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Judgments of the Court of Justice in Cases C-210/03 and C-434/02

*The Queen, on the application of: Swedish Match and Others v Secretary of State for Health
Arnold André GmbH & Co KG v Landrat des Kreises Herford*

THE COURT DECLARES THE PROHIBITION ON TOBACCO PRODUCTS FOR ORAL USE TO BE VALID

The existence of obstacles in the internal market in those products authorised the Community legislature to intervene and such a prohibition was not disproportionate to the objective of health protection

Swedish Match, the manufacturer of a tobacco product for oral use, called "snus", wished to place that product on the United Kingdom market. Arnold André, a company which markets tobacco products in Germany, wished to import snus and place it on the German market. However, the activities of both companies were prevented by national laws, which transpose a 2001 Community directive¹. That directive reproduces a prohibition on the marketing of tobacco products for oral use in the Member States of the European Community, which had already been introduced by a 1992 directive². The two companies thus brought actions against the decisions taken by the national authorities, before the English court and German court respectively, claiming that that directive was in breach of various provisions of Community law. The national courts before which the cases were brought referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling.

The legal basis of the Directive

The Court has found that, where there are obstacles to trade because the Member States have taken or are about to take divergent measures with respect to a product or a class of products such as to ensure different levels of protection, for example in relation to health, and thereby

¹ 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).

² Council Directive 92/41/EEC of 15 May 1992 (OJ 1992 L 158, p. 30) amending 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).

prevent the product or products concerned from moving freely in the Community, Article 95 of the EC Treaty authorises the Community legislature to intervene by adopting appropriate measures.

The Court has noted in that regard that existing national measures were such as to contribute to a heterogeneous development of the market in those products and to constitute obstacles to the free movement of goods. Action by the Community legislature on the basis of Article 95 was therefore justified in this case.

The principle of proportionality

The Treaty requires that, in the exercise of the power conferred on it by Article 95, the Community legislature is to take as a base a high level of protection of human health.

The Court has recalled that the Community legislature must be allowed a broad discretion in an area such as that concerned in the present case, which involves political, economic and social choices, and in which it is called upon to undertake complex assessments. Consequently, such a measure is deemed to be lawful unless it is manifestly inappropriate in relation to the objective pursued.

The Court has found that, while some experts were able to call into question the assertion that tobacco products for oral use caused cancer of the mouth in particular and maintained that those products could be used as substitutes for cigarettes, there was still, at the time the Directive was adopted, controversy over the various dangers which those products represented for human health. The Court has pointed out that those products contain nicotine, which causes addiction, and whose toxicity is not disputed. In those circumstances, the legislature was entitled to consider that a prohibition of those products, which were new on the market, was necessary and that, in particular, there was no alternative measure which allowed its objective to be achieved as effectively. The measure at issue is thus not manifestly inappropriate.

The duty to state reasons

According to the Court's case-law, it is not necessary for the statement of reasons for a measure, which must be assessed with reference to the context in which the measure is adopted, to go into every relevant point of fact and law. In the present case, the Court has found that the legislature set out its reasons clearly in the 1992 directive which introduced the ban. In particular, the text stated that new tobacco products for oral use appearing on the market were particularly attractive to young people, with the risk of their developing an addiction to nicotine if restrictive measures were not taken in time. The Court has considered that the 2001 directive which confirms that ban did not need to specify other points of fact and law in order to satisfy the obligation to state reasons.

The principle of non-discrimination

The 2001 directive prohibits the placing on the market of tobacco products for oral use, but not the marketing of other smokeless tobacco products, such as those which are intended to be chewed. According to the principle of non-discrimination, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. The Court has found that tobacco products for oral use were not in the same situation as other tobacco products, since the former had the particular

characteristic of being new to the markets of the Member States when they were prohibited. That particular situation authorises a difference in treatment, and it cannot validly be argued that there was a breach of the principle of non-discrimination.

The principle of freedom to pursue a trade or profession and the right to property

The Court has recalled that, while the freedom to pursue a trade or profession and the right to property are general principles of Community law, those principles are not absolute. They can be restricted, provided that any restriction in fact corresponds to objectives of general interest and does not constitute a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed.

The Court has found that the prohibition has no effect on the right to property. An economic operator cannot claim a right to property in a market share, even if he held that market share at a time before the introduction of a measure affecting that market, because such a market share is only a momentary economic position exposed to the risks of changing circumstances.

As to the freedom to pursue a trade or profession, the Court has held that although the prohibition is capable of restricting the freedom of manufacturers of those products to pursue their trade or profession, it cannot be regarded as a disproportionate interference with that right, having regard to the aim pursued.

Accordingly, the Court acknowledges that the prohibition on the marketing of tobacco products for oral use is valid.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: EN, FR, DE, SV

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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