European Court of Justice: Advocate General Opts For Annulment of EC Directive on the Advertising and Sponsorship of Tobacco Products

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On 15 June 2000, Advocate General Fennelly delivered his Opinion on joined cases C-376/98 (Germany v. European Parliament and Council) and C-74/99 (The Queen v. Secretary of State for Health and Others ex parte: Imperial Tobacco Ltd. and Others). Both cases concern the validity of E.P. and Council Directive 98/43/EC, of 6 July 1998, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p. 9; hereinafter: the "Directive"). In the first case the applicant is the German State; in the second case, the applicants are some tobacco manufacturers, which brought proceedings in the United Kingdom in order to prevent the implementation of the Directive into domestic law.

The Directive provides for an almost total ban on the advertising of tobacco products, and it applies to any means of dissemination of advertising messages (radio, magazines and newspapers, information society services; a general prohibition of advertising on television is already provided in the "Television Without Frontiers" Directive, Article 13). It was adopted pursuant to Articles 57 (now 47), par. 2 and 100A (now 95) of the EC Treaty, concerning the abolition of restrictions to the free movement of services, respectively the approximation of national rules in order to foster the functioning of the internal market.

The Advocate General followed the suggestion of the applicants, which argued that the Community was not competent to adopt the Directive since the chosen legal basis does not confer a general power to harmonise any national rules unless there is serious impact on the functioning of the internal market. According to the Advocate General, taking another view would create the risk of transferring general regulatory competence to the Community, thus violating the principle governing the split of competencies between the Community and the Member States.

The Attorney General notes that the only effect that the ban of tobacco advertising and sponsorship has on the internal market is to prohibit trade in goods and services to which the Directive relates. No benefit for the internal market can result from this comprehensive ban, since no removal of barriers to trade results from the Directive nor does it equalise the conditions of competition.

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Thus, according to the Attorney General, having regard to the internal market objectives invoked by the Community legislator, the latter was not competent to adopt the Directive.

The Decision of the Court is expected by the end of the year.

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