

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 June 2000 *

In Joined Cases T-172/98 and T-175/98 to T-177/98,

Salamander AG, established in Kornwestheim, Germany, represented by O.W. Brouwer, of the Amsterdam and Brussels Bars, and F.P. Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

Una Film 'City Revue' GmbH, established in Vienna, Austria, represented by R. Borgelt, Rechtsanwalt, Düsseldorf, assisted by M. Dausen, of the University of Bamberg, with an address for service in Luxembourg at the Chambers of Reding and Felten, 2 Rue Jean-Pierre Brasseur,

Alma Media Group Advertising SA & Co. Partnership,

Panel Two and Four Advertising SA,

Rythmos Outdoor Advertising SA,

Media Center Advertising SA,

all established in Athens, Greece, represented by H. Papaconstantinou, of the Athens Bar, É. Morgan de Rivery, of the Paris Bar, and J. Derenne, of the Paris and Brussels Bars, with an address for service in Luxembourg at the Chambers of A. Schmitt, 7 Val Sainte-Croix,

Zino Davidoff SA, established in Fribourg, Switzerland,

and

Davidoff & Cie SA, established in Geneva, Switzerland,

* Languages of the case: English and German.

represented by R. Wägenbaur, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicants,

supported by

Markenverband eV, established in Wiesbaden, Germany, represented by K. Bauer, Rechtsanwalt, Cologne, assisted by M. Dausen, of the University of Bamberg, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

and by

Manifattura Lane Gaetano Marzotto & Figli SpA, established in Valdagno, Italy, represented by L. Magrone Furlotti, of the Rome Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 7 Val Sainte-Croix,

interveners in Case T-172/98,

and by

Lancaster BV, established in Amsterdam, Netherlands, represented by R. Wägenbaur, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

intervener in Case T-177/98,

v

European Parliament, represented by C. Pennera, Head of Division in the Legal Service, and, in Cases T-172/98 and T-176/98, by M. Moore and, in Cases T-175/98 and T-177/98, by M. Berger, of its Legal Service, acting as Agents, with

an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

and

Council of the European Union, represented by R. Gosalbo Bono, Director of the Legal Service, and, in Case T-172/98, by A.P. Feeney and, in Cases T-175/98, T-176/98 and T-177/98, by S. Marquardt and A.P. Feeney, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the Legal Affairs Directorate, European Investment Bank, 100 Boulevard Konrad Adenauer,

defendants,

supported by

Republic of Finland, represented by T. Pynnä, Legislative Adviser in the Ministry of Foreign Affairs, and H. Rotkirch, acting as Agents, with an address for service in Luxembourg at the Finnish Embassy, 2 Rue Heinrich Heine,

by

Commission of the European Communities, represented, in Cases T-175/98 and T-177/98, by U. Wölker and I. Martinez del Peral and, in Cases T-172/98 and T-176/98, by I. Martinez del Peral and M. Schotter, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

by

United Kingdom of Great Britain and Northern Ireland, represented by M. Ewing, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

and by

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French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargée de Mission, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

interveners,

APPLICATION for annulment 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),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 November 1999,

gives the following

Judgment

Legal background

- 1 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, hereinafter 'the Directive') provides *inter alia*:

'Article 1

The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

Article 2

For the purposes of this Directive, the following definitions shall apply:

1. "tobacco products": all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco;
2. "advertising": 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;
3. "sponsorship": any public or private contribution to an event or activity with the aim or the direct or indirect effect of promoting a tobacco product;
4. "tobacco sales outlet": any place where tobacco products are offered for sale.

Article 3

1. Without prejudice to Directive 89/552/EEC, all forms of advertising and sponsorship shall be banned in the Community.

2. Paragraph 1 shall not prevent the Member States from allowing a brand name already used in good faith both for tobacco products and for other goods or services traded or offered by a given undertaking or by different undertakings prior to 30 July 1998 to be used for the advertising of those other goods or services.

However, this brand name may not be used except in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product.

...

Article 6

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive not later than 30 July 2001. They shall forthwith inform the Commission thereof.

...

