

JUDGMENT OF THE COURT (Grand Chamber)

12 December 2006 \*

In Case C-380/03,

ACTION for annulment under Article 230 EC, brought on 9 September 2003,

**Federal Republic of Germany**, represented by M. Lumma, W.-D. Plessing and C.-D. Quassowski, acting as Agents, and J. Sedemund, Rechtsanwalt,

applicant,

v

**European Parliament**, represented by R. Passos, E. Waldherr and U. Rösslein, acting as Agents, with an address for service in Luxembourg,

\* Language of the case: German.

**Council of the European Union**, represented by E. Karlsson and J.-P. Hix, acting as Agents,

defendants,

supported by:

**Kingdom of Spain**, represented by L. Fraguas Gadea and M. Rodríguez Cárcamo, acting as Agents, with an address for service in Luxembourg,

**Republic of Finland**, represented by A. Guimaraes-Purokoski and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

**French Republic**, represented by G. de Bergues and R. Loosli-Surrans, acting as Agents, with an address for service in Luxembourg,

**Commission of the European Communities**, represented by M.-J. Jonczy, L. Pignataro-Nolin and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts, P. Kūris and E. Juhász, Presidents of Chambers, J.N. Cunha Rodrigues (Rapporteur), R. Silva de Lapuerta, K. Schiemann, G. Arestis, A. Borg Barthet, M. Ilešič and J. Malenovský, Judges,

Advocate General: P. Léger,  
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2006,

gives the following

### **Judgment**

- 1 By its application, the Federal Republic of Germany ('the applicant') seeks the annulment of Articles 3 and 4 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 (OJ 2003 L 152, p. 16; 'the Directive').

- 2 The Directive was adopted by the European Parliament and the Council of the European Union following the annulment by the Court (judgment of 5 October 2000 in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419; ‘the tobacco advertising judgment’) of Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p. 9).

### Legal context

- 3 The Directive was adopted on the same legal bases as Directive 98/43. Like the latter, it regulates advertising and sponsorship in respect of tobacco products in media other than television.
- 4 The first recital in the preamble to the Directive states that certain obstacles to the free movement of products and services resulting from differences in the relevant legislation of the Member States 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.
- 5 The fourth recital in the preamble to the Directive states:

“The 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. In 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.'

6 The fifth recital is worded as follows:

'The 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. In 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, without regulating sponsorship on a purely national level.'

7 The sixth recital states:

'Use of information society services is a means of advertising tobacco products which is increasing as public consumption and access to such services increases. Such services, as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers. Tobacco advertising by both these media has, by its very nature, a cross-border character, and should be regulated at Community level.'

8 Article 3 of the Directive provides:

‘1. Advertising 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.

Other advertising in the press and other printed publications shall be prohibited.

2. Advertising that is not permitted in the press and other printed publications shall not be permitted in information society services.’

9 Article 4 of the Directive states:

‘1. All forms of radio advertising for tobacco products shall be prohibited.

2. Radio programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products.’

10 Article 5 of the Directive is worded as follows:

'1. Sponsorship of events or activities involving or taking place in several Member States or otherwise having cross-border effects shall be prohibited.

2. Any free distribution of tobacco products in the context of the sponsorship of the events referred to in paragraph 1 having the purpose or the direct or indirect effect of promoting such products shall be prohibited.'

11 Article 8 of the Directive provides:

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

### **Forms of order sought**

12 The applicant claims that the Court should:

- annul Articles 3 and 4 of the Directive;
  
- order the defendants to pay the costs.

13 The Parliament and the Council contend that the Court should:

- dismiss the action;
  
- order the applicant to pay the costs.

14 The Parliament contends in the alternative that, were the Court to intend to annul the Directive because of a formal breach of the duty to state reasons or of the codecision procedure, it should order in accordance with Article 231 EC that the effects of the annulled Directive be preserved until new legislation has been adopted in the field.

15 By orders of the President of the Court of 6 January and 2 March 2004, the Kingdom of Spain, the French Republic, the Republic of Finland and the Commission of the European Communities were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

### **The action**

16 The applicant puts forward five pleas in law in support of its action. It submits, first, that Article 95 EC is not an appropriate legal basis for the Directive and, second, that the Directive was adopted in breach of Article 152(4)(c) EC. In the alternative it pleads breach of the duty to state reasons, of the rules governing the codecision procedure that are laid down in Article 251 EC and of the principle of proportionality.



*The first plea: allegedly incorrect choice of Article 95 EC as legal basis*

Arguments of the parties

- 17 The applicant submits that the conditions justifying recourse to Article 95 EC for the adoption of Articles 3 and 4 of the Directive are not met. None of the prohibitions laid down in those articles actually contributes to eliminating obstacles to the free movement of goods or to removing appreciable distortions of competition.
- 18 As regards, first, 'the press and other printed publications', referred to in Article 3(1) of the Directive, more than 99.9% of products are marketed not in a number of Member States but only regionally or locally, so that the general prohibition on the advertising of tobacco products which is laid down in that provision responds only very marginally to the supposed need to eliminate barriers to trade.
- 19 'Press' products are traded between Member States only rarely, on account of not only linguistic and cultural reasons, but also policy reasons of publishers. There is no actual obstacle to their movement within the Community even though certain Member States prohibit tobacco advertising in the press since in those States the foreign press is not subject to such a prohibition.

