Court of Justice of the European Communities: Tobacco Advertising Ban

IRIS 2007-2:1/4

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On 12 December 2006, the Court of Justice of the European Communities (ECJ) dismissed the case brought by Germany against the European Parliament and the Council of the European Union for the annulment of the Directive on advertising and sponsorship in respect of tobacco products in media other than television (2003/33/EC) (case C-380/03).

Germany had essentially argued that Art. 95 of the EC Treaty, which empowers the Community to take measures for the approximation of national provisions, which have as their objective the establishment and functioning of the internal market, was not a suitable legal basis for the Directive (see IRIS 2005-7: 10 and IRIS 2006-7: 4). It had particularly challenged Articles 3 and 4 of the Directive, which prohibit the advertising of tobacco products in the press and "other printed publications", in "information society services" and in radio broadcasts, as well as the sponsorship of radio broadcasts by tobacco companies. Germany argued that neither of these provisions would contribute to the elimination of obstacles to the free movement of goods or to the removal of appreciable distortions of competition.

The Court ruled that Art. 95 of the EC Treaty is in fact a suitable basis for the intervention of the Community legislature, thus agreeing with the view of the Advocate General. In particular, the Court observed that, at the time of the Directive's adoption, disparities existed between national rules in the member states which were likely to impede the free movement of goods and the freedom to provide services and which - even though it was not necessary to prove distortions of competition if the existence of obstacles to trade had been established - led to an appreciable risk of distortions of competition. Since the contested articles did, in fact, have as their objective the improvement of the conditions for the functioning of the internal market, the conditions for recourse to Art. 95 of the EC Treaty were met. The Court added that the limits of the field of application of the prohibition were far from random and uncertain. The term "printed products", or "printed media" in language versions other than German, showed the will of the legislature not to include every type of publication in the field of application of this prohibition and only covered publications such as periodicals, newspapers and magazines, not items such as posters, telephone directories, programmes for cultural events and so on.

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The ECJ also ruled that Art. 152(4)(c) of the EC Treaty had not been infringed. The fact that Art. 152(4)(c) of the EC Treaty excluded any harmonisation of laws designed to protect and improve human health, this provision did not mean that harmonising measures adopted on the basis of other provisions of the Treaty could not have any impact on the protection of human health.

The Court also found no breach of the duty to state reasons for legislative action and therefore dismissed the entire case as unfounded.

In Germany, the implementation of the Directive, which was delayed because of the pending action (the Directive should have been transposed into national law by 31 July 2005), was not pursued until 2006. This delay was also partly due to the Advocate General's view, expressed in his conclusion of June 2006, that the case should be dismissed, and due to the subsequent Commission decision of 12 October 2006 to instigate proceedings against Germany for a breach of the Treaty. After the Bill banning tobacco advertising in the media was adopted by the German *Bundestag* on 9 November 2006 (see IRIS 2007-1: 6), it was passed by the *Bundesrat* in December. The Act entered into force on 29 December 2006.

Judgment (case C-380/03) of 12 December 2006

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0380:EN:PDF

ECJ Press Release No. 100/06 of 12 December 2006

http://www.curia.europa.eu/en/actu/communiques/cp06/aff/cp060100en.pdf

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