

# OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 13 June 2006<sup>1</sup>

1. By the present action the Federal Republic of Germany is applying to the Court under Article 230 EC for the partial annulment of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.<sup>2</sup>

issue in the present action) was adopted. By this fresh action,<sup>5</sup> the Federal Republic of Germany asks the Court to clarify the implications of its case-law regarding choice of legal basis for the adoption of the annulled directive, which was used again for the adoption of the contested directive.

2. This action is the sequel to proceedings already brought by that Member State against the preceding directive, Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998, whose title is identical,<sup>3</sup> which resulted in the annulment of that directive in its entirety by a judgment of the Court of 5 October 2000 in Case C-376/98 *Germany v Parliament and Council*.<sup>4</sup> It was after that judgment had been delivered that Directive 2003/33 (which is at

## I — Legal framework

3. I will begin by mentioning the provisions of the EC Treaty on which the present action

1 — Original language: French.

2 — OJ 2003 L 152, p. 16, hereinafter 'the contested directive' or 'Directive 2003/33'.

3 — OJ 2003 L 213, p. 9, hereinafter 'the preceding directive', 'the annulled directive' or 'Directive 98/43'.

4 — [2000] ECR I-8419. Shortly after that action for the annulment of Directive 98/43 had been brought, a question was referred to the Court of Justice by a UK court seeking a preliminary ruling on the validity of that same directive. After the directive was annulled by Case C-376/98 *Germany v Parliament and Council*, the Court ruled, by a judgment delivered on the same date in Case C-74/99 *Imperial Tobacco and Others* [2000] ECR I-8599, that there was no need to answer such a question referred for a preliminary ruling.

5 — Ultimately, this is the third action for annulment brought by the Federal Republic of Germany against a directive concerning tobacco products. It had previously applied for the partial annulment of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26). The Court ruled that the action was manifestly inadmissible because it was out of time (order in Case C-406/01 *Germany v Parliament and Council* [2002] ECR I-4561). It was subsequently required to assess the validity of Directive 2001/37, or of some of its provisions, in the context of several references for preliminary rulings from an English court and a German court. See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453 (hereinafter 'BAT') and Case C-434/02 *Arnold André* [2004] ECR I-11825 and Case C-210/03 *Swedish Match* [2004] ECR I-11893.

turns. I will then describe the background to the dispute, pointing out the content of Directive 98/43, then the wording of the Court's judgment by which the directive was annulled. Lastly, I will describe Directive 2003/33, which succeeded that directive and lies at the heart of the present case.

*A — The Treaty provisions relied on by the applicant*

4. Article 95 EC, which (together with Article 55 EC concerning freedom to provide services) forms the substantive legal basis for the contested directive, provides, in paragraph 1, that 'save where otherwise provided in this Treaty, ... for the achievement of the objectives set out in Article 14 [t]he Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.<sup>6</sup>

6 — Article 95(1) EC succeeds Article 100a(1) of the EC Treaty, which was introduced by the Single European Act. The measures referred to in Article 95(1) EC are exactly the same as those previously referred to in Article 100a(1) of the Treaty. For example, the internal market is given a strictly identical definition (in Article 7a(2) of the EC Treaty (now, after amendment, Article 14(2) EC), according to which '[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'). On the other hand, the procedure for adopting those measures has changed.

5. Article 251 EC, to which Article 95(1) EC and Article 47(2) EC (also mentioned by the contested directive) refer, provides for a 'codecision' procedure under which the European Parliament is heavily involved in the Council's decision-making process. Use of this procedure may result in an act being adopted even at first reading. The first indent of the second subparagraph of Article 251(2) EC provides that '[t]he Council, acting by a qualified majority after obtaining the opinion of the European Parliament, if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended'.

6. Under Article 254(1) EC, acts adopted in accordance with the codecision procedure laid down in Article 251 EC must be signed both by the President of the European Parliament and by the President of the Council.

7. Article 152 EC, which comes under Title XIII of the Treaty, entitled 'Public health', states, in paragraph 4, first subparagraph, point (c), that '[t]he Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting incentive measures designed to protect and improve

human health, excluding any harmonisation of the laws and regulations of the Member States’.

introducing, under certain conditions, such requirements as they consider necessary in order to guarantee the protection of the health of individuals’.

## B — *The annulled directive*

8. The annulled directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

9. The directive was adopted, according to its first recital, in response to the realisation that ‘there are differences between the Member States’ laws, regulations and administrative provisions on the advertising and sponsorship of tobacco products [and the idea that] such advertising and sponsorship transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market’. Faced with that situation, the second recital to the directive provided that ‘those barriers should be eliminated and, to this end, the rules relating to the advertising and sponsoring of tobacco products should be approximated, whilst leaving Member States the possibility of

10. In the light of these considerations, Article 3(1) of the annulled directive laid down the principle that ‘all forms of advertising<sup>[7]</sup> and sponsorship<sup>[8]</sup> [of tobacco products] shall be banned in the Community’.

11. The obligation on the Member States to comply with that ban was planned over time so as to allow trade practices to be adjusted.<sup>9</sup> As an extension of that ban, Article 3(4) of

7 — Advertising was defined in Article 2(2) of that directive as ‘any form of commercial communication with the aim or the direct or indirect effect of promoting a tobacco product, including advertising which, while not specifically mentioning the tobacco product, tries to circumvent the advertising ban by using brand names, trade marks, emblems or other distinctive features of tobacco products’.

8 — Sponsorship was defined in Article 2(3) of the same directive as ‘any public or private contribution to an event or activity with the aim or the direct or indirect effect of promoting a tobacco product’.

9 — Thus, initially, from 30 July 1998, the use of the same brand name both for tobacco products and for other goods or services was banned except — where certain conditions were satisfied — for goods or services marketed before that date under a brand name also used for a tobacco product (Article 3(2) of the annulled directive). Subsequently, from 30 July 2001, tobacco products could no longer bear the brand name, trade mark, emblem or other distinctive feature of any other product or service, unless the tobacco product had already been traded under that brand name, trade mark, emblem or other distinctive feature before that date (Article 3(3)(a) of that directive). Other transitional arrangements were provided for in Article 6(3) of the directive as regards the implementation of the ban laid down in Article 3(1) of the directive.

the annulled directive also prohibited 'any free distribution having the purpose or the direct or indirect effect of promoting a tobacco product'.

12. However, several forms of promotion of tobacco products fell outside the scope of that directive. This was the case for television advertising (Article 3(1)),<sup>10</sup> communications intended exclusively for professionals in the tobacco trade, advertising in establishments specialising in the sale of tobacco products and advertising inserted in publications which are published and printed in third countries and which are not principally intended for the Community market (Article 3(5), first, third and last indents).

10 — The ban on all forms of advertising and sponsorship in respect of tobacco products in the Community was laid down in Article 3(1) of Directive 98/43 'without prejudice to Council Directive 89/552/EEC [of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1999 (OJ 1997 L 202, p. 60, hereinafter "the TVWF directive")]. The eighth recital to the annulled directive clarified the meaning of this wording, stating that 'given the interdependence between the various forms of advertising — oral, written, printed, on radio or television or at the cinema — and in order to prevent any risk of distorting competition or circumventing rules and regulations, this Directive must cover all forms and means of advertising apart from television advertising already covered by [the TVWF directive]'.

13. In addition, Article 5 of that directive gave the Member States the option to lay down, in accordance with the Treaty, such stricter requirements concerning advertising or sponsorship in respect of tobacco products as they deemed necessary to guarantee the health protection of individuals.

*C — The judgment in Case C-376/98 Germany v Parliament and Council*

14. As has already been pointed out, Directive 98/43 (which has just been described) was annulled in its entirety by Case C-376/98 *Germany v Parliament and Council* solely on the ground that the choice of Articles 100a, 57(2) and 66 of the Treaty as a legal basis for the directive was incorrect.

15. Since the Court upheld the pleas relied on in this regard by the applicant, the Court did not deem it necessary to consider the other pleas raised by it,<sup>11</sup> concerning respectively a breach of the principles of proportionality and subsidiarity, a breach of fundamental rights, infringements of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC respectively) and an infringement of Article 190 of the EC Treaty (now, after amendment, Article 253 EC).

11 — Case C-376/98 *Germany v Parliament and Council*, paragraph 118.

16. The Court's reasoning in concluding that the choice of Articles 100a, 57(2) and 66 of the Treaty as a legal basis for Directive 98/43 was incorrect and that the directive was therefore null and void may be summarised as follows.

17. First of all, it made a point of stating that, whilst the first indent of Article 129(4) of the EC Treaty (now, after amendment, Article 152(4)(c) EC) excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, it 'does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health', whilst pointing out that 'the third paragraph of Article 129(1) [of the Treaty] provides that health requirements are to form a constituent part of the Community's other policies'.<sup>12</sup> However, according to the Court, the fact remains that 'other articles of the Treaty [articles other than Article 129 of the Treaty] may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty'.<sup>13</sup>

18. In the light of these introductory considerations and the principles which must traditionally guide recourse to Articles 100a, 57(2) and 66 of the Treaty,<sup>14</sup> the Court considered whether the choice of those articles as a legal basis for Directive 98/43 was appropriate. To that end it examined whether that directive actually contributed, first, to eliminating obstacles to the free movement of goods and to the freedom to provide services and, secondly, to removing distortions of competition.

19. As regards the objective of eliminating obstacles to the free movement of goods and the freedom to provide services, the Court acknowledged that 'as a result of disparities between national laws on the advertising of tobacco products, [such] obstacles ... exist or may well arise', in particular as regards press products, with the result that '[i]n principle, therefore, a directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products, on the lines of [the TVWF] Directive ..., Article 13 of which prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes'.<sup>15</sup>

12 — *Ibid.*, paragraph 78.

13 — *Ibid.*, paragraph 79.

14 — *Ibid.*, paragraphs 83 to 87 (to which reference will be made later).

15 — *Ibid.*, paragraphs 96 to 98.

20. However, the Court ruled that 'the Community legislature [should not have relied] on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services in order to adopt the directive [concerned] on the basis of Articles 100a, 57(2) and 66 of Treaty'.<sup>16</sup> That conclusion is based on two arguments.

21. The first argument stems from the idea that, according to the Court, 'for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the [annulled] Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising'.<sup>17</sup> Thus, it stated, '[t]hat applies, in particular, to the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned'.<sup>18</sup> Whilst the Court recognised that 'a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of

that purpose are not circumvented', it nevertheless considered that that was clearly not the case with the abovementioned prohibitions.<sup>19</sup>

22. The second argument is connected with the finding that 'the [annulled] Directive does not ensure free movement of products which are in conformity with its provisions'.<sup>20</sup> In support of that finding, the Court referred to Article 5 of Directive 98/43 under which Member States retain the right to lay down, in accordance with the Treaty, such stricter requirements concerning advertising or sponsorship in respect of tobacco products as they deem necessary to guarantee the health protection of individuals.<sup>21</sup> Furthermore, it noted that in contrast to other directives allowing Member States to adopt stricter measures for the protection of a general interest the directive contains no provision ensuring the free movement of products which conform to its provisions.<sup>22</sup>

19 — *Ibid.*, paragraph 100.

20 — *Ibid.*, paragraph 101.

21 — *Ibid.*, paragraph 103.

22 — *Ibid.*, paragraph 104. The Court made reference *inter alia* to Article 7(1) of Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes (OJ 1990 L 137, p. 36) and to Article 8(1) of Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1).

16 — *Ibid.*, paragraph 105.

17 — *Ibid.*, paragraph 99.

18 — *Idem.*

23. The Court inferred from all these arguments that the legal basis of Directive 98/43 is inappropriate since the directive cannot be based on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services.<sup>23</sup>

24. The Court drew the same conclusion from an examination of that directive in the light of the objective of eliminating distortions of competition.<sup>24</sup> In this regard it drew a distinction between the situation of operators in the tobacco products advertising and sponsorship sector (advertising agencies, producers of advertising media, undertakings involved in the organisation of sports events), on the one hand, and the situation of producers and sellers of such products, on the other.

25. As regards advertising agencies and producers of advertising media, the Court accepted that such undertakings are at an advantage in terms of economies of scale and increase in profits where they are established in Member States which impose fewer restrictions on tobacco advertising. However, it considered that the effects of such advantages are remote and indirect, with the result that, in its view, unlike differences

in production costs they do not constitute distortions of competition which could be described as appreciable and could thus justify the application of Articles 100a, 57(2) and 66 of the Treaty.<sup>25</sup>

26. In addition, according to the Court, even though there are appreciable distortions of competition, where the fact that sponsorship is prohibited in some Member States and authorised in others gives rise to certain sports events being relocated, the fact remains that 'such distortions, which could be a basis for recourse to Article 100a of the Treaty in order to prohibit certain forms of sponsorship, are not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the [annulled] Directive'.<sup>26</sup>

27. As regards producers and sellers of tobacco products, the Court observed that in Member States which have restrictive legislation such operators are obliged to resort to price competition to influence their market share. However, in its view, 'that does not constitute a distortion of competition but rather a restriction of forms of competition which applies to all economic operators in those Member States'.<sup>27</sup> Thus '[b]y imposing a wide-ranging prohibition on the

23 — Ibid., paragraph 105.