Article 8

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Facts and procedure

2 Salamander AG, the applicant in Case T-172/98, is a company incorporated under German law which manufactures shoes and boots. Since 1978 it has held a licence from R.J.R. Nabisco, the company which owns the 'Camel' trade mark, to manufacture and market footwear under the 'Camel Boots' mark. That product's share of the annual turnover of the applicant is approximately 20%, and it represents about 30% of gross profits.

3 Una Film 'City Revue' GmbH (hereinafter 'Una Film'), the applicant in Case T-175/98, is a company incorporated under Austrian law whose activity consists in the distribution of advertising films in cinemas. It states that it is the sole contractual partner of Austria Tabak, an undertaking governed by Austrian law which holds exclusive rights over advertising messages for tobacco products in Austria. The applicant thus claims to be the only undertaking which distributes advertising films for tobacco products in cinemas in that country.

4 Alma Media Group Advertising SA & Co. Partnership, Panel Two and Four Advertising SA, Rythmos Outdoor Advertising SA and Media Center Advertising SA (hereinafter 'the Alma Media group companies'), the applicants in Case T-176/98, are companies incorporated under Greek law, all belonging to the Alma Media group, which sell advertising space in public places in three Greek cities, Athens, Thessaloniki and Kalamaria. They have concluded concession

contracts with those municipalities under which they undertake to install and maintain advertising hoardings and street furniture for public use which, under certain conditions, may be used for advertising purposes, including, to a large extent, advertising for tobacco products. They state that, as they have 90% of the market in question, they are the largest undertakings in Greece which make advertising space available on hoardings provided for that purpose and on street furniture; in that country tobacco products are principally advertised by those means.

- 5 Zino Davidoff SA and Davidoff & Cie SA (hereinafter 'the Davidoff companies'), the applicants in Case T-177/98, are companies incorporated under Swiss law. Zino Davidoff SA holds the rights attached to the 'Davidoff' trade mark outside the tobacco sector. As such it grants licences to other undertakings for the commercial exploitation of diversification products under the 'Davidoff' and associated trade marks, such as cosmetic products and leather articles. Davidoff & Cie SA owns the rights attached to the 'Davidoff' trade mark for tobacco products, including articles for smokers (lighters, cigar-cutters and humidors).
- 6 By applications lodged at the Registry of the Court of First Instance on 19, 23 and 26 October 1998, Salamander, Una Film, the Alma Media group companies and the Davidoff companies brought the actions registered as Cases T-172/98, T-175/98, T-176/98 and T-177/98 respectively.
- 7 The Davidoff companies stated that their application was limited to the prohibition of sponsorship and advertising for trade marks used before 30 July 1998, the date of publication of the Directive, to advertise products other than tobacco products.
- 8 By separate documents lodged at the Court Registry on 15 December 1998, 21 December 1998, 8 January 1999, 14 January 1999 and 15 January 1999, the

Parliament and the Council raised pleas of inadmissibility in those four cases, pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

9 By documents lodged on 10 March 1999, 6 April 1999 and 15 April 1999, Salamander, Una Film, the Alma Media group companies and the Davidoff companies submitted observations on those pleas.

10 By letter of 16 December 1998, the Court requested the parties to submit observations on whether the proceedings should be stayed or referred to the Court of Justice, in view of the fact that an action for annulment of the Directive had been brought before the Court of Justice on 19 October 1998 by the Federal Republic of Germany (Case C-376/98). Salamander and the Alma Media companies (by pleadings lodged on 7 January 1999), the Parliament (by pleadings lodged on 5 January 1999 in Case T-172/98 and 8 January 1999 in Case T-176/98) and the Council (by pleadings lodged on 8 January 1999 in Cases T-172/98 and T-176/98) complied with that request; all parties other than the Alma Media group companies had already taken a position on that question in documents annexed to the applications or the documents raising pleas of inadmissibility.

11 On 2 March 1999 the High Court of Justice of England and Wales made a reference to the Court of Justice for a preliminary ruling on the validity of the Directive, registered as Case C-74/99.

12 By documents lodged at the Court Registry on 4, 17, 19, 23 and 25 March 1999, the Republic of Finland, the Commission, the United Kingdom and the French Republic sought leave to intervene in Cases T-172/98 and T-175/98 to T-177/98 in support of the forms of order sought by the Parliament and the Council. Leave was granted by the President of the Third Chamber of the Court of First Instance by orders of 2, 5 and 7 July 1999.