- 20 In the applicant's submission, the same is true of the term 'other printed publications' which appears in Article 3(1) of the Directive and covers a wide range of publications such as bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various advertising leaflets and prospectuses. These publications are targeted solely at local people and do not have any cross-border character.
- 21 Nor does Article 3(1) of the Directive meet the objective of removing appreciable distortions of competition. There is no competitive relationship between local publications in one Member State and those in other Member States or between newspapers, periodicals and magazines with a wider circulation and comparable foreign newspapers, periodicals and magazines.
- 22 As regards information society services, Article 3(2) of the Directive contributes neither to the elimination of obstacles to the free movement of goods or the freedom to provide services nor to the removal of distortions of competition. In the applicant's view, consultation on the internet of printed publications from other Member States is marginal and, in any event, does not meet with any technical obstacle because of the freedom of access to those services worldwide.
- 23 Likewise, in the applicant's submission, the choice of Article 95 EC as legal basis for the Directive is incorrect with regard to the prohibition, laid down in Article 4 of the Directive, on radio advertising and the sponsorship of radio programmes since the vast majority of radio programmes are addressed to the public in a locality or region and cannot be picked up outside a given area because of the limited range of the

transmitters. Furthermore, since the advertising of tobacco products on the radio is prohibited in most Member States, the prohibition thereof in Article 4(1) of the Directive is not justified. The same is true of the prohibition on sponsorship of radio programmes in Article 4(2) of the Directive.

24 Finally, Article 95 EC cannot constitute an appropriate legal basis for the prohibitions on the advertising of tobacco products set out in Articles 3 and 4 of the Directive since the true purpose of those prohibitions is not to improve the conditions for the establishment and functioning of the internal market, but solely to protect public health. The applicant submits that recourse to Article 95 EC as legal basis for the Directive is 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.

25 The Parliament, the Council and the parties intervening in support of them argue that Articles 3 and 4 of the Directive were legitimately adopted on the basis of Article 95 EC and are not contrary to Article 152(4)(c) EC.

26 They state that the prohibition on advertising and sponsorship in respect of tobacco products which is laid down in Articles 3 and 4 of the Directive merely prohibits advertising of those products in periodicals, magazines and newspapers and does not extend to the other publications relied upon by the applicant such as bulletins produced by associations, programmes for cultural events, posters, telephone directories, leaflets and prospectuses.

27 They further contend that intra-Community trade in press products is an incontrovertible reality and that, as is apparent from the first, second and fourth recitals in the preamble to the Directive, there are cross-border effects and an

appreciable risk of obstacles to free movement in the internal market as a result of differences between Member States' national legislation. That risk may increase on account of the accession of the new Member States and differences between their laws.

28 With regard to the prohibition on advertising in the press and other printed publications, the Parliament, the Council and the parties intervening in support of them dispute the relevance of the applicant's statistical analysis, which is limited exclusively to the German market and cannot be extended to the whole of the European Community, while the current phenomenon of 'media convergence' is making a considerable contribution to the development of intra-Community trade in press products inasmuch as numerous newspapers, periodicals and magazines are now available on the internet and thus circulate in all the Member States.

29 They state that it is difficult, or even impossible, to draw a distinction between the press with a local or national circulation and the press with a European or international circulation, and to prohibit advertising of tobacco products in publications distributed across borders while excluding those which are purely local or national would have the effect of rendering the limits of the prohibition particularly unsure and uncertain. Besides, that distinction would be contrary to the objective pursued by the Directive of approximating the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products.

30 So far as concerns information society services and the prohibition, laid down in Article 3(2) of the Directive, on advertising tobacco products in those services, the Parliament, the Council and the parties intervening in support of them contest the applicant's argument that obstacles to trade do not exist as regards information society services.

- 31 They submit that the prohibition on advertising tobacco products in information society services is prompted by the concern to prevent the circumvention of the prohibition on advertising tobacco products in the press and other printed publications by recourse to media offered on the internet and to avoid distortions of competition. As a result of the current process of media convergence, printed media and radio programmes are already available on the internet. The development of e-papers is tending, moreover, to intensify that process.
- 32 As regards the prohibition on radio advertising, laid down in Article 4(1) of the Directive, the Parliament, the Council and the parties intervening in support of them submit that it cannot seriously be doubted that radio broadcasting is cross-border in nature since terrestrial frequencies reach well beyond Member States' borders and more and more radio programmes are broadcast by satellite or by cable.
- 33 They also state that the 14th recital in the preamble to the Directive expressly refers 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) which, in Articles 13 and 17(2), prohibits all forms of television advertising for tobacco and all sponsorship of television programmes by tobacco-related businesses.
- 34 The prohibition on radio advertising for tobacco products and on the sponsorship of radio programmes which is laid down in Articles 3 and 4 of the Directive is a prohibition parallel to that laid down by Directive 89/552.
- 35 The fact that radio advertising is already prohibited in almost all the Member States does not prevent new rules from being introduced at Community level.