24 — Ibid., paragraph 114.

25 — Ibid., paragraph 109.

26 — Ibid., paragraphs 110 and 111.

27 — Ibid., paragraph 113.

advertising of tobacco products, the [annulled] directive would in the future [merely] generalise that restriction of forms of competition by limiting, in all the Member States, the means available for economic operators to enter or remain in the market'.<sup>28</sup>

28. The Court inferred from those arguments that 'the Community legislature [should likewise not have relied] on the need to eliminate distortions of competition, either in the advertising sector or in the tobacco products sector, in order to adopt [Directive 98/43] on the basis of Articles 100a, 57(2) and 66 of the Treaty'.<sup>29</sup>

29. Ruling that the legal basis of that directive was therefore inappropriate, the Court concluded that the directive should be annulled in its entirety and not only partially. Whilst, as it noted, 'a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Article 100a of the Treaty', the fact remains that 'given the general nature of the prohibition ... laid down by [Directive 98/43], partial annulment of the directive would entail amendment by the Court of provisions of [that] directive, [whereas] such amendments are a matter for the Community legislature'.<sup>30</sup>

28 — *Idem*.

29 — *Ibid.*, paragraph 114.

30 — *Ibid.*, paragraph 117.

30. On this ground alone, alleging that the legal basis of Directive 98/43 was inappropriate, the Court annulled the directive in its entirety. In those circumstances a new directive on the subject was adopted, namely the contested directive.

#### D — *The contested directive*

31. As has already been pointed out, the contested directive was adopted on the same legal bases as the annulled directive, Articles 95, 47(2) and 55 EC.

32. Like that directive, the contested directive regulates advertising and sponsorship in respect of tobacco products in the media other than television.<sup>31</sup>

31 — See the 12th and 14th recitals of Directive 2003/33 excluding television advertising and sponsorship of television programmes from its scope. The objective and the scope of the directive are laid down in Article 1 of the directive, which reads as follows:

'1. The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products and their promotion:

(a) in the press and other printed publications;  
(b) in radio broadcasting;  
(c) in information society services; and  
(d) through tobacco-related sponsorship, including the free distribution of tobacco products.

2. This Directive is intended to ensure the free movement of the media concerned and of related services and to eliminate obstacles to the operation of the internal market'.

Article 2 of the directive defines certain terms used in the body of the directive (tobacco products, advertising, sponsorship, information society services).



33. Echoing Case C-376/98 *Germany v Parliament and Council*, the first recital to the contested directive points out that certain obstacles to the free movement of goods and services resulting from the differences in the legislation of the Member States in this regard have already been encountered in the case of press advertising and that distortions of competition arising in the same circumstances have also been noted as regards the sponsorship of certain major sporting and cultural events.

34. As regards advertising, the fourth recital to that directive states that '[t]he circulation in the internal market of publications such as periodicals, newspapers and magazines is subject to an appreciable risk of obstacles to free movement as a result of Member States' laws, regulations and administrative provisions which prohibit or regulate tobacco advertising in those media'. That recital states that '[i]n order to ensure free circulation throughout the internal market for all such media, it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public such as publications intended exclusively for professionals in the tobacco trade and to publications printed and published in third countries, that are not principally intended for the Community market'.

35. The sixth recital to the directive adds that '[u]se of information society services is a

means of advertising tobacco products which is increasing as public consumption and access to such services increases, [that], as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers', and that '[t]obacco advertising by both these media has, by its very nature, a cross-border character, and should [therefore] be regulated at Community level'.

36. The fifth recital to the contested directive states that since '[t]he laws, regulations and administrative provisions of the Member States relating to certain types of sponsorship for the benefit of tobacco products with cross-border effects give rise to an appreciable risk of distortion of the conditions of competition for this activity within the internal market ...', [i]n order to eliminate these distortions, it is necessary to prohibit such sponsorship only for those activities or events with cross-border effects which otherwise may be a means of circumventing the restrictions placed on direct forms of advertising'.

37. In the light of those considerations, Article 3 of that directive, entitled 'Advertising in printed media and information society services', provides in its paragraph 1, that '[a]dvertising in the press and other printed publications shall be limited to publications intended exclusively for professionals in the tobacco trade and to publications which are

printed and published in third countries, where those publications are not principally intended for the Community market', with the result that '[o]ther advertising in the press and other printed publications shall be prohibited'. Accordingly, Article 3(2) states that '[a]dvertising that is not permitted in the press and other printed publications shall not be permitted in information society services'.

terms that 'Member States shall not prohibit or restrict the free movement of products or services which comply with this Directive'.

40. Under the first paragraph of Article 10(1) of the directive, the time-limit for its transposition into national law expired on 31 July 2005.

38. In addition, Article 4 of the directive, entitled 'Radio advertising and sponsorship', states, in paragraph 1 thereof, that '[a]ll forms of radio advertising for tobacco products shall be prohibited' and, in paragraph 2, that '[r]adio programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products'.

## II — The action for annulment

41. By an application lodged at the Registry of the Court of Justice on 10 September 2003, the Federal Republic of Germany (which voted against the adoption of Directive 2003/33) claimed that Articles 3 and 4 of the directive should be annulled.

39. Aside from Articles 3 and 4, which are the only articles to which the present action relates, Directive 2003/33 includes other provisions concerning, amongst other things, sponsorship of certain events (Article 5) and procedures and penalties for the enforcement of the measures to transpose the directive in question (Article 7). Article 8 of the directive, entitled 'Free movement of products and services', states in general

42. In support of its action, the applicant relies on five pleas in law. Principally, it claims that the choice of Article 95 EC as a legal basis for the contested directive is incorrect and that the directive was adopted in contravention of Article 152(4)(c) EC. In the alternative, it contends that the adoption of the directive did not comply with the rules governing the codecision procedure laid down in Article 251 EC and that the obligation to state reasons and the principle of proportionality were breached.

43. By orders of the President of the Court of Justice of 6 January and 2 March 2004, the Republic of Finland (by the first), then the Commission of the European Communities, the French Republic and the Kingdom of Spain (by the second) were granted leave to intervene in support of the European Parliament and the Council.

44. Before examining whether the action brought by the Federal Republic of Germany is well founded, it should first be examined whether it is admissible, even though none of the other parties has contested its admissibility in either their written or their oral submissions.

### III — The admissibility of the action

45. The Court has consistently held that ‘partial annulment of a Community act is possible only if the elements whose annulment is sought may be severed from the remainder of the act’,<sup>32</sup> stating that ‘that requirement of severability is not satisfied in

the case where the partial annulment of an act would have the effect of altering its substance’,<sup>33</sup> which must be assessed on the basis of ‘an objective criterion, and not a subjective criterion linked to the political intention of the authority which adopted the measure at issue’.<sup>34</sup>

46. In the light of this case-law, I consider the present action to be admissible.

47. The question could be raised whether or not any annulment of Articles 3 and 4 of the contested directive would render the directive largely meaningless and seriously affect the overall coherence of the act in so far as those articles form an important part of the directive.

48. Nevertheless, however important the articles at issue are, the fact remains, in my view, that the contested directive would not

32 — See, *inter alia*, Case C-239/01 *Germany v Commission* [2003] ECR I-10333, paragraph 33; Case C-244/03 *France v Parliament and Council* [2005] ECR I-4021, paragraph 12; and Case C-36/04 *Spain v Council* [2006] ECR I-2981, paragraph 12. See also Case 37/71 *Jamet* [1972] ECR 483, paragraph 11; Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, paragraph 21; Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-11375, paragraph 256; Case C-29/99 *Commission v Council* [2002] ECR I-11221, paragraph 45; and Case C-378/00 *Commission v Parliament and Council* [2003] ECR I-937, paragraphs 29 and 30.

33 — See *France v Parliament and Council*, paragraph 13, and Case C-36/04 *Spain v Council*, paragraph 13, as well as *France and Others v Commission*, paragraph 257, Case C-29/99 *Commission v Council*, paragraph 46, and *Germany v Commission*, paragraph 34.

34 — See *Germany v Commission*, paragraph 37, *France v Parliament and Council*, paragraph 14, and Case C-36/04 *Spain v Council*, paragraph 14.

be rendered ineffective if the articles were annulled.<sup>35</sup> Such annulment would not affect the prohibition on sponsorship in respect of tobacco products at certain events or the prohibition on any free distribution of those products in that context (Article 5) or the obligation to provide for appropriate procedures and penalties where those prohibitions are infringed (Article 7) and to guarantee the free movement of products or services which comply with the directive (Article 8). The benefit of those provisions alone appears objectively to be far from negligible.

49. In addition, in my view, Articles 3 and 4 of the contested directive may largely be severed from the remainder of the act, both formally and substantively.

50. From a purely formal point of view, the possible annulment of Articles 3 and 4 clearly would not be liable to give rise to an amendment of Article 5 concerning the sponsorship of certain events in so far as Article 5 does not contain any reference to Articles 3 and 4. In addition, substantively, whilst it is true that Article 5 is an extension of Article 4(2) on the sponsorship of radio programmes, the validity of which is being

challenged, Article 5 still covers another type of sponsorship with the result that it would retain all its meaning and scope even if Article 4(2) were annulled.<sup>36</sup>

51. As regards Articles 7 and 8 of the contested directive (concerning, respectively, procedures and penalties applicable in the event of infringement of the prohibitions laid down by the Member States under that directive and the guarantee of the free movement of products or services which comply with the directive), those articles include provisions which may be described as 'catch-all', that is to say they concern each of the prohibitions laid down by the contested directive (in Articles 3, 4 and 5, without referring to them expressly), with the result that the possible annulment of Articles 3 and 4 would not preclude the application of Articles 7 and 8 if the prohibitions laid down in Article 5 (which is not at issue in the present action) were infringed. It follows that, in the event of such partial annulment, Articles 7 and 8 would not be deprived of their entire *raison d'être*. The same would hold for the application of Article 6 of the contested directive (requiring the Commission to draw up a report on the implementation of the directive) and Articles 9 to 12 of the directive (final provisions

35 — For similar reasoning, see *Jamet*, paragraph 11, *Transocean Marine Paint*, paragraph 21, and the Opinion of Advocate General Tesouro in *France and Others v Commission*, points 142 and 144.

36 — Unlike the situation in *France and Others v Commission*, where the action for partial annulment in that case was declared inadmissible, the possible annulment of the provisions at issue in the present case would not mean that the retained provisions would be given another, radically different, meaning and that the intention of the Community legislature would thereby be seriously undermined.

concerning *inter alia* the date of entry into force of the directive and the prescribed period for its transposition).

53. In the light of these arguments, the present action for the partial annulment of Directive 2003/33 is admissible. It should therefore be examined whether the action is well founded.

#### IV — The substance of the action

52. As regards Articles 1 and 2 of the contested directive, which set out the subject-matter and scope of the directive and define certain terms used,<sup>37</sup> whilst it would undoubtedly be desirable to make a few adjustments and adaptations, removing some of their provisions, if Articles 3 and 4 of the directive were annulled, it would be unreasonable, in my opinion, to take the view that this purely formal ‘tidying up’ exercise would be sufficient to render the present action for annulment inadmissible. Such an exercise would not be comparable with the one that the Court refused to undertake in Case C-376/98 *Germany v Parliament and Council*, which, in order to avoid the annulment of Directive 98/43 in its entirety, would have required the Court to rewrite completely Article 3(1) of the directive, thereby doing the work of the Community legislature by limiting the scope of the general prohibition on advertising and sponsorship in respect of tobacco products under Article 3(1) to certain specific forms of advertising and sponsorship in respect of such products.<sup>38</sup>

54. As has already been pointed out, the Federal Republic of Germany is relying on five pleas in law in support of its action. Principally, it claims that the choice of Article 95 EC as a legal basis for the contested directive is incorrect and that the directive was adopted in contravention of Article 152(4)(c) EC. In the alternative, it contends that the adoption of the directive did not comply with the rules governing the codecision procedure laid down in Article 251 EC and that the obligation to state reasons and the principle of proportionality were breached.

55. I will first look at the two main pleas relied on, which should be examined together and, if necessary, the other pleas which are relied on only in the alternative.

37 — See the wording set out in footnote 31 to this Opinion.

38 — See paragraph 117 of the judgment (cited in point 29 of this Opinion), which echoes point 127 of the Opinion of Advocate General Fennelly in that case.

A — *The pleas alleging that the choice of Article 95 EC as a legal basis for the contested directive was incorrect*

responded only very marginally to the supposed need to eliminate obstacles to the free movement of such advertising media.

