourages the purchase and use of alternative tobacco products (electronic cigarettes, refill containers, etc.).

Although the Claimant denies that with its Campaign it joined and supported the UNSMOKE campaign carried out by the Company Group, it does not deny that the Campaign was inspired by the global initiative of the Philip Morris International Company Group. Second, the Claimant claims that the content of the Campaign was created exclusively for the Lithuanian market, however its similarity with the campaign carried out by the Company Group is obvious and undeniable. Third, the UNSMOKE slogan of the Company Group was broadly visible during the Campaign carried out by the Claimant, moreover, the slogan was accompanied by a hashtag #, which means that if you enter the word in the online search engines or social networks, you will find information, messages and links related to this topic. After performing the online search, e.g. using Google, social networks, e.g. Twitter or Facebook, you will obviously be directed to the UNSMOKE campaign of the Company Group. Fourth, the Claimant's own Website contains the name of the Company Group.

In addition, the Respondent was correct in saying that the Claimant introduced itself as a socially responsible company in the course of the Campaign, formed a positive image of itself, and by such actions aimed to retain its existing customers – consumers of tobacco products, and to acquire new customers who would purchase and use tobacco products distributed by the Claimant.

Thus, there is a reason to maintain that the Claimant joined and supported the said campaign of the Company Group; it positioned itself as a socially responsible person and formed a positive image. Such actions of the Claimant breach the provisions provided for in Article 18(2) of the Law.

23. On the other hand, even if the Claimant did not join the Company Group, in the present situation, the Claimant nevertheless undoubtedly breached the provisions of Article 18(2) of the Law, which prohibits representatives of the tobacco industry not only to contribute or sponsor other events, activities, etc., but also to organize themselves any such events, activities, etc. Any other interpretation of the Law would be contrary to its aims and purpose; it would be illogical to say that the Law, whose main purpose is to protect human and public health to the maximum possible extent, and to reduce the overall consumption of tobacco products, prohibits

representatives of the tobacco industry from contributing to events organized by others, while allowing to organise their own events and activities.

The Claimant's claim that the Campaign did not encourage consumers to purchase and use tobacco products and related products should be rejected as unfounded. The Respondent is correct in saying that when the Claimant presents itself as an organizer of this social action in the communication of the Campaign, it forms a favourable attitude towards itself as a socially responsible business; the formation of such a favourable attitude and image of the company creates a commercial advantage. This will encourage consumers to choose the products distributed by the Claimant and the Company Group – tobacco products or related products.

Re the existence of circumstances aggravating the Claimant's liability

24. As it is apparent from the Resolution, the final economic sanction, a fine of EUR 2,896 was imposed on the Claimant; this is a maximum fine that can be imposed for the infringements committed by the Claimant (Article 26[9] and [11] of the Law).

By imposing the maximum fine, the Respondent took into account three aggravating circumstances and none of the mitigating circumstances.

25. The Claimant claims that the Department unlawfully decided that there are aggravating circumstances, so the amount of the fine was incorrectly calculated.

26. Article 26 (14) of the Law provides that the institutions specified in paragraph 13 of this Article shall, when imposing fines for the infringements of this Law within the scope of their competence, determine the specific amount of a fine taking into account the nature of the infringement and the circumstances mitigating or aggravating liability. In the event of mitigating circumstances, the amount of a fine imposed may not exceed the average amount of the economic sanction usually imposed for similar infringement; in the event of aggravating circumstances, the amount of a fine imposed may not be lower than the average amount of the economic sanction usually imposed for similar infringement. In the presence of both mitigating and aggravating circumstances, a fine shall be imposed taking into account the quantity and significance thereof. Any reduction or increase in a fine shall be motivated by a decision of the institution which imposes the fine for infringements of the requirements set out in this Law.

Article 26(15) of the Law provides that mitigating circumstances shall include actions of the legal persons, branches of foreign legal persons, who committed an infringement, taken at their own initiative to prevent the harmful consequences of such infringement as well as their assistance to competent authorities in the investigation of the infringement, compensation of losses or elimination of the damage done. Aggravating circumstances shall include actions of the legal persons, branches of foreign legal persons concerned to impede the investigation procedure, conceal the infringement, continue the infringement despite the competent authority's instructions to discontinue illegal actions. The institution which imposes a fine may recognise circumstances other than those specified in this paragraph as mitigating or aggravating.

Thus, the Law provides a certain list of circumstances that are recognized as mitigating or aggravating liability. However, it should be noted that this list is not exhaustive, so the Department has the right, at its own discretion, to recognize certain circumstances, duly supporting them, as mitigating or aggravating liability.