## Findings of the Court

<sup>36</sup> Article 95(1) EC establishes that the Council is to adopt measures for the approximation of provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market.

<sup>37</sup> 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 (see, to this effect, the tobacco advertising judgment, paragraphs 84 and 95; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60; Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 30; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 29; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 28).

<sup>38</sup> It is also settled case-law that, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraph 35; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 15; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 61; *Arnold André*, paragraph 31; *Swedish Match*, paragraph 30; and *Alliance for Natural Health and Others*, paragraph 29).

39 The Court has also held that, provided that 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 (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 32; *Swedish Match*, paragraph 31; and *Alliance for Natural Health and Others*, paragraph 30).

40 It should be noted that the first subparagraph of Article 152(1) EC provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities, and that Article 95(3) EC explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 33; *Swedish Match*, paragraph 32; and *Alliance for Natural Health and Others*, paragraph 31).

41 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the EC Treaty or identified in the case-law, in particular the principle of proportionality (*Arnold André*, paragraph 34; *Swedish Match*, paragraph 33; and *Alliance for Natural Health and Others*, paragraph 32).

42 It is also to be observed that, by using the words 'measures for the approximation' in Article 95 EC, the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific

circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (see Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553, paragraph 45, and Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771, paragraph 43).

<sup>43</sup> Depending on the circumstances, those measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (*Arnold André*, paragraph 35; *Swedish Match*, paragraph 34; and *Alliance for Natural Health and Others*, paragraph 33).

<sup>44</sup> It is in the light of those principles that it must be ascertained whether the conditions for recourse to Article 95 EC as a legal basis for Articles 3 and 4 of the Directive were met.

<sup>45</sup> First of all, it is to be recalled that the Court has already found that, at the time of adoption of Directive 98/43, disparities existed between national laws on the advertising of tobacco products and that there was a trend in national legislation towards ever greater restrictions (the tobacco advertising judgment, paragraphs 96 and 97).

<sup>46</sup> It is common ground that, as mentioned in the first recital in the preamble to Directive 2003/33, at the time of the Directive's adoption there were differences, as regards those products, between the Member States' laws, regulations and administrative provisions. According to the information given by the Commission



in its written observations, when the draft directive was submitted advertising and/or sponsorship in respect of such products were partially prohibited in six Member States, totally prohibited in four, and the subject of legislative proposals seeking a total prohibition in the remaining five.

47 Having regard, in addition, to the enlargement of the European Union through the accession of 10 new Member States, there was an appreciable risk that those disparities would increase. According to the Commission, some of the new Member States envisaged a total prohibition on advertising and sponsorship in respect of tobacco products while others accepted such acts subject to compliance with certain conditions.

48 The fact that, as pointed out in the eighth recital in the preamble to the Directive, at the time of its adoption negotiations were in progress under the aegis of the World Health Organisation with a view to drawing up a Framework Convention on Tobacco Control ('the WHO Convention') does not affect this finding.

49 It is true that the WHO Convention seeks to reduce consumption of tobacco products by providing, *inter alia*, for a comprehensive ban on advertising, promotion and sponsorship in respect of tobacco products. However, the Convention entered into force after the Directive and not all the Member States have ratified it.

50 Furthermore, the Member States which have signed the Convention are free, under Article 13(2) thereof, to adopt, within a period of five years after the Convention's entry into force, either a comprehensive ban on tobacco advertising, promotion and sponsorship or, if they are not in a position to undertake a comprehensive ban due to their constitution or constitutional principles, only certain restrictions.

51 It follows that, at the time of the Directive's adoption, disparities existed between national rules on advertising and sponsorship in respect of tobacco products which justified intervention by the Community legislature.

52 It is in that context that it is necessary to examine the effects of such disparities, in the fields covered by Articles 3 and 4 of the Directive, on the establishment and functioning of the internal market, in order to determine whether the Community legislature was able to use Article 95 EC as a basis for adoption of the contested provisions.

53 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, in particular, of the link between the media in question and the internet, which is the cross-border medium *par excellence*.

54 Having regard, first of all, to press products, the movement of newspapers, periodicals and magazines is a reality common to all the Member States and is not limited only to States sharing the same language. The proportion of publications from other Member States may even in certain cases come to more than half of the publications on the market, according to information provided at the hearing by the Parliament, the Council and the parties intervening in support of them which was not challenged. It is necessary to include, in that intra-Community trade in press products on paper, trade made possible by information society services, especially the internet which enables direct access in real time to publications distributed in other Member States.