- 13 By documents lodged at the Court Registry on 15 April and 30 May 1999, Markenverband eV and Manifattura Lane Gaetano Marzotto & Figli SpA sought leave to intervene in Case T-172/98 in support of the form of order sought by the applicant. Leave was granted by the President of the Third Chamber of the Court of First Instance by orders of 7 and 21 July 1999.

- 14 By document lodged at the Court Registry on 17 March 1999, the International Chamber of Commerce sought leave to intervene in Case T-177/98 in support of the form of order sought by the applicants. By order of 7 July 1999 the President of the Third Chamber of the Court of First Instance refused to grant leave.

- 15 By document lodged at the Court Registry on 18 March 1999, Lancaster BV sought leave to intervene in Case T-177/98 in support of the form of order sought by the applicants. Leave was granted by the President of the Third Chamber of the Court of First Instance by order of 2 July 1999.

- 16 The Court requested the interveners in Cases T-172/98, T-175/98, T-176/98 and T-177/98 to submit statements limited to the question of admissibility.

- 17 The French Republic and the United Kingdom waived submission of a statement in intervention in those four cases.

- 18 Manifattura Lane Gaetano Marzotto & Figli waived submission of a statement in intervention in Case T-172/98.

- 19 The parties, except for the Republic of Finland, the United Kingdom and Manifattura Lane Gaetano Marzotto & Figli, presented oral argument and replied to the Court's oral questions at the public hearings which took place separately in the four cases on 25 November 1998.
- 20 Pursuant to Article 50 of the Rules of Procedure, and after hearing the parties, Cases T-172/98, T-175/98, T-176/98 and T-177/98 should be joined for the purposes of the judgment.

Forms of order sought by the parties

- 21 The applicants, supported by Markenverband and Lancaster, interveners, claim that the Court should:
- reject the plea of inadmissibility;
 - annul the Directive;
 - in the alternative, in Cases T-172/98 and T-175/98, annul Article 3 of the Directive;
 - order the defendants to pay the costs.

- 22 They also ask the Court to decline jurisdiction in favour of the Court of Justice, before which Case C-376/98 is pending.
- 23 The defendants, supported by the Republic of Finland and the Commission, interveners, contend that the Court should:
- dismiss the actions as inadmissible;
 - in the alternative, stay the proceedings pending the outcome of the application in Case C-376/98;
 - order the applicants to pay the costs.

Admissibility

- 24 The Parliament and the Council, supported by the Republic of Finland, the French Republic, the United Kingdom and the Commission, have raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure. They submit that the actions are inadmissible because of the nature of the contested act and because it is of neither direct nor individual concern to the applicants within the meaning of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC).

The fact that the actions challenge a directive

25 The Council submits, citing the order of the Court in Case T-99/94 *Asocarne v Council* [1994] ECR II-871, which was the subject of an appeal dismissed by order of the Court of Justice in Case C-10/95 P *Asocarne v Council* [1995] ECR I-4149, that the fourth paragraph of Article 173 of the Treaty makes no provision, for the benefit of individuals, for a direct action before the Community judicature challenging a directive. It considers that even if it is possible, contrary to the wording of that article, for directives to be assimilated to regulations so that an action against a decision 'adopted in the form of a directive' may be admissible, the Directive at issue neither constitutes a 'disguised' decision nor contains specific provisions which have the character of an individual decision as regards the applicants.

26 The applicants claim, citing Case T-135/96 *UEAPME v Council* [1998] ECR II-2335, paragraph 63, that an action for annulment brought by a natural or legal person is not inadmissible solely because it challenges a directive. Salamander adds that it must also be taken into account that the applicants' main argument is that the defendants misused their powers in adopting the Directive, in that it regulates an area which cannot be the subject-matter of a directive. It is therefore unacceptable to claim that the applicants may not challenge the act in question simply because it is a directive. The admissibility of the actions depends solely on whether the applicants are to be regarded as directly and individually concerned by the Directive.