## 1. Arguments of the parties

### (a) The view taken by the applicant

56. The applicant claims that the conditions justifying recourse to Article 95 EC for the adoption of Articles 3 and 4 of the contested directive have not been met. In its view, none of the prohibitions laid down in Articles 3 and 4 actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services or to removing appreciable distortions of competition. The applicant puts forward a number of arguments along these lines for each type of advertising or sponsorship medium referred to in Articles 3 and 4.

57. First of all, with regard to the *press* and *other printed publications*, referred to in Article 3(1) of the contested directive, more than 99.9% of products are not marketed in more than one Member State, but only regionally or locally, with the result that the general prohibition under Article 3(1) on inserting any advertising of tobacco products

58. In support of this statistical analysis, the applicant claims that the expression 'other printed publications' which appears in Article 3(1) covers a wide range of publications, such as bulletins produced by local (sports, cultural, political or religious) associations, programmes for events or exhibitions (cultural ones in particular), posters, telephone directories, and various leaflets and prospectuses. However, it states, such publications are targeted solely at local people with the result that they do not have any cross-border character.

59. 'Press' products (newspapers, periodicals, magazines) are traded between Member States only rarely, not only for linguistic and cultural reasons, but also on grounds of editorial policy. Nevertheless, for those that could be marketed abroad, there are no actual obstacles, according to the applicant, to their movement within the Community even though it is not disputed that some Member States prohibit advertising of tobacco products in the press. In its view, in those States the foreign press is not covered, in law or in fact, by such a prohibition.

60. The applicant infers from these considerations concerning the press and other printed publications that, unlike Article 5 of the contested directive (which applies solely to sponsorship of events having cross-border effects), Article 3(1) of that directive does not genuinely seek to eliminate supposed barriers to trade. It adds that by prohibiting advertising of tobacco products in printed publications having no cross-border character, Article 3(1) also does not contribute — indirectly — to eliminating barriers to trade by preventing any circumvention of the prohibition in respect of printed publications which could be marketed between Member States.

61. In the applicant's view, nor does Article 3(1) meet the objective of removing appreciable distortions of competition. There is no competitive relationship either between the local publications of one Member State and those of another Member State or between newspapers, periodicals and magazines with a wider circulation which give rise to intra-Community trade, with the result that that objective has no logical basis. This argument, which is put forward in addition to those expounded by the Court in Case C-376/98 *Germany v Parliament and Council*, concerning, first of all, advertising agencies and producers of advertising media (paragraph 109) and, secondly, producers and sellers of tobacco products (paragraph 113), reinforces the view that recourse to Article 95 EC as a legal basis cannot justify a general prohibition on advertising like that

laid down in Article 3(1) of the contested directive.

62. As regards Article 3(2) of that directive, concerning *information society services*, the applicant takes the view that it likewise pursues neither of these objectives, either to eliminate obstacles to the free movement of goods and to the freedom to provide services or to remove appreciable distortions of competition. Demand for consultation on the internet of printed publications originating in other Member States is marginal and, in any case, is not precluded by any technical obstacle in view of the free global access to information society services, with the result that there is no actual barrier to possible trade that needs to be removed.

63. The applicant further considers that the choice of Article 95 EC as a legal basis for the contested directive is also incorrect as regards the prohibition laid down in Article 4 of that directive on radio advertising and on sponsorship of *radio programmes*. Such programmes are targeted primarily at a local or regional audience, not an international audience, given the content of the programmes, the language used and the low range of transmitters. Furthermore, since radio advertising of tobacco products is prohibited in nearly all Member States, it was not necessary to provide for such a

prohibition in Article 4(1) of the directive. In the applicant's view, the same holds for the prohibition on sponsorship of radio programmes under Article 4(2) of the directive.

64. Lastly, the applicant takes the view that Articles 3 and 4 of the contested directive do not seek to improve the establishment and the functioning of the internal market by eliminating supposed obstacles to the free movement of goods and to the freedom to provide services or by removing appreciable distortions of competition, but only to protect public health. Consequently, it considers that recourse to Article 95 EC for the adoption of the contested directive was not only incorrect, but also contrary to Article 152(4)(c) EC, which expressly excludes any harmonisation of the laws and regulations of the Member States in the field of public health.

(b) The view taken by the defendants and the parties intervening in support of them

65. The Parliament, the Council and the parties intervening in support of them consider that Articles 3 and 4 of the contested directive were legitimately adopted on the basis of Article 95 EC and did not therefore infringe Article 152(4)(c) EC.

66. In support of this, the Parliament, the Council and the Commission argue that the prohibition on advertising and sponsorship in respect of tobacco products under Articles 3 and 4 of the contested directive is much narrower than that previously laid down in Article 3(1) of the annulled directive. In accordance with Case C-376/98 *Germany v Parliament and Council*, Article 3(1) of the contested directive merely prohibits advertising of such products in *periodicals, magazines and newspapers*, and not on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, or in advertising spots in cinemas. That prohibition does not extend to the other types of publications mentioned by the applicant, such as bulletins produced by local associations, programmes for events and exhibitions, posters, telephone directories, leaflets and prospectuses.

67. Given this definition of the scope of Article 3(1) of the contested directive, the Parliament, the Council and the Commission contest the applicant's view that the trade in press products (which, in their view, are the only things covered by that article) has virtually no cross-border effects. After challenging the relevance of the applicant's statistical analysis (whose results, which are restricted to the German market, cannot be extrapolated for the entire Community), they state that the current 'media convergence' phenomenon makes a significant contribution to developing intra-Community trade in the press sector, since many newspapers,



periodicals or magazines are now available on the internet and are therefore easily accessible in all Member States.

68. Moreover, the Parliament, the Council and the Commission also argue that it is particularly difficult, or even impossible, to determine precisely whether publications have a purely local or national circulation or a European or international circulation. Consequently, prohibiting advertising of tobacco products only in publications having a cross-border circulation within the Community and not in those deemed to be purely local or national, as the German Government had proposed during the negotiation of the contested directive, would have been liable to make the limits of the field of application of such a prohibition particularly unsure and uncertain. Such an approach would have been contrary both to the requirements of legal certainty and to the objective of the directive, which is, according to these Community institutions, to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of such products with a view to eliminating obstacles to the operation of the internal market.

69. Furthermore, several directives have already been adopted on the basis of Article 100a of the Treaty without their validity being challenged by the Court even

though their scope does not appear to be limited to cross-border situations.<sup>39</sup> Similarly, the Parliament, the Council and the Commission submit that the TVWF directive provides, in Article 13, that '[a]ll forms of television advertising for cigarettes and other tobacco products shall be prohibited', whatever the geographical scope of the broadcasting of the television programmes in question.

70. In their view, all these arguments show that, contrary to the claims made by the applicant, the printed publications referred to in Article 3(1) of the contested directive are actually the subject of intra-Community trade.

71. However, as the Court stated in paragraph 97 of Case C-376/98 *Germany v Parliament and Council*, it is probable, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, that obstacles to the free movement of press products will arise or increase in the future, with the result that, as the Court has consistently held, recourse to

39 — The Council makes reference to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), and Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

Article 95 EC as a legal basis for the directive, with a view to eliminating such barriers to trade, is justified.

72. According to the Parliament and the Council, recourse to that legal basis is all the more justified since, in any event, whatever the scale of intra-Community trade in press products, Article 3(1) also responds to the concern to prevent, first of all, circumvention of the prohibition on advertising of tobacco products through the supposedly local press and, secondly, the emergence of distortions of competition in the printed publications sector because of the advantage, in terms of advertising revenue, that would be enjoyed by those operating on the 'local' or 'national' market compared with those also operating on the Community market (if, as the Federal Republic of Germany had proposed during the negotiation of the contested directive, only products giving rise to cross-border trade were subject to the prohibition in question).<sup>40</sup>

<sup>40</sup> — According to the Commission, BAT denied the relevance of the view previously taken by the Court in Case C-376/98 *Germany v Parliament and Council*, when it considered whether Directive 2001/37 met both the objective of eliminating barriers to trade and the objective of removing appreciable distortions of competition. In its view, it was clear from this recent ruling that the requirement relating to the pursuit of those objectives should be seen alternatively and not cumulatively. Consequently, the Commission did not submit any arguments regarding the possible link between Articles 3 and 4 of the contested directive and the removal of appreciable distortions of competition. Whilst concurring with this interpretation of case-law (see paragraphs 41 to 43 of its defence), the Parliament, like the Council, considered that limiting the articles at issue to cross-border situations alone would undoubtedly have caused distortions of competition, so that, by not making such a limitation, the Community legislature ultimately prevented such distortions from appearing, rather than eliminating their existence.

73. As regards the prohibition of advertising of tobacco products in *information society services* under Article 3(2) of the directive, the Parliament, the Council and the Commission take the view that it is also prompted by the desire to eliminate any barriers to trade in that sector and, above all, by the concern to prevent circumvention, by electronic means, of the prohibition of such advertising in printed publications, or even the creation of distortions of competition.

74. Lastly, the general prohibition on radio advertising of tobacco products laid down in Article 4(1) of the contested directive is strictly identical to that provided for in Article 13 of the TVWF directive.<sup>41</sup> Like television programmes, *radio programmes* by their nature have a cross-border effect on account of the wide coverage of terrestrial frequencies and the increased use of satellite, cable and the Internet.

75. Going beyond these specific considerations relating to each type of advertising medium referred to in Articles 3 and 4 of the contested directive, the Parliament, the Council and the Commission argue that the directive also follows the line taken in Case C-376/98 *Germany v Parliament and Council*, in so far as the Member States are no longer free to prescribe stricter requirements than those laid down therein in order to ensure the protection of public health with regard to advertising and sponsorship in

<sup>41</sup> — See point 69 of this Opinion.

respect of tobacco products and in so far as, accordingly, under Article 8 of the directive, they may no longer prohibit or restrict the free movement of products or services which comply with the directive, with the result that, in this respect too, the directive actually seeks to eliminate barriers to trade and thereby to improve the conditions for the establishment and functioning of the internal market in accordance with the objective assigned to a measure adopted on the basis of Article 95 EC.

EC, taking the view that, to conclude that the choice of that article as a legal basis for the contested directive is justified, it is sufficient to find that the directive actually contributes to eliminating such barriers, without the need to check whether it also seeks to remove appreciable distortions of competition.

## 2. Assessment

76. The Parliament, the Council and the Commission also argue that since the conditions governing recourse to Article 95 EC as a legal basis for the contested directive are satisfied, there can be no infringement of Article 152(4)(c) EC, even though the directive is inspired partly by an objective to protect public health.

78. The choice of Article 100a of the Treaty, then Article 95 EC as a legal basis for a directive has given rise to a substantial body of case-law. In the course of laying down that case-law, the Court has set out the conditions which must be met by recourse to that article. I will describe these developments in case-law before drawing the necessary conclusions as regards the choice of Article 95 EC as a legal basis for the contested directive in the areas covered by Articles 3 and 4 thereof.

77. Similarly, the Kingdom of Spain, the French Republic and the Republic of Finland stress the scale of and steady increase in cross-border trade in printed publications, the internet and radio broadcasting, as well as the existence or probable growth in barriers to such trade resulting from differences in national legislation on advertising and sponsorship in respect of tobacco products. Like the Parliament and the Commission, the Republic of Finland relies on the Court's recent case-law on the conditions governing recourse to Article 95

(a) The Court's case-law concerning the choice of Article 100a of the Treaty as a legal basis for a directive

79. As has already been pointed out, Article 100a(1) of the Treaty gives the

Council the power to adopt, in accordance with a specific procedure, with a view to achieving the objectives set out in Article 7a of the Treaty, 'the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. The internal market is defined in Article 14(2) EC as comprising 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty', which requires, under Article 3(1)(c) EC, 'the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital measures'.

80. Going beyond the wording of those provisions, in *Commission v Council* known as '*Titanium dioxide*',<sup>42</sup> the Court recognised that the establishment and functioning of the internal market requires not only the elimination of barriers to trade, but also the removal of certain distortions of competition within the Community.<sup>43</sup>

42 — Case C-300/89 [1991] ECR I-2867.

43 — Paragraphs 14, 15 and 23. See also the Opinion of Advocate General Tesauro in that case (point 10). The Court annulled the directive at issue on the ground that it should have been adopted on the basis of Article 100a of the EEC Treaty (subsequently Article 100a of the EC Treaty) and not on the basis of Article 130s of the EEC Treaty (subsequently Article 130s of the EC Treaty and now, after amendment, Article 175 EC) (on the environment), in the light of the impact of the national rules on the treatment of waste which the directive seeks to harmonise on production costs in the titanium dioxide industry and, consequently, on the conditions of competition in that industry. As Advocate General Jacobs pointed out in point 45 of his Opinion in Case C-350/92 *Spain v Council* [1995] ECR I-1985, the directive in question could hardly be considered directly to contribute to free movement, either of waste or of the finished products.