55 Also, on the date when the Directive was adopted, several Member States already prohibited advertising of tobacco products, as indicated in paragraph 46 of the present judgment, while others were about to do so. Consequently, disparities

existed between the Member States' national laws and, contrary to the applicant's submissions, those disparities were such as to impede the free movement of goods and the freedom to provide services.

56 First, measures prohibiting or restricting the advertising of tobacco products are liable to impede access to the market by products from other Member States more than they impede access by domestic products.

57 Second, such measures restrict the ability of undertakings established in the Member States where they are in force to offer advertising space in their publications to advertisers established in other Member States, thereby affecting the cross-border supply of services (see, to this effect, Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraphs 38 and 39).

58 Moreover, even if, in reality, certain publications are not sold in other Member States, the fact remains that the adoption of divergent laws on the advertising of tobacco products creates, or is likely to create, incontestably, legal obstacles to trade in respect of press products and other printed publications (see, to this effect, the tobacco advertising judgment, paragraph 97). Such obstacles therefore also exist for publications placed essentially on a local, regional or national market that are sold in other Member States, even if only by way of exception or in small quantities.

59 Furthermore, it is common ground that certain Member States which have prohibited the advertising of tobacco products exclude the foreign press from that prohibition. The fact that those Member States have chosen to accompany the

prohibition with such an exception confirms that, in their eyes at least, there is significant intra-Community trade in press products.

60 Finally, the risk that new barriers to trade or to the freedom to provide services would emerge as a result of the accession of new Member States was real.

61 The same finding must be made with regard to the advertising of tobacco products in radio broadcasts and information society services. Many Member States had already legislated in those areas or were preparing to do so. Given the increasing public awareness of the harm caused to health by the consumption of tobacco products, it was likely that new barriers to trade or to the freedom to provide services were going to emerge as a result of the adoption of new rules reflecting that development and intended to discourage more effectively the consumption of tobacco products.

62 The sixth recital in the preamble to the Directive should be recalled, in which it is stated that use of information society services is a means enabling the advertising of tobacco products which is increasing as public consumption and access to such services increases and that such services, as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers.

63 Contrary to the applicant's submissions, tobacco advertising by means of those two media has a cross-border character which enables undertakings engaged in the production and sale of tobacco products to develop marketing strategies for the widening of their customer base outside the Member State from which they come.

- 64 Furthermore, it was conceivable that, since Article 13 of Directive 89/552 prohibited all forms of television advertising for cigarettes and other tobacco products, the disparities between national rules in respect of tobacco advertising in radio broadcasts and in information society services were liable to encourage the possibility of circumventing that prohibition by recourse to those two media.
- 65 The same finding can be made as regards sponsorship of radio programmes by tobacco companies. Differences between national rules had already emerged on the date when the Directive was adopted or were about to emerge and those differences were liable to impede the freedom to provide services by denying, *qua* recipients of services, radio broadcasting bodies established in a Member State where a measure prohibiting sponsorship was in force the benefit of sponsorship from tobacco companies established in another Member State, where such a measure did not exist.
- 66 As pointed out in the first and fifth recitals in the preamble to the Directive, those differences also meant that there was an appreciable risk of distortions of competition.
- 67 In any event, as the Court has already held, when the existence of obstacles to trade has been established, it is not necessary also to prove distortions of competition in order to justify recourse to Article 95 EC (see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 60).
- 68 It follows from the foregoing that the barriers and the risks of distortions of competition warranted intervention by the Community legislature on the basis of Article 95 EC.

69 It remains to determine whether, in the fields covered by Articles 3 and 4 of the Directive, those articles are in fact designed to eliminate or prevent obstacles to the free movement of goods or the freedom to provide services or to remove distortions of competition.

70 As regards, first of all, Article 3 of the Directive, the Court has already held that a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers with a view to ensuring the free movement of those goods may be adopted on the basis of Article 95 EC, following the example of Directive 89/552, Article 13 of which, as mentioned in paragraph 64 of the present judgment, prohibits television advertising for tobacco products (the tobacco advertising judgment, paragraph 98).

71 The adoption of such a prohibition, which is designed to apply uniformly throughout the Community, is intended to prevent intra-Community trade in press products from being impeded by the national rules of one or other Member State.

72 It should be pointed out that Article 3(1) of the Directive expressly permits the insertion of advertising for tobacco products in certain publications, in particular in those which are intended exclusively for professionals in the tobacco trade.

73 Furthermore, unlike Directive 98/43, Article 8 of the Directive provides that the Member States are not to prohibit or restrict the free movement of products which comply with the Directive. This article consequently precludes Member States from impeding the movement within the Community of publications intended exclusively for professionals in the tobacco trade, *inter alia* by means of more restrictive provisions which they consider necessary in order to protect human health with regard to advertising or sponsorship for tobacco products.