27 The Court notes that the fourth paragraph of Article 173 of the Treaty makes no provision, for the benefit of individuals, for a direct action before the Community judicature challenging a directive.

28 Even if it were possible — contrary to the wording of the fourth paragraph of Article 173 of the Treaty — for directives to be assimilated to regulations so that an action challenging a decision 'adopted in the form' of a directive might be

admissible, in the present case the Directive does not constitute a ‘disguised’ decision and does not contain specific provisions which have the character of an individual decision as regards the applicants. Nor indeed have they claimed that the Directive did not comply as such with the requirements of Article 189 of the EC Treaty (now Article 249 EC). It is in fact a normative measure, since it applies in a general and abstract manner to all economic operators in the Member States who, from 30 July 2001, fulfil the conditions it lays down, and since, furthermore, its application within the Member States requires its transposition into each national legal system by means of national implementing measures.

- 29 Moreover, even though a directive is in principle binding only on its addressees, the Member States, it is generally an indirect means of legislating or regulating. Indeed, the Court of Justice has repeatedly classified directives as measures having general scope (see Case 70/83 *Kloppenburg v Finanzamt Leer* [1984] ECR 1075, paragraph 11, and Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605, paragraph 16, and the orders in Case 160/88 R *Fédération Européenne de la Santé Animale and Others v Council* [1988] ECR 4121, paragraph 28, and *Asocarne*, paragraph 29).
- 30 In certain circumstances, however, even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them (see Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207, paragraphs 11 to 32, Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraphs 11 to 13, Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraphs 13 to 18, and Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraphs 19 to 22).
- 31 The Court must therefore ascertain whether the Directive affects the applicants directly and individually.

Whether the applicants are directly concerned by the Directive

Arguments of the parties

- 32 The applicants submit essentially that the requirement of being directly concerned by the contested act relates to the character of the act, which must be sufficiently clear and unconditional itself to impose obligations and so affect them in their individual rights. They consider that the Directive has that character.
- 33 In the first place, as things stand, that is, before its transposition into the national legal systems, which is to take place by 30 July 2001 at the latest, the Directive affects the position of the applicants in law and in fact.
- 34 First, the Directive produces legal effects as from now.
- 35 As Markenverband submits, it has recently been held that during the period laid down for transposition of a directive the Member States must refrain from taking any measures liable seriously to compromise its objectives (Case C-129/96 *Inter-Environnement Wallonie v Région Wallonne* [1997] ECR I-7411, paragraph 45). That prohibition of any action contrary to the objectives of a directive should be regarded as a general principle of law which must be observed both by the public-law bodies of the Member States and by all subjects of private law such as the applicants.

- 36 Una Film considers that it is in a special legal position in which it is obliged to comply with the Directive even before it is transposed. It notes that while directives may not impose obligations on individuals and hence may not be relied on against them (Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 24), it is otherwise where the person or body against which a directive is relied on must, regardless of its legal form, be regarded as forming part of the State sphere. This interpretation has recently been applied to private undertakings which are subject to the authority or control of the State or have more extensive powers than those which derive from the rules applicable to relations between individuals (Case C-188/89 *Foster and Others v British Gas* [1990] ECR I-3313, paragraphs 18 and 20). Moreover, the State and the entities to be assimilated to the State on the basis of the above case-law must, during the period laid down for transposition of a directive, refrain from taking any measures liable seriously to compromise its objectives (*Inter-Environnement Wallonie v Région Wallonne*, paragraph 45).
- 37 Una Film submits that it satisfies the conditions set out in the *Foster* judgment, and observes that while it is not a public undertaking it is the sole contractual partner of Austria Tabak, from which it holds a de facto monopoly on the market for advertising of tobacco products in Austrian cinemas. It says that Austria Tabak had a statutory monopoly of the cultivation, import and sale of tobacco in Austria until Austria acceded to the Community in 1995, following which the establishment of other wholesalers of tobacco products was allowed. In 1997 Austria Tabak was partially privatised, the Austrian State retaining 50.5% of the capital. Notwithstanding the abolition of its statutory monopoly and its partial privatisation, Austria Tabak kept its dominant position on the market in question and remained a public undertaking within the meaning of Article 90 of the EC Treaty (now Article 86 EC). Una Film concludes that because of this special factual situation it is obliged, in the same way as the State authorities, to comply as from now with the Directive even in the absence of national transposition measures.
- 38 Una Film submits that that conclusion is not affected by the circumstance that its monopoly derives from its contractual relations with Austria Tabak, a private-