81. Whilst in Case C-376/98 *Germany v Parliament and Council* (delivered several years after *Titanium dioxide*) the Court considered Directive 98/43 in the light of each of these two objectives, which both contribute to the creation of the internal market, it cannot be inferred, as the applicant suggests,<sup>44</sup> that recourse to Article 95 EC as a legal basis for some directive is justified only if the directive actually satisfies both these objectives, and not just one of them, so that if a directive does not contribute either to eliminating barriers to trade or to removing distortions of competition, the Community legislature is not justified in having recourse to that legal basis for the adoption of the directive.

82. In my view, by carrying out this two-fold examination, the Court merely verified that recourse to Article 100a of the Treaty for the adoption of the directive in question could not be justified having regard to one of the objectives on which the creation of the

44 — See in particular paragraphs 53, 71, 81, 85 and 89 of the defence submitted by the Federal Republic of Germany. It should be borne in mind that this interpretation of Case C-376/98 *Germany v Parliament and Council* has been contested by the Parliament and the Council and by the Republic of Finland.

internal market is based.<sup>45</sup> It is only at the end of that exhaustive examination that the Court was able to annul Directive 98/43 in its entirety, solely on the ground that the choice of Article 100a as a legal basis for the directive was incorrect.

the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, *or* to the removal of distortions of competition’.<sup>46</sup>

83. The subsequent rulings following Case C-376/98 *Germany v Parliament and Council* confirm my view in this regard.

84. As the Parliament, the Commission and the Republic of Finland have rightly pointed out, in *BAT*, the Court stated that ‘it is clear from paragraphs 83, 84 and 95 of the ... judgment [in Case C-376/98 *Germany v Parliament and Council*] that the measures referred to [in Article 100a(1) of the Treaty] are intended to improve the conditions for

85. These words highlight that the conditions governing recourse to Article 95 EC are non-cumulative. It does not therefore matter that a directive which has that article as a legal basis contributes only to eliminating obstacles to the free movement of trade and not to removing distortions of competition or, conversely, to the latter objective and not to the former, or to both objectives. The important factor is that, by pursuing such an objective or objectives, the directive in question genuinely has as its object to improve conditions for the establishment and functioning of the internal market.

45 — Furthermore, the Opinion of Advocate General Fennelly in Case C-376/98 *Germany v Parliament and Council* followed this line of thinking. In point 83, Advocate General Fennelly states that Article 100a of the Treaty does not confer on the Community a general regulatory power, but limited competences in so far as they are intended solely *either* to facilitate the exercise of the freedoms *or* to equalise the conditions of competition. In point 93, he adds that in order to determine whether a Community measure pursues internal-market objectives, it must first be ascertained whether the preconditions for harmonisation exist, that is, disparate national laws which *either* constitute barriers to the exercise of the fundamental freedoms or distort conditions of competition in an economic sector; in order then to verify that the measures adopted on the basis of Article 100a of the Treaty facilitate free movement *or* equalise conditions of competition in a specific sector. In point 117, the Advocate General considers whether the prohibition on tobacco advertising laid down by Directive 98/43 could satisfy the objective of eliminating distortions of competition only as regards some of the advertising media covered by that prohibition, which were not, in his view, related to the objective of eliminating barriers to trade.

86. Moreover, in *BAT*, the Court merely examined Directive 2001/37 (on the manufacture, presentation and sale of tobacco products) having regard to the objective of eliminating obstacles to the free movement of those products. Taking the view that the directive genuinely pursued such an objec-

46 — Paragraph 60 of the judgment (my emphasis).

tive, with the result that, by this fact alone, it therefore contributed to improving the conditions for the functioning of the internal market, the Court concluded that it was possible for the directive to be adopted on the basis of Article 95 EC.<sup>47</sup>

87. The Court followed strictly identical reasoning in the abovementioned judgments in *Arnold André* and *Swedish Match*,<sup>48</sup> with regard to the same directive, and subsequently in *Alliance for Natural Health and Others*,<sup>49</sup> with regard to Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements.<sup>50</sup>

88. It follows from all these arguments based on case-law that for a directive to be regarded as having as its object the establishment and functioning of the internal market within the meaning of Article 95(1) EC, it is sufficient for it to contribute genuinely to eliminating obstacles to the fundamental freedoms guaranteed by the Treaty or to removing distortions of competition. Thus, where a directive genuinely contributes to eliminating barriers to trade, it is irrelevant,

for the purposes of whether it fulfils the objective set out in Article 95 EC, that it does not have an impact on the conditions of competition.

89. In addition, with particular regard to the objective of eliminating restrictions to trade, the Court has consistently held that ‘while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC ..., it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market’.<sup>51</sup> The Court has also consistently added that ‘while recourse to Article 95 EC as a legal basis is possible if the aim is to prevent future obstacles to trade resulting from the heterogeneous development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them’.<sup>52</sup>

90. Thus, in determining whether the conditions governing recourse to Article 95 EC

47 — See paragraphs 64 to 75 of the judgment.

48 — See paragraphs 38 to 42 of *Arnold André* and paragraphs 37 to 42 of *Swedish Match*.

49 — Joined Cases C-154/04 and C-155/04 [2005] ECR I-6451, paragraphs 35 to 38.

50 — OJ 2002 L 183, p. 51.

51 — *Arnold André*, paragraph 30, *Swedish Match*, paragraph 29, and *Alliance for Natural Health and Others*, paragraph 28, which make reference to Case C-376/98 *Germany v Parliament and Council*, paragraphs 84 and 95, and *BAT*, paragraph 60.

52 — *Arnold André*, paragraph 31, *Swedish Match*, paragraph 30, and *Alliance for Natural Health and Others*, paragraph 29, which make reference to Case C-36/04 *Spain v Council*, paragraph 35, Case C-376/98 *Germany v Parliament and Council*, paragraph 86, *BAT*, paragraph 61, and Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 15.

are fulfilled having regard to the objective of eliminating restrictions on trade, it must first be verified whether, when the measure in question was adopted, there were differences between the rules of the Member States or whether, at the very least, those rules were developing heterogeneously. It is then necessary to establish whether such circumstances were liable to impede the fundamental freedoms guaranteed by the Treaty or were likely to give rise to such an effect. Lastly, it is necessary to examine whether the measure at issue genuinely has as its object, directly or even indirectly,<sup>53</sup> to eliminate or prevent such (existing or likely) obstacles. This reasoning is very close to that adopted by the Court with regard to the objective of removing distortions of competition, which, like the objective of eliminating barriers to trade, contributes to the creation of the internal market.<sup>54</sup>

91. The Court has consistently held that 'where the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the

ground that public health protection is a decisive factor in the choices to be made'.<sup>55</sup>

92. In Case C-376/98 *Germany v Parliament and Council* the Court stated that whilst '[t]he first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, ... that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health'.<sup>56</sup> The Court added that '[o]n the contrary, the third paragraph of Article 129 (1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured'.<sup>57</sup>

93. In the light of all this case-law, it is now necessary to verify whether the conditions governing recourse to Article 95 EC as a legal basis for the contested directive have been fulfilled.

53 — It should be borne in mind that, in paragraph 100 of Case C-376/98 *Germany v Parliament and Council*, the Court recognised that 'a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented'. This ruling has been confirmed, *inter alia*, in *BAT*, paragraph 82.

54 — See, to this effect, *Titanium dioxide*, paragraph 23, and Case C-36/04 *Spain v Council*, paragraphs 32 to 36 and 40.

55 — *BAT*, paragraph 62, *Arnold André*, paragraph 32, *Swedish Match*, paragraph 31, and *Alliance for Natural Health and Others*, paragraph 30, which follow precisely the line taken in Case C-376/98 *Germany v Parliament and Council*, paragraph 88.

56 — Paragraphs 77 and 78.

57 — Paragraph 88. These arguments were reproduced identically in *BAT*, paragraph 62, *Arnold André*, paragraph 33, *Swedish Match*, paragraph 32, and *Alliance for Natural Health and Others*, paragraph 31.

(b) The appropriateness of the choice of Article 95 EC as a legal basis for the contested directive in the areas covered by Articles 3 and 4 thereof

(i) Existence of supposed differences between national rules in the areas covered by Articles 3 and 4 of the contested directive

94. In my view, the pleas raised by the applicant, which allege that the choice of Article 95 EC as a legal basis for the contested directive, in the areas covered by Articles 3 and 4 thereof, was incorrect, are not well founded.

96. It should be noted that, in Case C-376/98 *Germany v Parliament and Council*, the Court had already established the existence, at the time of the adoption of Directive 98/43, of disparities between national laws on the advertising of tobacco products,<sup>59</sup> and 'the trend in national legislation towards ever greater restrictions ..., reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption'.<sup>60</sup>

95. My analysis in this respect will follow the reasoning normally adopted by the Court with regard to the objective of removing distortions of competition or the objective of eliminating barriers to trade.<sup>58</sup> Thus, I will first look at the existence (when the contested directive was adopted) of alleged differences between national rules in the areas covered by Articles 3 and 4 of that directive, then the effects of these supposed differences on the establishment or the functioning of the internal market and, lastly, the object of Articles 3 and 4, before drawing the necessary conclusions regarding the appropriateness of the choice of Article 95 EC as a legal basis for the contested directive (in the areas covered by Articles 3 and 4).

97. It is not disputed that this was also the case when the contested directive was adopted, not only for advertising, but also for sponsorship in respect of tobacco products. This can be clearly seen from the precise and detailed examination of national laws conducted by the Commission which it made a point to describe in point 4 of the

58 — I have summarised the reasoning in point 90 of this Opinion.

59 — See paragraph 96.

60 — Paragraph 97.



explanatory memorandum for the proposal for a directive which it submitted on 20 June 2001.<sup>61</sup> It is also underlined by the first and third recitals to the contested directive.<sup>62</sup>

98. This was the case especially since the directive was adopted exactly a year before the enlargement of the European Union to include 10 new Member States. The proximity of that event could only increase the risk of differences between national rules in the short or medium term in the area in question.<sup>63</sup>

61 — Proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (COM(2001) 283 final, hereinafter the 'proposal for a directive'). As the Commission pointed out at the hearing, when that proposal for a directive was tabled, advertising and/or sponsorship in respect of such products was subject to a partial ban in six Member States (Federal Republic of Germany, Hellenic Republic, Kingdom of Spain, Grand Duchy of Luxembourg, Republic of Austria and Kingdom of Sweden), a total ban in four Member States (French Republic, Italian Republic, Portuguese Republic and Republic of Finland) and legislative work with a view to a total ban in the other five (Kingdom of Belgium, Kingdom of Denmark, Ireland, Kingdom of the Netherlands, and United Kingdom of Great Britain and Northern Ireland).

62 — The first recital states that 'there are differences between the Member States' laws, regulations and administrative provisions on the advertising and sponsorship of tobacco products'. The third recital states that '[t]he legislation of the Member States to be approximated is intended to protect public health by regulating the promotion of tobacco, an addictive product responsible for over half a million deaths in the Community annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted'.

63 — At the hearing the Commission stated that some new Member States had a total ban on advertising and sponsorship in respect of tobacco products (such as the Czech Republic, the Republic of Latvia and the Republic of Lithuania), whilst others accept such action subject to observance of certain conditions (such as the Republic of Hungary and the Republic of Malta).

99. This finding cannot be called into question by the fact that, as is mentioned in point 5 of the explanatory memorandum for the proposal for a directive and the eighth recital to the directive, when the directive was adopted negotiations were in progress in the World Health Organisation (WHO) with a view to drafting a Framework Convention on tobacco control (hereinafter 'the WHO Convention').

100. Whilst it is true that the draft WHO Convention sought to reduce consumption of tobacco products by providing *inter alia* for a comprehensive ban on advertising, promotion and sponsorship in respect of such products which was such as to approximate the relevant national rules, the fact remains that the negotiations in question were still in progress when the contested directive was adopted (on 26 May 2003) and that whilst the negotiations shortly afterwards (the following month) led to the adoption of the WHO Convention, the Convention did not enter into force until 27 February 2005 and is still not yet binding on all the Member States of the European Community.<sup>64</sup>

64 — To date, although they signed the WHO Convention when it had been adopted, three Member States have not yet ratified it. They are the Czech Republic, the Italian Republic and the Republic of Poland.

101. Moreover, whilst Article 13 of the Convention, which concerns advertising, promotion and sponsorship in respect of tobacco products, is genuinely liable to reduce differences in the relevant national rules, it does not seek to eliminate those differences completely and immediately and does not rule out the risk of divergent developments. Under Article 13(2), the contracting parties have the option to undertake, within a period of five years after entry into force of the WHO Convention (i.e. by 27 February 2010), either a comprehensive ban of these commercial activities (including where they have a cross-border character) or only certain restrictions or limitations in this field.