- 74 In preventing the Member States in this way from opposing the provision of advertising space in publications intended exclusively for professionals in the tobacco trade, Article 8 of the Directive gives expression to the objective laid down in Article 1(2) of improving the conditions for the functioning of the internal market.
- 75 The same finding must be made with regard to the freedom to provide services, which is also covered by Article 8 of the Directive. Under this article, the Member States cannot prohibit or restrict that freedom where services comply with the Directive.
- 76 Following the example of Article 13 of Directive 89/552, Articles 3(2) and 4(1) of the Directive, which prohibit the advertising of tobacco products in information society services and in radio broadcasting, seek to promote freedom to broadcast by radio and the free movement of communications which fall within information society services.
- 77 Likewise, in prohibiting the sponsorship of radio programmes by undertakings whose principal activity is the manufacture or sale of tobacco products, Article 4(2) of the Directive seeks to prevent the freedom to provide services from being impeded by the national rules of one or other Member State.
- 78 It follows from the foregoing that Articles 3 and 4 of the Directive do in fact have as their object the improvement of the conditions for the functioning of the internal market and, therefore, that they were able to be adopted on the basis of Article 95 EC.

- 79 This conclusion is not called into question by the applicant's line of argument that the prohibition laid down in Articles 3 and 4 of the Directive concerns only advertising media which are of a local or national nature and lack cross-border effects.
- 80 Recourse to Article 95 EC as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis. As the Court has previously pointed out, to justify recourse to Article 95 EC as the legal basis what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market (see, to this effect, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraphs 41 and 42, and Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 40 and 41).
- 81 Accordingly, it must be held that, as has been stated in paragraph 78 of the present judgment, Articles 3 and 4 of the Directive are intended to improve the conditions for the functioning of the internal market.
- 82 It should be pointed out that the limits of the field of application of the prohibition set out in Articles 3 and 4 of the Directive are far from random and uncertain.
- 83 In defining the field of application of the prohibition laid down in Article 3 of the Directive, the German version alone uses the term 'printed products' ('Druckerzeugnisse') in the heading of that article, whereas the other language versions use the term 'printed media', thereby showing the will of the Community legislature not to include every type of publication in the field of application of that prohibition.



84 Furthermore, contrary to the applicant's argument that the term 'printed publications' used in Article 3(1) of the Directive should be interpreted broadly, encompassing bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various leaflets and prospectuses, the term covers only publications such as newspapers, periodicals and magazines.

85 This interpretation is borne out by the fourth recital in the preamble to the Directive, which notes that the 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.

86 The same recital states that, in 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.

87 In addition, the prohibition laid down in Articles 3 and 4 of the Directive is limited to various forms of advertising and sponsorship and, contrary to the provisions of Directive 98/43, does not amount to a general ban.

88 It follows from the foregoing that Article 95 EC constitutes an appropriate legal basis for Articles 3 and 4 of the Directive.

89 The first plea is accordingly not well founded and must be dismissed.

*The second plea: circumvention of Article 152(4)(c) EC*

Arguments of the parties

90 The applicant maintains that, since the true purpose of the prohibition laid down in Articles 3 and 4 of the Directive is not to improve the conditions for the establishment and functioning of the internal market, the Community legislature, in adopting the provisions at issue, infringed the prohibition laid down in Article 152(4)(c) EC on any harmonisation of the laws and regulations of the Member States in the field of public health.

91 The Parliament, the Council and the parties intervening in support of them, relying on the Court's case-law, submit that, given that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the objective of public health protection does not in any way preclude the measures covered by that provision from improving the conditions for the establishment and functioning of the internal market (see, to this effect, *British American Tobacco (Investments) and Imperial Tobacco*, paragraphs 60 and 62).

Findings of the Court

92 As stated in paragraph 39 of the present judgment, it is settled case-law that, provided that 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.

- 93 Article 95(3) EC explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed.
- 94 The first subparagraph of Article 152(1) EC provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 33; *Swedish Match*, paragraph 32; and *Alliance for Natural Health and Others*, paragraph 31).
- 95 While it is true that Article 152(4)(c) EC excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, that provision does not mean, however, that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health (see the tobacco advertising judgment, paragraphs 77 and 78).
- 96 With regard to the applicant's argument that public health protection largely prompted the choices made by the Community legislature when adopting the Directive, in particular so far as concerns Articles 3 and 4, suffice it to state that the conditions for recourse to Article 95 EC were met in this instance.
- 97 The Community legislature therefore did not infringe Article 152(4)(c) EC by adopting Articles 3 and 4 of the Directive on the basis of Article 95 EC.
- 98 Accordingly, the second plea is unfounded and must also be dismissed.