law undertaking, but one which is subject to State control. Thus in Case 249/81 *Commission v Ireland* [1982] ECR 4005, paragraphs 10 and 15, the Court of Justice regarded the organisation of an advertising campaign for Irish products by a private-law undertaking set up for that purpose by the Irish Government as an infringement of the prohibition of measures having equivalent effect for which Ireland was liable, and rejected Ireland's argument that that advertising campaign had been conducted by a legal person distinct from the State as regards its legal form.

39 Second, the Directive produces factual effects as from now.

40 Una Films submits that it is now, before transposition of the Directive, suffering losses caused by a decline in orders. Salamander and the Davidoff companies state that by laying down the principle that with effect from 30 July 2001 at the latest advertising for articles marketed under the names of tobacco products is prohibited, subject to an exception with very restrictive conditions, the Directive creates as from now great uncertainty as to the conditions of marketing of those articles in the immediate future. Since they are marketed in highly competitive markets, retailers are obliged as from now to decide either to continue with the distribution of those articles, with the risk of losses once the prohibition of advertising enters into force, or to obtain supplies from competing undertakings marketing products which are not liable to be subject to that prohibition. According to Salamander and the Davidoff companies, that situation is such as to entail a reduction in their sales volumes and hence a substantial fall in turnover.

41 Lancaster notes that the exception in Article 3(2) of the Directive may be allowed by a Member State only if the name of the diversification product is 'used... in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product'. Since this derogation from the prohibition of advertising for tobacco products is left in part to the discretion of the Member States in the definition of the conditions for allowing it, it is impossible to know now whether those States will require

existing brand names to be altered. Apart from the uncertainty produced by this situation, Lancaster points out that in all probability the conditions for allowing the derogation will not be uniform, which will constitute a barrier to advertising and hence to the free movement of goods and services. To obviate these difficulties, it would be necessary to provide for a reciprocity rule guaranteeing that a brand name recognised by one Member State as complying with the Directive is also recognised as such in the other Member States. According to Lancaster, no such rule is expressly provided for by Article 3(2) of the Directive, nor may one be deduced from the wording of that provision. That legal uncertainty makes it likely that legal disputes will arise and fines be imposed, so that wholesalers are already threatening to cancel orders for the diversification products at issue.

- 42 The applicants conclude on this point that to regard the Directive as producing effects only when it is transposed into national law is a purely theoretical approach which takes no account of reality.
- 43 In the second place, after transposition, the Directive will affect the applicants directly, independently of the national transposition measures.
- 44 That will be the case, first, for Una Film and the Alma Media group companies because of the advertising they create for tobacco products. The Directive prohibits that advertising without leaving Member States any discretion at all as to the forms of advertising prohibited and the date of entry into force of the prohibition.
- 45 It will be the case, second, for Salamander, the Davidoff companies and Una Film again as regards advertising created for products other than tobacco products marketed under the names of tobacco products. That conclusion is not affected

by the fact that Member States may permit derogations under Article 3(2) of the Directive.

- 46 Apart from such a derogation, advertising for products other than tobacco products marketed under a name used for tobacco products will be prohibited altogether and unconditionally, under Article 3(1) of the Directive. Implementation of the ban thus does not require any specific decision by the Member State concerned.
- 47 Moreover, allowing a derogation is subject to strict conditions, defined by the Directive, which restrict the Member States' discretion. First, the prohibition of advertising such products is absolute if the manufacturer of tobacco products has not marketed diversification products before 30 July 1998. Second, a Member State cannot allow an exemption from the advertising ban for diversification products unless the diversification took place in good faith before 30 July 1998. Third, if a Member State makes use of that possibility, under the second subparagraph of Article 3(2) of the Directive it is obliged to require that the name of the diversification product be used only 'in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product'.
- 48 Salamander and the Davidoff companies submit that, even if the Member States make use of the possibility of derogation, they will still be obliged to alter the design of the brand names which they own or use under licence and which are used for marketing products other than tobacco products. Those brands would thus lose their value and the applicants would be effectively expropriated. This requirement that the brands which are currently used for marketing diversification products be altered constitutes a serious and unjustified infringement of trade mark rights, the right to property and the right to the free exercise of economic activity.