102. It follows that when the contested directive was adopted there remained significant differences between national rules on advertising and sponsorship in respect of tobacco products (including in the areas covered by Articles 3 and 4 of that directive) and that those differences were far from being eliminated.

103. In the light of those circumstances, it is now necessary to determine the effects of those differences on the establishment and the functioning of the internal market.

(ii) The effects of existing and future differences in the areas covered by Articles 3 and 4 of the contested directive on the establishment and functioning of the internal market

104. Unlike the applicant, I consider that the differences that existed between the national rules of the Member States when the contested directive was adopted and the heterogeneous development of those rules in the areas covered by Articles 3 and 4 of the directive do have an impact on the establishment and functioning of the internal market, since, in my view, such (existing and future) differences were, respectively, liable to impede the free movement of goods and the freedom to provide services or were likely to give rise to new barriers to such trade.

105. It is clear, first of all, that, as is stated in the sixth recital to the contested directive, information society services and radio broadcasting (which may also be retransmitted simultaneously on the internet) have a largely cross-border dimension.<sup>65</sup>

<sup>65</sup> — As the French Republic stated in paragraph 30 of its statement, coverage of radio programmes, which varies according to the frequency bands used, may extend to several thousand kilometres from the broadcast location. Thus, some radio stations are aimed specifically at a foreign audience (BBC World, Radio France International, Deutsche Welle).

106. Press products are not exempt from the phenomenon of media globalisation. It is clear from the report produced by the Commission in 1997, as regards the press market, that the circulation of newspapers, periodicals and magazines between Member States is a reality that is far from negligible.<sup>66</sup> This is the case in particular between countries sharing a common language such as French (Belgium, France, Luxembourg), English (Ireland, United Kingdom), or German (Germany, Austria, the region of Bolzano in Italy). In addition, it appears that the importation of press products from other Member States is very widespread in Belgium, the Netherlands, Denmark, Finland and Sweden. Lastly, certain publications have over a long time built up a sizeable readership beyond national borders and therefore create a constant flow of exports to Member States other than those from which they originate.<sup>67</sup> Alongside this traditional trade in press products on paper media, we should add all the constant growing trade that now occurs through the internet, with many publications already being available online.

107. It follows that, contrary to the claims made by the applicant, the market in press products, like the radio market, is a market in which trade between Member States is

relatively sizeable and is set to grow further as a result inter alia of the convergence of the media in question with the internet, which is the cross-border medium *par excellence*.

108. As the Court has pointed out, the market in tobacco products is also a market in which trade between Member States is relatively sizeable.<sup>68</sup> In addition, it is commonly accepted that advertising and, to a certain extent, sponsorship contribute appreciably to the expansion of consumption of such products by encouraging young people in particular to 'do the deed', thereby exposing themselves to the risk of addiction to those products.<sup>69</sup>

109. In these circumstances, the tobacco industry has every interest in developing international marketing strategies to promote its products, including on the Community market, using a wide range of advertising media or sponsorship which have the advantage of cross-border coverage, including the written press, radio and the Internet.

66 — This report, which has been put before the Court by the Commission, is entitled 'Newspaper distribution and pricing structure of crossborder printed press within the Member States and its effect on the free circulation of printed media within the European Union'.

67 — These include *The Times* and *Le Monde* and, for the specialist press, *The Financial Times*, *The Economist*, *Newsweek* and *Handelsblatt*.

68 — See inter alia *BAT*, paragraph 64, *Arnold André*, paragraph 39, and *Swedish Match*, paragraph 38.

69 — This was pointed out by the Court inter alia in Case C-376/98 *Germany v Parliament Council*, paragraph 97 (cited in point 96 of this Opinion), *BAT*, paragraph 67, *Arnold André*, paragraphs 38 and 40, and *Swedish Match*, paragraphs 37 and 39.

110. It may be inferred that the differences existing when the contested decision was adopted between national rules on advertising and sponsorship in respect of tobacco products, in particular in the press, radio or information society services sectors, genuinely impede the free movement of goods and the freedom to provide services.<sup>70</sup>

111. In addition and in any event, it must be acknowledged that, in view of the trend in those rules towards ever greater restrictions (which can only become more marked following the entry into force of the WHO Convention), it was highly likely that such obstacles would arise and grow.<sup>71</sup>

112. As far as *press products* are concerned, it should be borne in mind that, on the date in question, several Member States already prohibited advertising of tobacco products on such media (including media from other

Member States) or were about to introduce a ban.<sup>72</sup> Moreover, recent legislative reforms confirm that a strong tendency, which is not refuted at all, was becoming apparent. The new Spanish rules which strengthen significantly the restrictions that had been laid down up until then with regard to the advertising of such products are clear evidence of this.<sup>73</sup>

113. Such national rules, which impose certain conditions that must be met by press

70 — Furthermore, it is interesting to note that the Commission Green Paper on Commercial Communications in the Internal Market, produced in 1996 (which led to a broad consultation of various interested groups) had already shown that the divergence in national rules on advertising and sponsorship in general was seen by operators (advertising agencies, advertisers, press and broadcasting bodies) as a significant source of difficulties in undertaking cross-border activities in this field to almost the same extent as difficulties resulting from specific cultural aspects of a certain Member State (COM(1996) 192 final (part 1)).

71 — See, to that effect, Case C-376/98 *Germany v Parliament and Council* (paragraph 97, concerning press products).

72 — This can be seen from the comparative review of legislation at point 4 of the explanatory memorandum for the proposal for a directive (see point 97 of this Opinion). According to that review, the Kingdom of Sweden, the French Republic, the Italian Republic and the Portuguese Republic banned all advertising of tobacco products in the press, including in press from other Member States. Ireland and the Kingdom of the Netherlands were about to do the same. According to the same review, of all the Member States at the time, only the Republic of Finland expressly provided that foreign printed publications whose main purpose was not the advertising of tobacco were not subject to such a prohibition, whilst the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Denmark and the Kingdom of Belgium, which were about to strengthen their rules in this area, appeared to be planning a similar derogation.

73 — Spanish Law of 26 December 2005 introducing health measures to combat nicotine addiction and regulating the sale, supply, consumption and advertising of tobacco products (*Ley de medidas sanitarias frente al tabaquismo y reguladora de la venta, el suministro, el consumo y la publicidad de los productos del tabaco* (BOE No 309, 27 December 2005, p. 42241)). Article 9(1) of that law lays down the principle that sponsorship in respect of tobacco products and any form of advertising and promotion of such products, by any means or medium (including using vending machines and information society services) are prohibited, save for a non-exhaustive list of exceptions. As regards press products, the prohibition does not cover publications aimed exclusively at professionals in the tobacco trade or publications containing advertising of tobacco products that are published or printed in third countries, where those publications are not intended primarily for the Community market, except where they are targeted primarily at minors. These new provisions are very close to those laid down in Article 3 of the contested directive. To understand how much progress has been made with the Spanish rules in this regard, see point 4.1.3 of the explanatory memorandum for the proposal for a directive.

products in order to be marketed, have a direct impact on the actual content of those products.

equivalent effect to quantitative restrictions on imports.<sup>76</sup>

114. Those rules seek to preclude the insertion of advertisements in media such as newspapers, periodicals or magazines, of which they would form an integral part. The rules therefore require press undertakings established in other Member States, which would not be subject to such rules, to modify accordingly the content of publications which did not satisfy those conditions.

116. In any event, even if the prohibition or the limitation of press advertising of tobacco products were considered to be concerned with simple selling arrangements for those products (to be distinguished from press products), the fact remains that, from this point of view too, such measures restrict significantly access to the market in tobacco products which are imported from other Member States, by having a greater effect on the marketing of those products than on the marketing of domestic products.

115. It follows that, as was held in *Familia-press*,<sup>74</sup> we tend to think that, even though they are directed against a method of sales promotion for goods, the prohibitions and restrictions on advertising of tobacco products do not merely govern simple selling arrangements within the meaning of *Keck and Mithouard*,<sup>75</sup> with the result that they are not liable to fall outside the prohibition under Article 28 EC on measures having

117. As Advocate General Jacobs pointed out in his Opinion in *Gourmet International Products*,<sup>77</sup> advertising plays a major role in launching a new product or in penetrating a new market. In reality, going beyond increasing the consumption of certain products by expanding the customer base, advertisers seek above all to persuade those who already do consume such a product to switch brands, on the assumption that in the absence of advertising there would be less likelihood of consumers abandoning their consumer habits.

74 — Case C-368/95 [1997] ECR I-3689, see paragraphs 11 and 12. The Austrian rules at issue in that case prohibited publishers of periodicals from inviting consumers to take part in draws. The effect of those rules was to prohibit the distribution on Austrian territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions.

75 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

76 — Paragraphs 15 and 16 of *Keck and Mithouard*.

77 — Case C-405/98 [2001] ECR I-1795, point 36.

118. This analysis, which was developed with regard to Swedish rules which prohibited the insertion of advertisements for alcoholic beverages, in particular in periodicals aimed at consumers, can be applied to national prohibitions or limitations on advertising of tobacco products in press items such as newspapers, periodicals and magazines which are also aimed at consumers. This holds *a fortiori* because consumer habits prove to be particularly persistent with respect to tobacco products, where consumers remain attached to the product of one brand or another (in most cases to a single product) which they chose initially and which has become familiar to them.

119. It follows that, as the Court ruled in *Gourmet International Products*, following the logic of the ruling in *Keck and Mithouard*, such measures, which have a greater effect on the marketing of tobacco products from other Member States than the marketing of domestic products, constitute an obstacle to the free movement of goods, prohibited under Article 28 EC.<sup>78</sup>

120. It can be inferred that, like national rules on the manufacture, presentation and

sale of tobacco products,<sup>79</sup> rules on advertising — in the press — of such products are, by their nature, liable, in the absence of harmonisation at Community level, to constitute obstacles to the free movement of goods.

121. In addition to this effect on the free movement of press products or tobacco, there is also the effect on the freedom to provide advertising services.

122. A Member State's rules prohibiting or limiting the insertion of advertisements in the press for goods like tobacco products restrict the possibility for press undertakings established in that State to offer advertising space in their publications to advertisers established in other Member States.<sup>80</sup> It should be added that such rules have a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market for tobacco products.<sup>81</sup>

123. In view of all these arguments relating to press products, I consider that the

78 — See paragraphs 18 to 25.

79 — *BAT*, paragraph 64, *Arnold André*, paragraph 39, and *Swedish Match*, paragraph 38.

80 — See, along similar lines, *Gourmet International Products*, paragraph 38.

81 — *Ibid.*, paragraph 39.

differences existing when the contested directive was adopted between the national rules on advertising — in the press — of tobacco products (which generally seek to limit or prohibit such advertising) inevitably have the effect of impeding not only the free movement of goods, but also the freedom to provide services. Moreover, having regard to the trend in these national rules towards ever greater restrictions, it was highly likely that such obstacles would intensify and extend to new Member States.

electronic commerce).<sup>82</sup> These national rules also reflect the growing public awareness that consumption of tobacco products is harmful to health, since they seek to prohibit or to limit advertising of such products.

124. In my view, a similar conclusion must be drawn as regards advertising of tobacco products on the *radio* and in *information society services*.

126. However, such measures have an effect on the cross-border supply of advertising space by radio broadcasters or providers of information society services established in one Member State (in which those rules are in force) to advertisers established in another Member State (where such rules do not exist).

127. In addition, these prohibitions or limitations of advertising of tobacco products are accordingly liable to preclude the circulation between Member States of radio programmes and electronic communications (covered by information society services) where those programmes or communications contain advertisements for such products.

125. As we have seen, when the contested directive was adopted, many Member States had already laid down legislation on the subject or were about to do so, whether with regard to radio (extending beyond the TVWF directive, which prohibits all forms of television advertising for tobacco products) or with regard to information society services (extending beyond the directive on

82 — Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ 2000 L 178, p. 1). That directive, which was adopted on the basis of Article 95 EC, includes certain provisions concerning commercial communications which, even though they do not deal specifically with advertising of tobacco products, could contribute, along with the measures under the WHO Convention, to the adoption of national rules on this subject. See, for example, the Spanish Law of 26 December 2005, cited in footnote 73 to this Opinion.

128. Consequently, such national rules, which already existed when the contested directive was adopted or were in all likelihood about to be introduced, constitute actual or potential obstacles to the freedom to provide services.

fully capable of justifying intervention by the Community legislature on the basis of Article 95 EC in order to put an end to the divergent development of national rules in this field, which was contributing significantly to the fragmentation of the internal market.

129. The same was true as regards sponsorship of radio programmes by operators on the tobacco market. This activity was affected by the trend of national laws towards ever greater restrictions on the means of promotion for such products. Differences between national rules in this regard had already emerged when the contested directive was adopted or were in all likelihood about to emerge.