*Third plea: breach of the duty to state reasons*

## Arguments of the parties

- 99 The applicant submits that the Directive fails to comply with the requirement to state reasons laid down in Article 253 EC. The existence of actual barriers to trade, a condition required by the Court to be met if the Community legislature is to have competence, is not mentioned with regard to the prohibition on radio advertising laid down in Article 4 of the Directive or the prohibition on advertising in information society services that is envisaged in Article 3(2). Nor does the preamble to the Directive make any reference whatsoever to the existence of significant distortions of competition concerning those services.
- 100 In the applicant's submission, the mere reference in the first recital in the preamble to the Directive to the existence of differences between national laws is not sufficient to justify competence on the part of the Community legislature. The same is true of the consideration that information society services and radio broadcasting have a cross-border character by their very nature.
- 101 So far as concerns the prohibition on advertising in the press and other printed publications, the applicant contends that, while it is stated in the first recital in the preamble to the Directive that 'certain obstacles have already been encountered', no detail is provided concerning the rules and the specific obstacles to trade which could justify competence of the Community legislature under Article 95 EC.
- 102 Finally, the particular circumstance that the products and services falling within Articles 3 and 4 of the Directive have only marginal cross-border effects should have entailed an assessment as to whether the extension of the prohibitions on

advertising to non-cross-border situations was a measure necessary for the functioning of the internal market within the meaning of Article 14 EC. However, no such assessment was carried out.

- 103 The Parliament, the Council and the parties intervening in support of them observe that the Community legislature clearly set out the grounds which prompted it to adopt the Directive, in particular in the first, second, fourth, fifth and sixth recitals in the preamble, and that the duty to state reasons does not require every relevant point of fact and law to be gone into (see, to this effect, Case 87/78 *Welding* [1978] ECR 2457, paragraph 11, and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 165).
- 104 They plead that the prohibition on the advertising of tobacco products in printed media laid down in Article 3(1) of the Directive is justified in the first and fourth recitals in the preamble thereto by reference to barriers to trade, whose intensification is to be feared in the future.
- 105 They explain that the reasons for the prohibition on advertising in information society services are set out in the sixth recital in the preamble to the Directive.
- 106 They state with regard to the prohibition on radio advertising that a parallel must be drawn with Directive 89/552 which, in Articles 13 and 17(2), prohibits all forms of television advertising for tobacco products and all sponsorship of television programmes by tobacco-related businesses.

## Findings of the Court

- 107 Although 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 the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law (Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 165; *Arnold André*, paragraph 61; *Swedish Match*, paragraph 63; and *Alliance for Natural Health and Others*, paragraph 133).
- 108 Furthermore, 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. If the contested measure clearly discloses the overall objective pursued by the Community institution concerned, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (Case C-100/99 *Italy v Council and Commission* [2001] ECR I-5217, paragraph 64; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 166; *Arnold André*, paragraph 62; *Swedish Match*, paragraph 64; and *Alliance for Natural Health and Others*, paragraph 134).
- 109 In the present case, the 1st, 2nd, 3rd and 12th recitals in the preamble to the Directive clearly show that the measures laid down by it prohibiting advertising and sponsorship in respect of tobacco products are designed to eliminate obstacles to the free movement of goods or services resulting from differences between the Member States' national laws in that field, while ensuring a high level of public health protection.

- 110 In addition, the reasons which determined the adoption of such measures are specified for each of the forms of advertising and sponsorship referred to in Articles 3 and 4 of the Directive.
- 111 As regards, first, the prohibition on advertising in printed media and in certain publications, the fourth recital in the preamble to the Directive states that an appreciable risk exists of obstacles to free movement in the internal market as a result of Member States' laws, regulations and administrative provisions and that, in 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.
- 112 So far as concerns, second, radio advertising and advertising transmitted via information society services, the sixth recital in the preamble to the Directive refers to the particular attraction and accessibility of these services for young people, whose consumption increases in line with the use of those media.
- 113 Regarding, third, the prohibition on certain types of sponsorship such as that of radio programmes and activities or events having cross-border effects, the fifth recital in the preamble to the Directive explains that the prohibition in question is intended to prevent the possible circumvention of the restrictions placed on direct forms of advertising.
- 114 These recitals clearly disclose the essential objective pursued by the Community legislature, namely the improvement of the conditions for the establishment and

functioning of the internal market by the removal of obstacles to the free movement of goods or services which serve as a medium for advertising or sponsorship in respect of tobacco products.

115 Furthermore, it is to be noted that the Directive was adopted, following the annulment of Directive 98/43, on the basis of a Commission proposal which was accompanied by an explanatory memorandum that set out comprehensively the differences between the national rules in force in the Member States on advertising and sponsorship in respect of tobacco products.

116 It follows that Articles 3 and 4 of the Directive satisfy the duty to state reasons laid down in Article 253 EC.

117 The third plea is therefore unfounded and must be dismissed.

*The fourth plea: infringement of the codecision procedure*

Arguments of the parties

118 The applicant contends that the Directive was adopted in breach of the codecision procedure set out in Article 251 EC. It submits that substantive amendments were made by the Council after the vote of the Parliament in plenary sitting on the proposal for a directive.



