European Court of Justice: Final Motion by the Advocate General in Case C-244/06

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In the proceedings relating to the issue referred by the regional court in Koblenz for an intermediary decision (case C-244/06; see IRIS 2006-9: 5), Advocate-General Mengozzi has presented his final proposal. He proposed that the ban, established in §12 para. 3 No. 2 of the German Protection of Young Persons Act, on mail-order sales of video material that has no reference to their having been given clearance for access by young persons under national arrangements, is compatible with community law. The ban, described as “terms of sale” is not a measure of equivalent effect to that under Art. 28 EC Treaty, inasmuch as it impinges equally on goods brought into circulation from Germany and goods brought into circulation from other member countries. In addition it would be justified at least in accordance with Art. 30 EC Treaty.

In the initial proceedings, two companies were in conflict over the admissibility of the sale of video material over the Internet in Germany. The material in question (videos and DVDs) had not been reviewed and classified in terms of the protection of young persons by the German competent authority. Such review and classification was undertaken solely by a British assessment agency. The plaintiff company asserted that the sale via mail order of video material imported from the United Kingdom should be forbidden due to the absence of German assessment and age classification features.

The Advocate General began by making the point that the review and classification of the video material by the German competent authority did not represent an obligation under §12 para. 1 of the Protection of Young Persons Act but was rather a task for the supplier. The marketing restrictions set out in §12 para. 3 of the Act allowed the performance of this function in respect of non-controlled recorded material to be omitted The Advocate General went on to state that the national regulations were to be considered in relation to primary law, i.e. Articles 28 and 30, as neither Directive 2000/31/EC (E-Commerce Directive) nor Directive 97/7/EC (on the protection of consumers in respect of distance contracts) exhaustively harmonised national provisions on the protection of young persons in the mail-order business. Moreover, this Directive could only be of significance to the extent that the ban also covered economic operators established in other member countries. The question submitted referred, however, only to companies established in Germany.

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The ban on “non-controlled” mail-order business in video material, in the view of the Advocate General, did not represent a regulation with respect to the features of the goods but a regulation on the terms of sale; that is to say there was no complete ban on marketing video material not subjected to classification by the German competent authority; sale to adults in salesrooms or on “controlled” mail-order terms was still possible. The regulation had more to do with “how”, “where” and “to whom” - i.e. the terms of sale covering some, but not all, categories of video material. Accordingly, it should be viewed in terms of the principles established in the Keck and Mithouard judgments. As this regulation was applicable to all businesses operating in the area of the member state concerned, it would represent no quantitative import limitation or measure of equivalent effect within the meaning of Art. 28 of the EC Treaty, inasmuch as it would impinge in the same way on the circulation of goods from Germany as from other member states. The evidence before the Advocate General was not sufficient in order to make any definitive statement on this issue. This would be a matter for the national court. The court might find that a measure of equivalent effect can be seen to be justified, on grounds of public safety, public order or the protection of public health as under Art. 30 EC Treaty. This would also hold true if the video material had been subjected to review for young persons and corresponding classification in another member country.

The German regulation at issue was intended for the protection of young persons, which was a legitimate concern justifying a restriction on the free movement of goods. In the view of the Advocate General this German regulation was in line with the principle of proportionality. In the absence of harmonisation on standards of protection for young persons, each member state was free to make its own appraisal in accordance with its own value system in reviewing and classifying the content of video material. Hence, the review carried out in the exporting country did not necessarily diminish the danger that the use of the video material might infringe the rules concerning the public interest in Germany.

Schlussanträge des Generalanwalts vom 13. September 2007 in der Rechtssache C-244/06

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Final motion of the Advocate-General on 13 September 2007 in case C-244/06

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