132. In these circumstances, it is not really important to know whether the (existing or future) differences between those rules were also liable to cause distortions of competition within the Community.

130. Such differences are liable to restrict the freedom to provide services, in particular by preventing radio broadcasters established in one Member State (where a prohibition is in force) from benefiting, as service recipients, from sponsorship from companies that produce or market tobacco products which are established in another Member State (where such a prohibition does not exist).

133. However, to ensure that the conditions governing recourse to Article 95 EC as a legal basis for the contested directive have been fulfilled in the areas covered by Articles 3 and 4 thereof, it should be verified, lastly, that Articles 3 and 4 genuinely have as their objective the elimination or the prevention of such obstacles.

(iii) The objective of Articles 3 and 4 of the contested directive

131. All these obstacles to the freedom to provide services in the radio and information society services sectors and the obstacles to the free movement of goods and the freedom to provide services in the press sector were

134. In my view, Articles 3 and 4 of the contested directive, in conjunction with Article 8 of the directive, genuinely have as



their objective (as provided for in Article 1 thereof),<sup>83</sup> first, to eliminate existing obstacles to the free movement of goods and to the freedom to provide services and, secondly, to prevent the likely emergence of new obstacles.

135. It is true that that immediately prompts the question of how the prohibition of certain forms of advertising and sponsorship in respect of tobacco products under Articles 3 and 4 is likely to contribute to eliminating barriers to trade in this field. Would not the intervention of the Community legislature ultimately amount to maintaining such obstacles rather than removing them, replacing those based on national rules with obstacles stemming from Articles 3 and 4?

136. As paradoxical as this situation might appear, the fact remains that in several respects Articles 3 and 4 of the contested directive genuinely contribute to eliminating barriers to trade, both in goods and in services.

<sup>83</sup> — Article 1 of the contested directive reads as follows:

‘1. The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products and their promotion:  
 (a) in the press and other printed publications;  
 (b) in radio broadcasting;  
 (c) in information society services; and  
 (d) through tobacco related sponsorship, including the free distribution of tobacco products.  
 2. This Directive is intended to ensure the free movement of the media concerned and of related services and to eliminate obstacles to the operation of the Internal Market.’

137. First of all, as the Court had already acknowledged in Case C-376/98 *Germany v Parliament and Council*, the prohibition of the advertising of tobacco products in periodicals, magazines and newspapers (as laid down in Article 3(1) of the contested directive) seeks to ensure the free movement of press products, on the lines of the TVWF directive which (as has been shown) prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes.<sup>84</sup>

138. The introduction of such a prohibition, which is designed to apply uniformly throughout the Community, seeks to prevent the movement of press products within the Community being impeded at the discretion of each Member State on the basis of some existing or future national rules in this field.

139. Quite apart from the benefit of a measure of this kind, in terms of the comprehensibility and stability of the legal framework governing the marketing of press products, which can only help to guarantee their free movement, it should be added, more specifically, that Article 3(1) of the contested directive expressly accepts the insertion of advertising of tobacco products in certain publications, in particular in those

<sup>84</sup> — See paragraph 98 (cited in point 19 of this Opinion).

intended exclusively for professionals in the tobacco trade.<sup>85</sup> Thus, Article 3(1) effectively lays down the principle that publications of this type are intended to circulate freely within the Community, even where they contain advertising for tobacco products.

140. Furthermore, unlike the annulled directive, Article 8 of contested directive expressly provides that 'the Member States shall not prohibit or restrict the free movement of products ... which comply with this Directive'.

141. This is the case *a fortiori* since, again, unlike the preceding directive,<sup>86</sup> the contested directive does not include a safeguard clause giving the Member States the option, provided they comply with the Treaty, to lay down stricter requirements (than those provided for in the directive in question) concerning advertising or sponsorship in respect of tobacco products as they deem necessary to guarantee the health protection of individuals.

142. Thus, it is contrary to Article 8 of the contested directive *inter alia* for the Member States to impede the movement within the Community of publications intended exclusively for professionals in the tobacco trade solely on the ground that they contain advertisements for tobacco products since, in this specific case, those press products would be perfectly consistent with Article 3(1) of that directive.

143. By Article 8, the Community legislature ensured it took account of the lessons learned from Case C-376/98 *Germany v Parliament and Council*. The absence of a free movement clause, combined with the existence of a safeguard clause, undoubtedly had a significant bearing on the Court's decision to annul Directive 98/43.<sup>87</sup>

144. The importance that the Court has attached to the existence of a free movement clause was subsequently confirmed in *BAT*, with regard to Directive 2001/37 (concerning the manufacture, presentation and sale of tobacco products). In that judgment, the Court observed that, unlike the annulled directive, that directive contained a provision setting out a free movement clause and it inferred that '[b]y forbidding the Member States to prevent, on grounds relating to the

85 — These provisions are identical to those contained in Article 3(5), first indent, of the annulled directive.

86 — See Article 5 of the annulled directive (mentioned in point 13 of this Opinion).

87 — See paragraphs 101 to 104 of the judgment (cited in point 22 of this Opinion).

matters harmonised by [Directive 2001/37], the import, sale or consumption of tobacco products which do comply, that provision gives the Directive its full effect in relation to its object of improving the conditions for the functioning of the internal market’.<sup>88</sup>

145. A similar conclusion must be drawn with regard to the contested directive. Article 8 of the directive gives its full effect in relation to its objective, set out in Article 1(2), of improving the conditions for the functioning of the internal market.<sup>89</sup>

146. As has just been shown, that is the case with regard to the free movement of goods. It is also the case for the freedom to provide services, which is also mentioned in Article 8 and whose objective is pursued accordingly by Articles 3 and 4 of the contested directive.

147. First of all, Article 3(1), first subparagraph, of that directive<sup>90</sup> seeks to authorise

the provision of advertising space in publications intended exclusively for professionals in the tobacco trade by press undertakings established in one Member State to advertisers established in another Member State. Article 3(1), first subparagraph, is also intended to authorise the provision of advertising services by which advertising agencies established in one Member State provide advertisers established in another Member State with services involving the insertion of advertisements for tobacco products in publications which are printed and published in third countries, where those publications are not principally intended for the Community market. By allowing such services to be performed, Article 3(1), first subparagraph, contributes to eliminating the existing or likely obstacles with regard to advertising of tobacco products.

148. In addition, and above all, in more general terms the definition of a prohibition of the forms of advertising and sponsorship at issue under Articles 3 and 4 of the contested directive, which is intended to apply uniformly throughout the Community, seeks to prevent the freedom to provide services, in the media sector concerned, being impeded at the discretion of each Member State on the basis of some existing or future national rules in this field.

<sup>88</sup> — Paragraph 74.

<sup>89</sup> — It should be noted that Article 1(2) states that ‘[t]his Directive is intended to ensure the free movement of the media concerned and of related services and to eliminate obstacles to the operation of the Internal Market’.

<sup>90</sup> — It should be noted that Article 3(1), first subparagraph, provides that ‘[a]dvertising in the press and other printed publications shall be limited to publications intended exclusively for professionals in the tobacco trade and to publications which are printed and published in third countries, where those publications are not principally intended for the Community market’.

149. This applies in particular to the circulation between Member States of radio pro-

grammes and electronic communications covered by information society services. On the lines of Article 13 of the TVWF directive, which prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes,<sup>91</sup> Articles 3(2) and 4(1) of the contested directive, which prohibit advertising of such products on the radio and in information society services, seek to promote the free circulation of radio programmes and information society services.

adoption of Article 3(2) is manifestly justified.<sup>93</sup>

151. This contribution made by Articles 3 and 4 of the contested directive together to eliminating obstacles to the freedom to provide services is reinforced by the free movement clause under Article 8 of the directive. By preventing the Member States from prohibiting or restricting the free movement of services, like the free movement of goods, which comply with the directive, Article 8 gives the directive its full effect in relation to its objective of improving the conditions for the functioning of the internal market.

150. Moreover, in any event, as the Parliament, the Council and the Commission have pointed out, the prohibition on advertising of tobacco products in information society services appears necessary, in the light of the media convergence phenomenon, to prevent circumvention, by electronic means, of the prohibition of such advertising in printed publications.<sup>92</sup> As has already been explained, this prohibition genuinely has as its objective to eliminate barriers to trade, inter alia, in the field of the free movement of goods. Article 3(2) of the contested directive therefore in any case contributes to the functioning of the internal market with the result that recourse to Article 95 EC for the

152. In my view, it follows from all these arguments that the conditions for recourse to Article 95 EC as a legal basis for the contested directive were fulfilled for the adoption of Articles 3 and 4 without it being necessary to examine whether those articles also contribute to removing any distortions of competition.

153. Contrary to the claims made by the applicant, this conclusion cannot be called

91 — This was pointed out by the Court in Case C-376/98 *Germany v Parliament and Council*, paragraph 98.

92 — See point 73 of this Opinion.

93 — For similar reasoning, see Case C-376/98 *Germany v Parliament and Council*, paragraph 100, and *BAT*, paragraph 82.

into question by the fact that, as is shown by the third, eighth and ninth recitals of the contested directive, the protection of public health largely prompted the choices made by the Community legislature when the directive was adopted, in particular as regards Articles 3 and 4 thereof. Reference is made in this regard to the Court's consistent case-law which has already been set out.<sup>94</sup>

154. In my view, that conclusion likewise cannot be called into question by the applicant's view that the prohibition laid down in Articles 3(1) and 4(1) of the contested directive essentially concerns local and national advertising media which do not circulate between Member States.

155. First of all, I am not convinced that the expression 'printed publications' used in Article 3 and in Article 1(1)(a) of that directive should be interpreted as broadly as the applicant claims, that is to say as covering bulletins produced by local (sports, social, cultural, political or religious) associations, programmes for events and exhibitions (particularly cultural ones), posters, telephone directories, various leaflets and pro-

spectuses, and not just newspapers, periodicals and magazines.

156. Whilst in itself that expression may suggest that the prohibition laid down in Article 3(1) extends to publications of all kinds which convey messages or information on a paper medium, in order to interpret such an expression it must be placed in its context.

157. In this regard, it must be borne in mind that the contested directive was adopted in a very particular context, following the annulment by the Court, shortly before, of the preceding directive adopted on the subject in its entirety

158. In Case C-376/98 *Germany v Parliament and Council*, which ruled to that effect, the Court stated that '[i]n principle ... a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products',<sup>95</sup> whilst pointing out that the prohibition of advertising in certain advertis-

94 — See points 91 and 92 of this Opinion.

95 — Paragraph 98.

ing media, including posters, in no way helped to facilitate trade within the internal market.<sup>96</sup>

159. In these circumstances, it would be surprising if the Community legislature, when its action had been censured by the Court through the annulment of the preceding directive in its entirety, decided not to take account of this case-law when it adopted the contested directive, thereby exposing itself to the risk of having its action challenged once again.

160. In my view, this holds *a fortiori* since the scope of the prohibition on advertising and sponsorship in respect of tobacco products laid down in the annulled directive was reduced considerably by the contested directive in several respects, specifically in order to take account of Case C-376/98 *Germany v Parliament and Council*, which is also mentioned in the 16th recital to the latter directive. The almost general prohibition laid down by the preceding directive was succeeded by a prohibition limited to certain exhaustively listed forms of advertising or sponsorship in respect of those products.

161. Thus, that prohibition does not now cover the advertising media referred to in

paragraph 99 of that judgment, such as parasols, ashtrays and other articles used in hotels, restaurants and cafés, and advertising spots in cinemas. Similarly, the prohibition of event sponsorship was limited to events or activities having a cross-border effect (Article 5(1) of the contested directive). Extending those provisions, the prohibition of the free distribution of tobacco products was reduced to only the context of this kind of sponsorship (Article 5(2) of the directive).

162. These different measures to limit the prohibition on advertising and sponsorship in respect of tobacco products, the insertion of a free movement clause and the corresponding removal of a safeguard clause clearly reflect the Community legislature's desire to comply with the requirements laid down by the Court in Case C-376/98 *Germany v Parliament and Council*.

163. Thus, it is difficult to see why, other than to contradict itself and to contradict the Court, the Community legislature would have wanted to give the prohibition on advertising laid down in Article 3(1) of the contested directive an interpretation as broad as that proposed by the applicant.

164. The fourth recital to that directive supports my view in this regard. That recital

<sup>96</sup> — See paragraph 99.

(my emphasis) states that '[t]he circulation in the Internal Market of *publications such as periodicals, newspapers and magazines* is subject to an appreciable risk of obstacles to free movement as a result of Member States' laws, regulations and administrative provisions which prohibit or regulate tobacco advertising in *those media*' and that '[i]n order to ensure free circulation throughout the Internal Market for all *such media*, it is necessary to limit tobacco advertising therein to those *magazines and periodicals which are not intended for the general public* such as publications intended exclusively for professionals in the tobacco trade and to publications printed and published in third countries, that are not principally intended for the Community market'.