- 119 According to the applicant, those amendments go beyond mere linguistic or editorial adjustment of the various language versions or the mere correction of manifest factual errors. Article 10(2) of the Directive was added to the text of the Directive after its approval, and Article 11 was substantially amended compared with the version approved by the Parliament since the date of the Directive's entry into force was brought forward. Furthermore, Article 3 was amended and, in the German version at least, permits a broader interpretation of 'printed media' which enlarges the Directive's field of application.
- 120 The Parliament, the Council and the parties intervening in support of them submit that, under the codecision procedure, measures are not adopted solely by the Council but, pursuant to Article 254 EC, are jointly signed by the President of the Parliament and by the President of the Council who, by their signatures, take formal notice that the Directive corresponds to the Commission's proposal coupled with the amendments approved by the Parliament.
- 121 It would be incompatible with the drafting quality requirements resulting from the existence of a large number of official languages to require the text approved by the Parliament and the text adopted in accordance with the codecision procedure to be strictly identical.
- 122 In the submission of the Parliament, the Council and the parties intervening in support of them, the corrections made to the Directive do not go beyond the limits of the legal/linguistic finalisation of a text, whether it be a question of Article 3(1) of the Directive, relating to the press and printed publications, or Article 10(2), relating to communication by the Member States to the Commission of the main provisions of national law which they adopt in the field of the Directive.
- 123 They observe that the amendment to Article 11, which concerns the Directive's entry into force, was made in accordance with the manual of precedents for acts of

the Council, which envisages the entry into force of directives on the day of their publication in order to keep the number of dates as small as possible.

### Findings of the Court

124 By the present action, the applicant seeks to call into question the validity of Articles 3 and 4 of the Directive alone.

125 Accordingly, the plea alleging infringement of the codecision procedure laid down in Article 251 EC with regard to the adoption of Articles 10 and 11 of the Directive in their final form is immaterial to the assessment of the validity of Articles 3 and 4 of the Directive.

126 In any event, the amendments to Articles 10 and 11 of the Directive were the subject of a corrigendum, a fact which is indeed not disputed, and this corrigendum was signed pursuant to Article 254 EC by the President of the Parliament and by the President of the Council, and then published in the *Official Journal of the European Union*.

127 The amendments made to Article 3 of the Directive, as the Advocate General has rightly stated in point 197 of his Opinion, do not appear to have exceeded the limits applicable when the various language versions of a Community measure are harmonised.

128 The fourth plea must therefore necessarily be dismissed.

*The fifth plea: breach of the principle of proportionality*

Arguments of the parties

- 129 The applicant submits that the prohibitions laid down in Articles 3 and 4 of the Directive infringe the principle of proportionality laid down in the third paragraph of Article 5 EC.
- 130 These prohibitions, which are drafted in extremely broad terms, cover almost exclusively situations of a local or regional nature and seriously compromise fundamental rights in the economic sectors concerned, rights which are protected by the Community legislature.
- 131 That is true of freedom of the press and of expression which, in accordance with the Court's case-law relating to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is ensured in particular, from the point of view of the financing of press products, by advertising revenue and unimpeded commercial communication.
- 132 The extremely general way in which the prohibitions on advertising laid down in Articles 3 and 4 of the Directive have been formulated and in which the term 'advertising' has been defined means that the prohibition on advertising covers any indirect effect on the sale of tobacco products of any form of commercial communication and that the editorial contributions of journalists on certain subjects having a link with the production or distribution of tobacco products may be covered by that prohibition.

133 The prejudice caused thereby to freedom of the press is, in the applicant's submission, all the greater because the press derives 50% to 60% of its income not from the sale of its products but from advertising revenue and in Europe today the media are experiencing a structural economic crisis that is very deep.

134 Furthermore, the inappropriateness of enacting the prohibitions laid down in Articles 3 and 4 of the Directive is shown by the fact that the number of cases in which products or services have a cross-border character is marginal and out of all proportion to the purely local or regional situations, 99% of which have no cross-border effect whatever.

135 It follows that the extension of the prohibitions on advertising to purely national situations is disproportionate vis-à-vis the alleged objective of harmonisation of the internal market.

136 In any event, that measure is neither necessary nor appropriate. The Directive itself contains an appropriate solution in Article 3(1) since press products from third countries not principally intended for the Community market are not subject to that prohibition on advertising. No explanation is given as to why this solution would not also have sufficed for press products from the Community.

137 Likewise, no reason has been given regarding the refusal of the alternative proposed by the applicant of limiting the prohibitions on advertising to activities and services having cross-border effects, a solution which was indeed adopted in Article 5 of the Directive with regard to sponsorship.