- 49 Lancaster submits, in support of the Davidoff companies, that although those companies did diversify the 'Davidoff' brand before 30 July 1998, they are concerned by the ban in the Directive on any further diversification. Their commercial policy has for 15 years consisted in marketing a new diversification product every three years. According to Lancaster, that policy is now at risk, given that no potential contractual partner of the applicants will agree to conclude a licence contract with no certainty that he will be able to benefit from the reputation of the 'Davidoff' mark.
- 50 Markenverband observes, finally, that the Court of Justice has recently held that the direct effect of a directive adopted under Article 100a of the EC Treaty (now, after amendment, Article 95 EC) is not contradicted by the fact that, in view of the legal basis of the directive, Member States may request a derogation from its implementation (Case C-319/97 *Kortas* [1999] ECR I-3143, paragraphs 22 and 23).
- 51 The defendants and the interveners supporting them consider that the applicants are not directly concerned by the Directive.

Findings of the Court

- 52 The condition that an individual must be directly concerned by the contested Community measure means that the measure must directly affect his legal situation and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules alone without the application of other intermediate rules (Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43).

- 53 The Court must therefore ascertain whether the Directive of itself affects the legal situation of the applicants.
- 54 It must be recalled here that a directive cannot of itself impose obligations on an individual and may therefore not be relied on as such against him (*Marshall*, paragraph 48, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9, *Faccini Dori*, paragraph 25, and Case C-192/94 *El Corte Inglés v Blázquez Rivero* [1996] ECR I-1281, paragraph 15). It follows that a directive which, as in the present case, requires the Member States to impose obligations on economic operators is not of itself, before the adoption of the national transposition measures and independently of them, such as to affect directly the legal situation of those economic operators within the meaning of the fourth paragraph of Article 173 of the Treaty.
- 55 The applicants submit, however, that the Directive affects them directly even before its transposition.
- 56 They submit, first, relying on *Inter-Environnement Wallonie*, that there is a general principle of law that both public-law entities in the Member States and all subjects of private law are obliged to refrain, during the period laid down for transposition of a directive, from taking any measures which may seriously compromise the aims of that directive.
- 57 On that point, it is sufficient to note that this obligation, to which the Member States are subject in accordance with the *Inter-Environnement Wallonie* judgment, may not be extended to individuals. It is founded on the second paragraph of Article 5 of the EC Treaty (now, after amendment, the second paragraph of Article 10 EC), under which Member States are to 'abstain from any measure which could jeopardise the attainment of the objectives' of the Treaty, and the third paragraph of Article 189 of the EC Treaty (now the third

paragraph of Article 249 EC), under which 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' (*Inter-Environnement Wallonie*, paragraph 45), that is, on provisions addressed to the Member States alone, not to individuals. To extend that reasoning of the Court of Justice to individuals would amount to recognising that the Community had the power to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (*Faccini Dori*, paragraph 24). As pointed out in paragraph 54 above, a directive may not of itself impose obligations on an individual.

58 This argument must therefore be rejected.

59 Una Film considers, second, that despite its status as a private undertaking, it forms part of the Austrian State sector, and that in those circumstances it is obliged to comply with the Directive during the period prescribed for its transposition, in accordance with the interpretation adopted in *Inter-Environnement Wallonie*. In support of this argument it cites the *Foster* judgment.

60 However, Una Film cannot rely to any purpose on that judgment, in which the Court of Justice held that the provisions of a directive which are capable of having direct effect may be relied on against 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals' (*Foster*, paragraph 20 and the operative part). In the present case, even supposing that, despite the abolition of the statutory monopoly of the sale of tobacco products in Austria and the privatisation of Austria Tabak, the latter may, if appropriate by reference to the *Commission v Ireland* judgment cited by Una Film, be regarded as a public authority within the meaning of the *Foster* judgment, Una Film has not shown, or indeed even claimed, that the object of its commercial activity — the distribution of

advertising films for tobacco products in cinemas, a responsibility which it has been given by Austria Tabak — constitutes a public service, that that activity is carried on not under private-law contracts but under measures adopted by the State, and that for that purpose it has special powers beyond those which result from the normal rules applicable in relations between individuals.