27. First, the Claimant submits that by requiring to discontinue the Claimant's illicit acts the Department exceeded its competence, did not comply with the requirements of legal acts; therefore, this circumstance could not be recognized as aggravating the Claimant's liability. The

Court disagrees with this. Article 25(1) of the Law provides that supervision of activities with regard to tobacco products shall, in accordance with the provisions of the Law of the Republic of Lithuania on Public Administration, be carried out by the Drug, Tobacco and Alcohol Control Department within the scope of its competence. Thus, the Respondent, who performs the functions of supervision of the Law, having commenced an investigation, had the right, having provisionally assessed the actions of the Claimant as possibly unlawful, to request to discontinue (cease) these actions. Subsequently, if the Claimant's actions were found to have breached the requirements of the Law, the Respondent could, in accordance with Article 26(15) of the Law, recognize this circumstance, i.e. disregarding the Department's order to discontinue potentially unlawful acts, as aggravating the Claimant's liability. It should be noted that the Claimant unreasonably maintains that a protocol regarding the violation should have been drawn up and served, that the Claimant should have been notified of the start of the investigation regarding the infringement of the law, etc. The Claimant incorrectly mixes up the infringement investigation procedure with the essentially preventive action taken by the Respondent to discontinue potentially illicit activities, in order to avoid further damage, etc. The Respondent has such right arising from the general supervision obligation imposed by the Law; it was proportionate and adequate in the present situation.

The Claimant further submits that it essentially took the Respondent's comments into account and this fact should also have been assessed in the context of the imposition of the sanction. However, the Court notes that although the Claimant partially responded, it actually did not discontinue the infringement, it only reduced its scope. There is therefore no reason to consider the circumstance in question as a mitigating factor.

28. The Claimant also disagrees with recognising the fact that it is "negatively characterised/described" as an aggravating circumstance, i.e. that in the past it was repeatedly penalised for the infringement of Article 17(1) of the Law; it states that the Law establishes a finite list of circumstances to be assessed in determining the amount of the fine and negative characterisation is not included in this list.

Such arguments of the Claimant should also be rejected as unfounded. Contrary to the Claimant's claim, Article 26(15) of the Law very clearly provides that the institution imposing a fine may recognise the circumstances mitigating or aggravating the liability and other circumstances not specified in this paragraph, i.e. the list of the circumstances is not exhaustive. The Court, having assessed the arguments of the Department regarding the recognition of the said circumstance as the circumstance aggravating the Claimant's liability, acknowledges that it is well supported, therefore the Respondent duly recognised it as an aggravating circumstance.

29. The third circumstance – an extremely high level of publicity of the Campaign –was also duly recognized by the Respondent as an aggravating circumstance; it was also well substantiated.

30. To sum up the arguments set out in this section of the judgment, it must be held that the Department duly assessed the nature of the infringement, reasonably identified three circumstances aggravating the Claimant's liability (no mitigating circumstances were established) and imposed a maximum penalty (in the Court's view, even if two aggravating circumstances were established [out of the three], there would be grounds for imposing the maximum penalty).

Re some of the arguments by the Claimant

31. The Claimant claims that the information provided during the Campaign was intended to contribute to the solution of the smoking problem, i.e. to help people quit smoking.

The Court disagrees with the purpose declared by the Claimant and repeated several times. The information disseminated clearly shows another, commercial purpose of the Claimant not permitted by the Law; the Claimant's actual purpose has already been essentially disclosed in the present Judgement.

On the other hand, it is undeniable that in the Campaign information concerning alternatives, consumers were encouraged to opt for supposedly better alternatives, as a result prohibited advertising was provided. The fact that, as the Claimant points out, emphasis was placed primarily on the promotion of quitting smoking, and only then the information on better alternatives to cigarettes was provided to those who did not want to quit smoking, does not change the essence of the matter; this is still advertising of tobacco products and related products prohibited by the Law. It has already been mentioned several times that strict prohibition of advertising of tobacco products and related products is formulated in the Law and very clearly reflected in case law.

The Claimant, as a representative of the tobacco industry, completely unfoundedly identifies itself with competent international and national health care organizations and other institutions and services that actually fight against smoking, take care of public health, aim to minimize the number of people who smoke, etc.

32. The Claimant pays particular attention to the actions of the Respondent prior to the investigation of the violation and adoption of the Resolution. The Court notes, however, that the alleged improper actions of the Respondent prior to the initiation of the investigation of the violation do not in principle affect the proper qualification of the unlawful actions performed by the Claimant, so the Court will not investigate these actions any further. The Court will comment more broadly only on the circumstances aggravating the Respondent's liability. Also, on the fact that the Claimant responded to the comments made by the Department, did not evade its responsibility for the violations.

33. The Claimant claims that the Campaign must be classified as social advertising, which is supported by the Law. Social advertising is supported in the media, regardless of the person who organizes such campaigns. The right to disseminate social advertising is based on the right to freedom of expression (Article 25 of the Constitution of the Republic of Lithuania). The right of a person to receive information relevant to his health, i.e. better alternatives to smoking, is not only protected by Article 25 of the Constitution of the Republic of Lithuania, but is also in compliance with one of the state tobacco control objectives indicated in Article 1(2) of the Law, that is to reduce harmful effects of the use of tobacco products and related products on human health and the economy. The fact that social advertising is a legitimate form for everyone (including economic entities directly involved in the present proceedings) wishing to contribute to the public interest debate has been repeatedly stressed and confirmed by the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR). The Department had to assess the differences between advertising and social advertising. Without doing so, it violated the requirements of the Law.