- 138 The applicant thus considers that, if the objective of the Community legislature is weighed against the prejudice to fundamental rights, the contested provisions contained in Articles 3 and 4 of the Directive are inappropriate. It is only as a last resort that the Community legislature could have adopted measures as restrictive as the total prohibition on advertising tobacco products in the press.
- 139 The Parliament, the Council and the parties intervening in support of them contend that means less restrictive than a directive prohibiting advertising in all printed media and in radio broadcasts were not available to the Community legislature in order to achieve the objective of harmonisation of the internal market.
- 140 They submit that the Community legislature did not resort to a total prohibition on the advertising of tobacco products. Such advertising was not prohibited in publications intended for professionals in the tobacco trade or in publications printed and published in third countries when those publications are not principally intended for the Community market. Likewise, such advertising was not prohibited in information society services unless it was prohibited in the press and other printed publications. They add that, contrary to the applicant's contention, the term 'printed publications' covers only newspapers, magazines and periodicals.
- 141 They explain, with regard to the prejudice pleaded by the applicant to the fundamental rights of freedom of the press and freedom of expression, that freedom of expression may, under Article 10(2) of the ECHR, be subject to certain restrictions or penalties, prescribed by law, which are necessary in a democratic society in the interests of the protection of health or morals and that in the present case the prohibition relates to 'any form of commercial communication with the aim or direct or indirect effect of promoting a tobacco product', as is apparent from the definition of 'advertising' in Article 2(b) of the Directive. Consequently, editorial contributions of journalists are not affected by Articles 3 and 4 of the Directive.

- 142 They submit that the Court has already held that the ‘discretion enjoyed by the [competent] authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest ..., review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising’ (Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 51).
- 143 They contend that the Community legislature did not exceed the broad discretion which it enjoys 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, and that the prohibitions laid down in Articles 3 and 4 of the Directive are necessary and appropriate for achieving the objective of harmonisation of the internal market at a high level of health protection.

### Findings of the Court

- 144 The principle of proportionality, which is one of the general principles of Community law, requires the means employed by a Community provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it (see, inter alia, Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15; Case C-339/02 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15; and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).
- 145 With regard to judicial review of the conditions referred to in the previous paragraph, 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. 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 institutions are seeking to pursue (see, to this effect, 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; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 61; and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123).

<sup>146</sup> Here, it is apparent from the analysis set out in paragraphs 72 to 80 of the present judgment that Articles 3 and 4 of the Directive may be regarded as measures appropriate for achieving the objective that they pursue.

<sup>147</sup> Nor, given the obligation on the Community legislature to ensure a high level of human health protection, do they go beyond what is necessary in order to achieve that objective.

<sup>148</sup> The prohibition on the advertising of tobacco products in printed media which is laid down in Article 3 of the Directive does not cover publications intended for professionals in the tobacco trade or published in third countries and not intended principally for the Community market.

<sup>149</sup> Furthermore, contrary to the applicant's assertions, it was not possible for the Community legislature to adopt, as a less restrictive measure, a prohibition on advertising from which publications intended for a local or regional market would be exempted, given that such an exception would have rendered the field of application of the prohibition on the advertising of tobacco products unsure and uncertain, which would have prevented the Directive from achieving its objective of harmonisation of national law on the advertising of tobacco products (see, to this effect, *Lindqvist*, paragraph 41).

150 The same finding must be made with regard to the prohibition, laid down in Articles 3(2) and 4(1) of the Directive, on the advertising of tobacco products in information society services and in radio broadcasts.

151 The prohibition on the advertising of tobacco products in those media, following the example of the prohibition laid down in Article 13 of Directive 89/552, cannot be regarded as disproportionate and can, moreover, be justified by the concern to prevent circumvention, made possible through media convergence, of the prohibition applicable to printed media through increased recourse to those two media.

152 As regards the prohibition on sponsorship of radio programmes which is laid down in Article 4(2) of the Directive, it is not apparent from the preamble to the Directive, particularly the fifth recital, that in not limiting such a measure to activities or events with cross-border effects, following the example of Article 17 of Directive 89/552, the Community legislature exceeded the limits of the discretion available to it in this area.

153 This interpretation is not called into question by the applicant's argument that prohibitions of this kind would have the effect of denying the press significant advertising income, or even contribute to the closure of certain undertakings, and would, ultimately, prejudice the freedom of expression guaranteed by Article 10 of the ECHR.

154 In accordance with settled case-law, whilst the principle of freedom of expression is expressly recognised by Article 10 of the ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from Article 10(2) that freedom of expression may also be subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance



with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to this effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 79; and *Karner*, paragraph 50).

155 Also, as has been correctly pointed out by the Parliament, the Council and the parties intervening in support of them, the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression in a field as complex and fluctuating as advertising (see, in particular, *Karner*, paragraph 51).

156 In the present case, even assuming that the measures laid down in Articles 3 and 4 of the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly, journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected.

157 It must therefore be found that the Community legislature did not, by adopting such measures, exceed the limits of the discretion which it is expressly accorded.

158 It follows that those measures cannot be regarded as disproportionate.

159 The fifth plea is therefore unfounded and must be dismissed.

160 Since none of the pleas relied upon by the applicant in support of its action is well founded, the action should be dismissed.

### **Costs**

161 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have applied for costs to be awarded against the Federal Republic of Germany, and the latter has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene in the proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

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

[Signatures]