61 This argument must therefore likewise be rejected.

62 The applicants refer, third, to the economic consequences they are suffering or may suffer as a result of the imminent transposition of the Directive. However, even if those consequences are the direct result of the Directive itself rather than of the anticipation by economic operators of its transposition by the Member States, they do not in any event influence the applicants' legal situation, but only their factual situation.

63 This argument must therefore also be rejected.

64 The applicants submit, next, that the Directive will affect them directly after it has been transposed, independently of the national transposition measures: indeed, the Directive prohibits the advertising of tobacco products without leaving the Member States any discretion at all, and, furthermore, prohibits advertising for products other than tobacco products marketed under the name of a tobacco product, although it admittedly leaves the Member States the possibility of derogating from the ban. The applicants assert that prohibition is thus the rule, while derogation is no more than a possibility which would require a specific decision by the Member State and the fulfilment of strict criteria. Thus a derogation cannot apply to a product which is marketed for the first time, under the name of a tobacco product, after 30 July 1998, the date of the entry into force

of the Directive. Where a derogation is allowed, the Member States must in any event require changes in the design of the marks under which the diversification products are marketed.

- 65 The Court notes to begin with that, in accordance with the cases cited in paragraph 54 above, the Directive cannot of itself impose an obligation on the applicants to refrain from all advertising for tobacco products or diversification products. That obligation can arise only from the transposition measures adopted by the Member States.
- 66 The argument based on the *Kortas* judgment is unfounded. According to that judgment, the direct effect of a directive adopted, as in the present case, on the basis of Article 100a of the Treaty is not contradicted by the fact that, in view of the legal basis of the directive, Member States are allowed to request a derogation, just as in the present case they are allowed under certain conditions to grant a derogation from the advertising ban for diversification products. The interpretation adopted in *Kortas* refers exclusively to the right of individuals to rely on a directive as against a Member State, and it has been stated above that a directive cannot of itself impose obligations on an individual and hence may not be relied on as such against him.
- 67 Next, as a secondary point, the Member States are free to authorise advertising for products other than tobacco products which were marketed in good faith under the name of a tobacco product before 30 June 1998, which is the case of Salamander, the Davidoff companies and, in part, Una Film.
- 68 For those products, any prohibition of advertising in a Member State would therefore derive in any event not from the Directive but from that Member State's discretionary decision not to make use of the possibility of obtaining a derogation under the Directive.

69 Again for those products, a derogation from the advertising ban by a Member State would similarly derive in any event from a discretionary decision of that Member State to make use of the possibility of derogation. It is true that the Member State is then obliged to require, under the second subparagraph of Article 3(2) of the Directive, that the name of those products be used 'in a manner clearly distinct from that used for the tobacco product'. But that obligation of the Member States is simply a corollary of the discretionary decision mentioned above and, in view of the very general wording of the above provision, the Member States enjoy a broad power of assessment when implementing it.

70 It follows that the Directive, which requires the Member States to impose obligations on economic operators, cannot of itself impose those obligations on the applicants, and is thus not such as to concern them directly. As a secondary point, the Directive leaves the Member States a power of assessment, such that the applicants cannot be directly concerned by it. Accordingly, it does not of itself affect the legal situation of the applicants, as required by the criterion defined in the *Dreyfus* judgment.

71 Consequently, the applications are inadmissible and must therefore be dismissed, without there being any need to consider whether the applicants are individually concerned by the Directive.

Adequacy of judicial protection

72 The applicants submit that, should their applications be declared inadmissible, they could not be guaranteed adequate legal protection in the context of actions brought against the national legislative or administrative measures transposing the Directive.