165. It can be inferred from that recital, which echoes Article 3(1) of the contested directive, that that article applies only to newspapers, periodicals and magazines (which were the only items mentioned in paragraph 98 of Case C-376/98 *Germany v Parliament and Council*), that is to say periodicals intended for the general public.

166. Moreover, that was provided for in the proposal for a directive. Following the fourth recital, which also made reference to publications such as periodicals, newspapers and magazines, Article 1, first paragraph, point (a) and Article 3 of that proposal mentioned only advertising 'in the press and other printed publications' whilst Article 3 was already specifically entitled 'Advertising in printed media and information society services'. In my view, the fact that that title was

retained corroborates the interpretation that, contrary to the claims made by the applicant, the prohibition on advertising of tobacco products 'in printed publications' under Article 3(1) of the contested directive is limited to newspapers, periodicals and magazines, in accordance with the requirements laid down by the Court in Case C-376/98 *Germany v Parliament and Council*, as the basis for recourse to Article 100a of the Treaty.

167. Lastly, contrary to the claims also made by the applicant, it does not matter, in my view, as regards recourse to Article 95 EC as a legal basis for the contested directive, that the prohibition under Article 3(1) does not apply exclusively or mainly to cross-border situations.

168. In *Österreichischer Rundfunk and Others*, the Court ruled, with regard to Directive 95/46, that 'recourse to Article 100a of the Treaty as legal basis does not presuppose the existence of an actual link with free movement between [the] Member States in every situation referred to by the measure founded on that basis'.<sup>97</sup> In support of that assertion, it pointed out that, in accordance with now well-established case-law, 'what matters is that the measure adopted on that basis must actually be

<sup>97</sup> — Joined Cases C-465/00, C-138/01 and C-139/01 [2003] ECR I-4989, paragraph 41.

intended to improve the conditions for the establishment and functioning of the internal market'.<sup>98</sup> It added that 'a contrary interpretation could make the limits of the field of application of the directive [in question] particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations'.<sup>99</sup>

169. This ruling was confirmed by the Court in *Lindqvist*,<sup>100</sup> concerning the same Directive 95/46.

170. In my view, the considerations applying to that directive also apply to the contested directive.

171. Like the Parliament, the Council and the Commission,<sup>101</sup> I consider that any limitation of the prohibition on advertising

of tobacco products in the press only to publications having a cross-border circulation within the Community, and not to those which are deemed to be purely local or national, could make the limits of the field of application of such a prohibition particularly unsure and uncertain. This prospect would have been contrary to both the requirements of legal certainty and the objective pursued by the contested directive which, under Article 1 thereof, is 'to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products and their promotion' in order to 'ensure the free movement of the media concerned and of related services and to eliminate obstacles to the operation of the Internal Market'.

172. The same considerations must be made with regard to radio programmes. Moreover, Article 13 of the TVWF directive, which provides that '[a]ll forms of television advertising and teleshopping for cigarettes and other tobacco products shall be prohibited' is intended to apply whatever the coverage (transnational or purely domestic) of the programmes in question.

173. I conclude that, in the areas covered by Articles 3 and 4 of the contested directive, that directive was rightly adopted on the

98 — *Idem*. The Court referred to Case C-376/98 *Germany v Parliament and Council*, paragraph 85, and *BAT*, paragraph 60.

99 — *Österreichischer Rundfunk and Others*, paragraph 42.

100 — Case C-101/01 [2003] ECR I-12971 (paragraphs 40 and 41). See also, with regard to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 1), Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 34, and my Opinion in that case, points 197 to 203.

101 — See point 68 of this Opinion.



basis of Article 95 EC. Consequently, the pleas alleging that the choice of that legal basis was incorrect must be rejected.

(first recital) or to the cross-border nature of such media (sixth recital) would not be sufficient to give grounds for the Community legislature's competence and would not allow the Court to exercise judicial review on this point.

174. In furtherance of these arguments, it should be examined whether the plea alleging a breach of the obligation to state reasons under Article 253 EC is well founded.

*B — The plea alleging a breach of the obligation to state reasons under Article 253 EC*

175. The applicant claims that sufficient reasons are not given for Articles 3 and 4 of the contested directive, with the result that they infringe Article 253 EC.

176. With regard to the prohibition laid down in Article 3(2) of that directive, concerning information society services, and the prohibition set out in Article 4(1) of that directive, relating to radio programmes, it argues that no mention is made of either the existence of actual barriers to trade or the existence of distortions of competition. Simply referring to the existence of differences between national rules

177. As regards the prohibition laid down in Article 3(1) of the contested directive concerning the press and other printed publications, the applicant claims that the general trend of such differences and the statement that certain barriers to trade have already been encountered in that sector (first recital), which is incorrect in its view, do not satisfy the requirements governing the statement of reason in accordance with paragraph 84 of Case C-376/98 *Germany v Parliament and Council*.<sup>102</sup> It adds, first of all, that no reference is made to the existence of any appreciable distortions of competition and, secondly, that no explanation is given to justify the extension of the prohibition in question to situations having no cross-border character.

178. The Parliament, the Conseil and the Commission, as well as the other interveners, contest that plea, relying on the Court's case-law regarding the scope of the obligation to

<sup>102</sup> — The applicant points out that in paragraph 84 of that judgment, the Court ruled that '[i]f a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory'.

state reasons and pointing out that it does not matter than no reference is made to the existence of any distortions of competition since the directive genuinely has as its objective to eliminate barriers to trade.

sued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution'.<sup>104</sup>

179. I also take the view that this plea is not well founded.

180. It should be borne in mind that, as the Court has consistently held, 'while the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, it is not required to go into every relevant point of fact and law'.<sup>103</sup>

182. As regards the contested directive, the 1st, 2nd, 3rd and 12th recitals thereof clearly show that, by approximating the rules applicable to certain forms of advertising and sponsorship in respect of tobacco products, the prohibitions on advertising that it introduces seek to eliminate obstacles to the free movement of goods or services (that serve as the support for such advertising or sponsorship) which result from the differences between existing national rules in the area (prompted by the desire to avoid a situation where young people begin smoking at an early age as a result of promotion and become addicted), whilst ensuring a high level of protection of public health.

181. It is also established that 'the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question [so that] [i]f the contested measure clearly discloses the essential objective pur-

183. The reasons that prevailed during the adoption of these measures are then clarified for each of the forms of advertising and sponsorship mentioned, inter alia, in Articles 3 and 4 of the contested directive. That is the case for advertising contained in certain publications (fourth recital) and for the radio advertising and advertising trans-

103 — See, inter alia, *Arnold André*, paragraph 61, *Swedish Match*, paragraph 63, and *Alliance for Natural Health and Others*, paragraph 133. See also Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29, and *BAT*, paragraph 165.

104 — See, inter alia, *Arnold André*, paragraph 62, *Swedish Match*, paragraph 64 and *Alliance for Natural Health and Others*, paragraph 134. See also Case C-100/99 *Italy v Council and Commission* [2001] ECR I-5217, paragraph 64, and *BAT*, paragraph 166.

mitted by information society services, which are shown to be cross-border in character and attractive to young consumers (sixth recital). It is also the case for certain types of sponsorship having cross-border effects, such as sponsorship of radio programmes, the prohibition of which is presented as a means of preventing the restrictions placed on direct forms of advertising being circumvented (fifth recital).

184. In my view, those recitals show the objective essentially pursued by the Parliament and the Council, with the result that they are sufficient to satisfy the obligation to state reasons under Article 253 EC.

185. This is the case in particular because the proposal for a directive drafted by the Commission, which forms part of the context in which the contested directive was adopted, is accompanied by an explanatory memorandum which includes substantial arguments on the points of fact and law which governed its adoption, in particular, as has been shown, in terms of comparative law.

186. Nevertheless, it should be noted that in Case C-376/98 *Germany v Parliament and Council* the Court had already recognised that 'in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to

an appreciable increase in tobacco consumption, it is probable that obstacles to the free movement of press products will arise in the future' and that, consequently, '[i]n principle, therefore, a directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products, on the lines of [the TVWF Directive]'.<sup>105</sup> In accordance with these considerations laid down in case-law, which must be taken into account as arguments relating to context, a detailed statement of reasons relating to the prohibition on advertising of such products in printed publications (laid down in Article 3(1) of the contested directive) is even less necessary.

187. Consequently, in my view, the wording and the context of that directive, first of all, enable the persons concerned to ascertain the reasons for the prohibitions laid down in Articles 3 and 4 of that directive and, secondly, give the Court all the necessary information so that it is able to exercise judicial review concerning the choice of Article 95 EC as a legal basis of the contested directive (in the areas covered by Articles 3 and 4). This is proven by the analysis that has just been expounded regarding the pleas alleging that the choice of that legal basis was incorrect.

<sup>105</sup> — Paragraphs 97 and 98.

188. I conclude that the plea alleging a breach of the obligation to state reasons in the areas covered by Articles 3 and 4 of the contested directive must also be rejected.

was replaced [in the French version] by 'printed media'. The same was true of Article 10(2) of that directive which was added unilaterally by the Council<sup>106</sup> and Article 11 of the directive, which was substantively amended under the same circumstances.<sup>107</sup>

*C — The plea alleging an infringement, when the contested directive was adopted, of the rules laid down in Article 251 EC relating to the codecision procedure*

189. The applicant claims that the contested directive was adopted in contravention of the rules laid down in Article 251 EC, which govern the codecision procedure. In its view, the Council did not merely adopt the proposal for a directive in the version amended by the Parliament in accordance with the procedure set out in the first indent of the second subparagraph of Article 251(2) EC, but made substantive amendments to that proposal on which the Parliament did not take a decision, whereas under the third indent of the second subparagraph of Article 251(2) EC, the Council should have adopted a common position and communicated it to the Parliament, which would then take a decision on it.

190. In the applicant's view, such a procedural irregularity was committed with regard to Article 3(1) of the contested directive, where the expression 'printed publications'

191. The Parliament, the Council, the Commission, the Kingdom of Spain and the French Republic consider that this plea should be rejected.

192. The Council, which is directly concerned by this plea, considers that the objection concerning Articles 10(2) and 11 of the contested directive is irrelevant since those articles have already been corrected accordingly.<sup>108</sup> In addition, in any event, that objection falls outside the scope of the present action since it is limited to seeking

106 — It added to Article 10 of the contested directive the following paragraph 2: 'Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.'

107 — The date of entry into force of the contested directive was moved forward as follows: initially set for the 20th day following that of its publication in the *Official Journal of the European Union*, it was then prescribed for the date of publication.

108 — Corrigendum to the contested directive (OJ 2004 L 67, p. 34). Under that corrigendum, which was made after the present action was brought, Article 10(2) of the contested directive was deleted and Article 11 of the directive was to read as follows: '[t]his Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*' instead of '[t]his Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*'.

the annulment of Articles 3 and 4 of the directive.

tive was adopted), which would soon rise to more than 20 with the enlargement of the European Union.

193. With regard to Article 3(1) of the directive, the Council claims that no amendment was made to the English version of the directive which was used during the negotiations and that, whilst amendments were made in other versions of the directive, they were made by lawyer-linguists in accordance with their duties merely in order to align the different language versions of the contested directive to the English reference version, with the result that such amendments cannot be regarded as substantive amendments. In addition, in its final version, that directive was signed both by the Council and by the Parliament. The directive was therefore fully approved.

194. The Parliament adds to this argument, with which it concurs, that the English version is not the only version which was not subject to amendments (this was also the case for the Spanish and Dutch versions) and that the other versions which were actually amended were amended only slightly in order to harmonise the different language versions. The Parliament also takes the view that guaranteeing that the text approved by it and the text finally adopted by the codecision procedure are strictly identical is incompatible with the drafting quality requirements resulting from the existence of 11 official languages (when the contested direc-

195. The Commission, the Kingdom of Spain and the French Republic share this view.

196. In my view, from the outset it is important to set aside the question relating to compliance with the rules laid down in Article 251 EC when Articles 10 and 11 of the contested directive were adopted. This question has become redundant because of the corrigendum made jointly by the Parliament and the Council after the plea in question had been raised. Moreover, even if no such corrigendum had been made, I cannot see how the objection raised by the applicant regarding Articles 10 and 11 could justify the annulment of Articles 3 and 4 of the contested directive, which are the only articles whose validity is being challenged.

197. As regards Article 3(1) of the contested directive, whilst amendments were indeed made in certain language versions, those amendments do not in my view exceed the limits applicable when the various language versions of a Community measure are harmonised.

198. I conclude that the plea alleging an infringement, when the contested directive was adopted, of the rules laid down in Article 251 EC must also be rejected.

199. It should lastly be examined whether the final plea relied on by the applicant, alleging a breach of the principle of proportionality, is well founded.