After hearing these statements by the Claimant, the Court concludes that they do not in any way rule out the infringements committed by the Claimant nor exempt the Claimant from liability.

First, the term "social advertising" is defined in Article 2(32) of the Law as advertising designated to promote social wellbeing, that is a healthy lifestyle, health improvement and prevention of diseases and harmful health habits. Article 3(10) of the same Law provides that one

of the principles of the state policy in respect of the control of tobacco, tobacco products and related products is to support social advertising and promote non-smoking through the media. Having assessed legal regulation related to social advertising, and to other requirements of the Law, the Court concludes that social advertising is supported by the Law, but it cannot be interpreted and understood as conferring the right to disregard the imperatives of the Law during social advertising, e.g. as enshrined in Article 17(1) of the Law, Article 17^1 (1), Article 18(2), etc. It should be noted that offering other alternatives to those not wishing to quit smoking by the Claimant, as a representative of the tobacco industry, is imperatively prohibited by the Law, which has been previously stated in the Judgment; in this case, it does not matter that all along it was stated that the best solution was to quit smoking. It should be reiterated that in the advertising of tobacco products and related products there are no exceptions for advertising alternative products which are better than conventional cigarettes as indicated in the Campaign and specified by the Claimant.

Moreover, the Supreme Administrative Court has stated that the purpose of social advertising is to draw public attention to existing problems, to encourage people to change certain habits, and to choose a new model of behaviour, but social advertising must not promote using certain goods or services, because this function is performed by commercial advertising *(See Ruling No EA-1606-492/2019 of 15 January 2020)*. In the present case, it is unquestionably established that the information disseminated by the Claimant, inter alia, influences consumers to choose certain tobacco products and related products, and is therefore, in any event, prohibited by the Law.

Second, tobacco products and related products are subject to special legal regulations, e.g. advertising and/or surreptitious advertising of these products is prohibited, and there are many other prohibitions with respect to this matter. In Lithuania, this is regulated by the Law on the Control of Tobacco, Tobacco Products and Related Products. Therefore, all economic entities, including the Claimant, must take this regulation into account and comply with it. Since the Claimant did not comply with the above-mentioned mandatory requirements, an economic penalty was imposed on the Claimant. The Claimant's arguments that the Respondent restricted the Claimant's freedom of expression shall be rejected as completely unfounded, because in a democratic society such restrictions of the law are appropriate and permissible in order to protect public health and morals.

Third, the Claimant submits that it has contributed to the public interest debate; such method, according to the CJEU and ECtHR rulings, is lawful for everyone, including economic operators directly involved in the matter. However, the CJEU and ECtHR rulings quoted by the Claimant do not address the issues related to tobacco products and their regulation, but the issues related to the advertising of medicines and food labelling. Therefore, the factual circumstances of the cases cited by the Claimant do not coincide with the case at issue and there is no reason to take them into account.

On the other hand, after assessing the information provided by the Claimant, its intensity, quantity and dissemination, there is no reason to conclude that the Claimant has contributed to the public interest debate by means of such a flow of information. In general, it is not clear from the Claimant's claim what the purpose of the Campaign was, and how it should be called; in each case the Claimant submitted different information: it stated that it organized a social campaign aimed at promoting and strengthening the generally known facts that smoking was harmful; the Campaign was inspired by the global initiative of Philip Morris International; then it asked for it to be called and qualified as social advertising; in the third case the Claimant claimed that it was

intended to contribute to public interest discussions; and in the fourth case, i.e. when the Respondent was investigating the Claimant's infringement, the Claimant's representative acknowledged that the campaign had a commercial purpose, but only at raising consumer awareness. Thus, these discrepancies, in the Court's view, only refute any statements made by the Claimant concerning its attempts to contribute to the public interest debate (and, at the same time, the application of court judgments indicated by the Claimant in the present case) and confirm the violations of the Law established by the Respondent.

34. The Court notes that the other arguments of the Claimant are irrelevant or have already been examined in other paragraphs of the Judgment.

Re the outcome of the case

35. In conclusion, it should be stated that the contested Resolution is lawful and justified, so there is no reason to dismiss or change it. The Claimant's complaint must be rejected as unfounded.

Re litigation costs

36. Article 40(1) of the Law on Administrative Proceedings of the Republic of Lithuania provides that the party for which the judgment has been rendered shall be entitled to the payment by the other party of the costs incurred by it. Since the Claimant's claim is rejected in the present case, i.e. the judgment has *not* been rendered for the benefit of the Claimant, therefore it is not entitled to the payment of the costs incurred by it.

On the basis of the foregoing, and in accordance with Article 87, Article 88(1), and Articles 132–133 of the Law on Administrative Proceedings of the Republic of Lithuania, the Court

rules:

To reject the claim by the Claimant, private limited liability company Philip Morris Baltic, regarding the annulment of the Resolution.

The Judgment may be appealed against with the Supreme Administrative Court of Lithuania within 30 (thirty) calendar days from the date of its adoption and publication, by filing an appeal via Vilnius Regional Administrative Court.

Judge Saulius Jakaitis