73 First, they contest the existence, and in any event the effectiveness, in most national legal systems of actions challenging the measures transposing a directive and the effects produced by a directive before it is transposed. Second, they consider that the procedure for obtaining a preliminary ruling, to which actions in national courts may give rise, is not a satisfactory alternative to a direct action for the annulment of a directive, which is a much swifter and more effective legal remedy for the protection of a right. Salamander and the Alma Media group companies also submit that this situation prevents them from having the question of the validity of the Directive decided within a reasonable time and deprives them of an effective remedy, so that there is a violation of Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

74 As regards the argument that there are no national remedies which might allow the validity of the Directive to be reviewed by means of a reference for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), the Court points out that the principle of equality of conditions of access to the Community judicature by means of an action for annulment requires that those conditions do not depend on the particular circumstances of the legal system of each Member State. It should be observed, moreover, that pursuant to the principle of genuine cooperation set out in Article 5 of the Treaty, Member States must help to ensure that the system of legal remedies and procedures established by the EC Treaty and designed to permit the Community judicature to review the lawfulness of acts of the Community institutions is comprehensive (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23, and order in Case T-173/98 *Unión de Pequeños Agricultores v Council* [1999] ECR II-3357, paragraph 62). Those factors cannot, however, justify this Court in departing from the system of legal remedies established by the fourth paragraph of Article 173 of the Treaty, as explained by the case-law, and exceed the bounds of its jurisdiction under that provision.

75 As regards the argument that a reference for a preliminary ruling is less effective than a direct action for annulment, such a circumstance, even if proved, could not entitle the Court to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by Articles 173 and 177 of the Treaty and by Article 178 of the EC

Treaty (now Article 235 EC) and designed to give the Court of Justice and the Court of First Instance power to review the legality of acts of the institutions. That circumstance can certainly not allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 173 of the Treaty to be declared admissible (orders in *Asocarne*, paragraph 26, and Case C-87/95 P *CNPAAP v Council* [1996] ECR I-2003, paragraph 38).

76 It may be added that there is already, that is, before the expiry of the period prescribed for transposition of the Directive, a reference pending before the Court of Justice for a preliminary ruling on its validity, made on 2 March 1999 by the High Court of Justice of England and Wales (Case C-74/99).

77 Moreover, it does not appear that the applicants are deprived of all right of recourse against the possible consequences of the Directive. They may in any event, if they consider themselves to have suffered damage flowing directly from that measure, challenge it in proceedings for non-contractual liability under Article 178 of the Treaty and Article 215 of the EC Treaty (now Article 288 EC) (order in Case C-409/96 P *Sveriges Betodlares Centralförening and Henrikson v Commission* [1997] ECR I-7531, paragraph 52).

78 The general principle of Community law that any person whose rights or freedoms have been infringed is entitled to an effective remedy, which is inspired by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is therefore complied with in the present case.

79 Consequently, the actions brought by Salamander, Una Film, the Alma Media group companies and the Davidoff companies must be dismissed as inadmissible.

- 80 In view of that conclusion, the requests by the applicants that the Court decline jurisdiction in Cases T-172/98 and T-175/98 to T-177/98 to enable the Court of Justice to rule on the claims for annulment have become devoid of purpose.

Costs

- 81 Under Article 87(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 applicants have been unsuccessful, they must be ordered to pay the costs of the Parliament and the Council, as applied for in their pleadings.
- 82 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Republic of Finland, the French Republic, the United Kingdom and the Commission must therefore bear their own costs.
- 83 Since Markenverband, Manifattura Lane Gaetano Marzotto & Figli and Lancaster have not applied for the applicants to be ordered to pay the costs of their intervention, they must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Joins Cases T-172/98 and T-175/98 to T-177/98 for the purposes of the judgment;
2. Dismisses the actions as inadmissible;
3. Orders the applicants to bear their own costs and, jointly and severally, those of the Parliament and the Council;
4. Orders the Republic of Finland, the French Republic, the United Kingdom and the Commission to bear their own costs;
5. Orders Markenverband eV, Manifattura Lane Gaetano Marzotto & Figli SpA and Lancaster BV to bear their own costs.

Lenaerts

Azizi

Jaeger

Delivered in open court in Luxembourg on 27 June 2000.

H. Jung

Registrar

K. Lenaerts

President