*D — The plea alleging a breach of the principle of proportionality*

1. Arguments of the parties

200. The applicant claims that the prohibitions laid down in Articles 3 and 4 of the contested directive are disproportionate. In support of this view, it contends, once again, that those prohibitions essentially cover purely local or regional situations and that, in the rare cases where they apply to cross-border situations, the trade in question does not encounter any current or potential obstacle liable to justify prohibitions or, at least, prohibitions that are as general as those laid down in Articles 3 and 4. In this regard, it states that those articles should have been

limited to advertising media circulating between the Member States, along the lines of the provisions laid down in Article 3(1) of the contested directive for publications originating from third countries not principally intended for the Community market (which are not covered by the prohibition in question) and in Article 5 of that directive for sponsorship of events (which is subject to that prohibition only if those events have cross-border effects).

201. The applicant also claims that particular attention should have been paid to compliance with the principle of proportionality since the prohibitions in question seriously impinge on a fundamental right like freedom of expression.

202. Since advertising is defined in Article 2(b) of the contested directive as ‘any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco product’, the prohibition of such advertising (in Articles 3 and 4 of that directive) is intended to apply broadly, even extending to ‘diversification’ products (that is to say products marketed under a tobacco brand without being tobacco products) and to certain press items or other publications (written by journalists on subjects linked with the production or distribution of tobacco products).

203. Thus, the prohibitions in question are liable to deprive the press bodies of considerable advertising revenue, which forms a substantial part of their income, above all in Member States like Germany where the sector in question does not receive government subsidies. Such a loss of earnings would result in a marked reduction in editorial content and even the closure of some publishers, which would contribute to weakening significantly the pluralism of the press and, consequently, freedom of expression.

204. In the view of the applicant, whilst the fundamental right to that freedom could be restricted by a pressing social need, such as the protection of public health against the dangers of nicotine addiction, such a restriction would nevertheless be acceptable only in a situation, which it challenges, where there were no less restrictive means of satisfying such a need. The applicant concludes that, from this point of view too, the prohibitions in question are disproportionate.

205. The Parliament, the Council, the Commission, the Kingdom of Spain and the French Republic consider that this plea should be rejected.

206. In support of this, they argue that, as was held in *BAT*, the Community legislature has a broad discretion in this regard with the result that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate. They add that in *Karner*<sup>109</sup> the Court acknowledged that review of the legality of national rules having regard to freedom of expression is also limited particularly in a field as complex and fluctuating as advertising. The same should hold for Community rules like the contested directive.

207. In the context of such review, they consider that the prohibitions laid down in Articles 3 and 4 of the directive are not manifestly disproportionate. Articles 3 and 4 do not lay down a total prohibition on advertising or sponsorship, but a partial prohibition, which, contrary to the claims made by the applicant, cannot be intended to preclude indirect advertising, diversification products or the publication of press items relating to tobacco products.

208. According to the Parliament, the Council, the Commission, the Kingdom of Spain

<sup>109</sup> — Case C-71/02 [2004] ECR I-3025.

and the French Republic, limiting the prohibitions laid down in Articles 3 and 4 of the contested directive even further by excluding from their scope any situations not having cross-border effects is contrary, first of all, to the objectives referred to in Article 95(1) EC, since it would produce distortions of competition and legal uncertainty and, secondly, the requirement laid down in Article 95(3) EC for the Community legislature to ensure a high level of protection of public health. In this regard, the French Republic states that coherence should be preserved, in terms of the level of protection of public health, between the contested directive (as regards the promotion of tobacco products) and Directive 2001/37 (as regards warnings on the dangers of those products).

onerous, and that the disadvantages caused must not be disproportionate to the aims pursued.<sup>110</sup>

210. However, in *BAT*,<sup>111</sup> the Court recognised that, with respect to judicial review with a view to verifying that the principle of proportionality has not been breached, 'the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments [with the result that] the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.

## 2. Assessment

209. The Court has consistently held that the principle of proportionality, which is one of the general principles of Community law, requires that means used by a Community measure are appropriate for attaining the objective in question and do not exceed the limits of what is necessary in order to attain that objective, it being understood that when there is a choice between several appropriate measures recourse must be had to the least

211. In my view, the considerations applying to the manufacture, presentation and sale of tobacco products, referred to in that judgment, must also apply to advertising and sponsorship in respect of those products, covered by Articles 3 and 4 of the contested directive.

110 — See, inter alia, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; and Case C-157/96 *National Farmers' Union and Others* [1994] ECR I-2211, paragraph 60.

111 — Paragraph 123. See, inter alia, with regard to other areas, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56; and *National Farmers' Union and Others*, paragraph 61.



212. Whilst it is commonly recognised that these forms of promotion of tobacco products have an effect on the consumption of such products, it is not easy, on the basis of available knowledge, to measure precisely the real or potential impact of these forms of advertising or sponsorship and, conversely, the impact of their prohibition in certain media on the level of consumption of the products in question.<sup>112</sup> These are delicate, complex questions which entail political, economic and social choices on the part of the Community legislature.

213. A similar approach was adopted by the European Court of Human Rights in examining whether a breach of the principle of freedom of expression by a national measure restricting advertising is proportionate.

214. Whilst that Court has acknowledged that freedom of expression, guaranteed in Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), does not apply solely to certain types of information or ideas or forms of expression in a (political, scientific,

artistic or religious) general interest debate, but also to information of a commercial nature,<sup>113</sup> it has nevertheless subjected existing national measures in this regard to a less rigorous proportionality test on the ground that, in order to determine whether interference with freedom of expression responds proportionately to a 'pressing social need', the margin of appreciation enjoyed by the national authorities appears 'essential in commercial matters, especially in an area as complex and fluctuating as that of advertising'.<sup>114</sup>

215. It should be added that this applies all the more where a national measure of this nature responds to such a pressing social need as the protection of public health. As the Court held in *Karner*, '[i]t is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and [the objectives of general interest referred to in Article 10(2) of the

112 — See, to that effect, the 1999 World Bank report entitled 'Curbing the Epidemic: Governments and the Economics of Tobacco Control' (p. 52 to 55), and Roemer R., *Legislative Action to Combat the World Smoking Epidemic*, second edition, WHO, Geneva (p. 25 to 30).

113 — See, inter alia, European Court of Human Rights, judgments in *Markt intern Verlag GmbH and Klaus Beermann v Federal Republic of Germany* of 20 November 1989 (Series A No 165, § 25 and 26); *Groppera Radio AG and others v Switzerland* of 28 March 1990 (Series A No 173, § 54 and 55); *Casado Coca v Spain* of 23 February 1994 (Series A No 285, § 35), and *Jacobowski v Germany* of 23 June 1994 (Series A No 291-A, § 25).

114 — See, inter alia, the judgment in *Casado Coca v Spain*, § 50, and the judgments in *VGT Verein gegen Tierfabriken v Switzerland* of 28 June 2001 (*Reports of Judgments and Decisions* 2001-VI, § 66 to 69), and *Demuth v Switzerland* of 5 November 2002 (*Reports of Judgments and Decisions* 2002-IX, § 42). The Court of Justice has described this case-law in Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 73, and *Karner*, paragraph 51.

ECHR] varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'.<sup>115</sup> It may be inferred that the proportionality test for national rules on advertising should be particularly strict where the objective pursued by those rules is to protect public health, and not simply to protect the reputation or rights of others.<sup>116</sup>

tising and sponsorship in respect of tobacco products, the contested directive has as its objective to eliminate barriers to trade resulting from existing or potential differences between national rules in this field, which constitute an obstacle to the establishment and functioning of the internal market. In addition, the third recital to that directive states that in attaining that objective, the Community institutions must take as a base a high level of health protection in accordance with Article 95(3) EC.

216. It is in the light of these considerations that it must be determined whether the prohibitions on advertising and sponsorship in respect of tobacco products under Articles 3 and 4 of the contested directive must be regarded as reasonably proportionate or manifestly inappropriate having regard to the objective pursued by that directive.

218. In my view, the prohibitions on advertising and sponsorship in respect of tobacco products laid down in Articles 3 and 4 of the contested directive are appropriate for attaining that objective and do not manifestly exceed the limits of what is necessary in order to attain that objective.

217. As has already been shown,<sup>117</sup> by approximating the rules applicable to adver-

219. As regards Article 3(1) of the directive, first of all, the Community legislature does not appear to have exceeded the limits of its discretion by considering that the prohibition of such advertising in printed publications, including in those having essentially local, and not exclusively cross-border coverage, is liable to contribute significantly to eliminating barriers to trade and to reducing nicotine addiction.

115 — Paragraph 51.

116 — This objective of protecting the reputation and rights of others (also referred to in Article 10(2) of the ECHR as being capable of justifying a restriction on freedom of expression) forms the basis for most of the national measures on advertising that have been challenged before the European Court of Human Rights on grounds of having breached the principle of freedom of expression.

117 — See my arguments regarding the first and second pleas.

220. Limiting the prohibition on the advertising in question solely to publications having cross-border circulation between Member States would have been contrary both to the requirements of legal certainty and to the objective of the contested directive which is to facilitate the movement of products and services in the internal market whilst ensuring a high level of protection of public health.<sup>118</sup>

222. Consequently, in my view, the prohibition of advertising of tobacco products laid down in Article 3(1) of the contested directive cannot be regarded as being manifestly disproportionate.

223. The same conclusion must be drawn with regard to the prohibition of advertising of tobacco products in information society services and on the radio under Articles 3(2) and 4(1) of the directive.

221. In actual fact, the Community legislative had good reason to believe that limiting the prohibition laid down in Article 3(1) of the contested directive in this way would be manifestly insufficient, or would even be pointless in terms of protecting public health. Many studies conducted by official observers had already shown (before the directive was adopted) that a fragmented or piecemeal prohibition of advertising of tobacco products would have very little impact on tobacco consumption, since such a measure would inevitably mean that advertising would be transferred to other media (not subject to that prohibition) with the result that public exposure to advertising would remain high, whereas a comprehensive prohibition in the media would very probably have a significant effect on the overall level of consumption and on nicotine addiction.<sup>119</sup>

224. This applies *a fortiori* since, as is stated in the sixth recital to that directive, these media have, by their very nature, a cross-border character and, like television, are particularly attractive to young people. Young people are a favourite target for advertisers because of their natural suggestibility and their propensity to be dependent on tobacco products for longer than older people. It follows that the prohibition on advertising of such products in these media, like the prohibition laid down in Article 13 of the TVWF directive, is not at all disproportionate. Furthermore, more specifically as regards the prohibition applying to information society services, such a measure is clearly essential in the current situation of media convergence in order to prevent the prohibition applying to printed publications and radio programmes being circumvented.

118 — See my earlier arguments in point 171 of this Opinion.

119 — See, to this effect, the report and the work already cited footnote 112, and points 161 to 163 of the Opinion of Advocate General Fennelly in Case C-376/98 *Germany v Parliament and Council*.

225. As regards the prohibition on sponsorship of radio programmes by operators on the market in tobacco products under Article 4(2) of the contested directive, whilst it is true that, at first sight, it might be wondered whether such a prohibition is likely to have the same effects, in terms of level of consumption of these products, as prohibitions on the advertising of the products, in my view the fact remains that the Community legislature has not exceeded the limits of its discretion by considering, as the fifth recital to that directive suggests, that the promotion of such sponsorship is the natural extension of the prohibition on the advertising in question. Furthermore, Article 17(2) of the TVWF directive (adopted before the contested directive) provides, in almost identical terms, that '[t]elevision programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products'. These provisions concerning the sponsorship of television programmes reinforce my view that the prohibition laid down in Article 4(2) of the contested directive concerning the sponsorship of radio programmes is not manifestly disproportionate.

226. Therefore, in my view, none of the prohibitions laid down in Articles 3 and 4 of that directive manifestly exceeds the limits of what is necessary in order to attain the objectives pursued by the directive with the

result that the plea alleging a breach of the principle of proportionality must be rejected.

227. This conclusion cannot be called into question by the argument that, by depriving the press bodies of considerable advertising revenue, the prohibitions of the advertising in question would result in a marked reduction in editorial content and even the closure of some publishers, which would contribute to weakening significantly the pluralism of the press and, consequently, freedom of expression. Even if the measures in question were liable to result in such extreme consequences, I consider, in the light of the case-law of the European Court of Human Rights, that the Community legislature has not exceeded the limits of the discretion it enjoys with regard to rules in a field as complex and fluctuating as advertising and sponsorship and responding, in the context of the creation of the internal market, to such a pressing social need as the protection of public health, at a high level.

228. I conclude that this final plea alleging a breach of the principle of proportionality must be rejected, as must the action in its entirety.

## **V — Conclusion**

229. In the light of all the foregoing considerations, I propose that the Court should:

- (1) dismiss the action;
- (2) order the Federal Republic of Germany to pay the costs;
- (3) order the French Republic, the Kingdom of Spain, the Republic of Finland and the Commission of the European Communities each to bear their own costs.