

## The scope of EC harmonising powers revisited?

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Judgement of the CJEC in Case C-491/01, *The Queen and the Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Tobacco Manufacturing Directive Case)

### A. Introduction

As in most multi-level systems of governance, the search for a proper delimitation of the European Community's scope of powers is a constant feature of EU law making and interpretation. This concerns in particular the scope of article 95 EC which enables the Community to harmonise national regulation in order to establish or to facilitate the free movement within the internal market.

Both the Community's harmonisation practice based on article 95 and the ECJ's related case law have often been criticised as being too liberal and granting the EC an unlimited power to regulate subject matters still belonging to the Member States' fields of competences. This concern has grown to such an extent that it has been put on the EU reform agenda. In fact, the Declaration No. 23 on the future of the Union annexed to the Treaty of Nice states that the next Treaty reform - which is presently prepared by the European Convention - should address the question "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States".

Within the Convention, at least two Working Group have already dealt with the possibilities to delimit more precisely the scope of article 95. It appears that there is a consensus within the Convention to maintain this article. There are good reasons to consider that this consensus has been established thanks to the ECJ's interpretation of its limits in the tobacco advertising case (C-376/98, *Germany v. EP/Council*). In this case the Court pointed out that a harmonisation measure based on article 95 has to have positive effect on interstate trade. Some members of the Convention have, hence, proposed to "codify" this case law by introducing this

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principle *expressis verbis* into the new “constitutional treaty”. The new tobacco case reviewed in this case note should be read against this background.

## B. Facts

Shortly before the Christmas break the Court of Justice handed down its judgement in Case C-491/01, which concerned a request for a preliminary ruling from an English court on the validity of Directive 2001/37/EC (hereafter “the Directive”). The Directive aimed at harmonising various aspects of the manufacture, sale and presentation of tobacco products. It contained three main harmonising provisions aiming at a removal of barriers to trade. Firstly, building on previous measures, the Directive harmonised maximum tar, nicotine and carbon monoxide (hereafter “CO”) yields in cigarettes, prohibiting the manufacture of products having a higher yield (article 3). This prohibition was extended to cigarettes manufactured for export on the grounds that such cigarettes could be illegally reimported creating new barriers to trade and thus undermining the other provisions of the Directive. Secondly, the Directive harmonised certain labelling requirements, imposing the printing on cigarette packets and other tobacco products of large warnings along with information on tar, nicotine and CO content (article 5). Thirdly, it prohibited the use on tobacco products of descriptors (such as the words “mild” or “light”) suggesting that the product is less harmful than others (article 7).

BAT, Imperial Tobacco and Japan Tobacco sought judicial review before the English courts of the UK Government’s intention to transpose the Directive, arguing that the latter measure was invalid<sup>1</sup>. The national court sought guidance from the ECJ on the validity of the legal basis of the measure, its compatibility with certain fundamental rights and principles and its scope of application.

## C. Admissibility

France and the Commission both contested the admissibility of the reference on the grounds that the latter had been made before the Directive’s transposition deadline had expired and before national implementing legislation had been adopted. To allow such a reference would, in their view, be contrary to the principle that an individual cannot invoke a Directive before the national courts prior to the date of transposition and constitute a means of circumventing the conditions laid down in Article 230.

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<sup>1</sup> Japan Tobacco had already sought the annulment of the Directive before the CFI. Its application was rejected as inadmissible due to lack of direct concern (Case T-223/01).

The Court gives short shrift to these arguments. Citing its classic jurisprudence it recalls that it is for the national judge to assess the need to make a reference and the Court is in principle obliged to give an answer except in very exceptional cases where the questions referred either bear no relation to the main dispute or are entirely hypothetical in nature. Clearly such an exception finds no application in the present case.

As to the alleged circumvention of article 230, the Court recalls that, if a general measure cannot be challenged under article 230, it can be challenged incidentally using either the exception of illegality (art. 241) or indirectly using the preliminary reference procedure. Availability of the latter remedy cannot be made dependant on prior adoption of national implementing measures.

The solution reached by the Court to this rather novel question is no doubt correct from a logical, pragmatic, judicial policy and effectiveness point of view. Indeed, there was no apparent reason to accept the Commission's parallel between, on the one hand, the ability to rely, in national Courts, on a directive which can have no legal effects for individuals before the end of the transposition period and, on the other, the right to challenge an allegedly illegal directive which has already entered into force at the Community level. Moreover, the Court recently caused a great deal of controversy when it refused to relax the conditions for standing under article 230.4 in cases where access to national courts was denied<sup>2</sup>. It did, however, in the name of the principle of loyal cooperation, call for full and effective access to national courts. It would have been contradictory for it in the present case to go on to neutralise expansive national rules on locus standi by introducing new conditions of admissibility for preliminary references. The solution of the Court is also understandable from a pragmatic point of view. Had it rejected the reference, it would only have been postponing an inevitable future challenge. Finally, the acceptance by the Court probably contributed to the effectiveness of Community law and to legal certainty. This early decision on the validity of the Directive will make those Member States doubtful of its legality less likely to stall implementation and make individuals clearer about their impending obligations.

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<sup>2</sup> Case C-50/00P, *Union de Pequeños Agricultores*, see on this D. Hanf, "Kicking the ball into the Member States' field: the Court's response to *Jégo-Quéré*" in 3 (2002) *German Law Journal* 8 ([http://www.germanlawjournal.com/past\\_issues.php?id=171](http://www.germanlawjournal.com/past_issues.php?id=171)).

## D. Substance

### 1. The first questions

The national court's first questions relate (*infra* 1.1.) to the appropriateness and adequacy of the Directive's legal bases and (*infra* 1.2.) the Directives compatibility with certain fundamental rights and principles.

#### 1.1. Legal basis

The Directive was adopted on the basis of articles 95 (harmonisation of the internal market) and 133 (common commercial policy). According to the applicants these were not the appropriate legal bases. Firstly, article 95 could not be used since the measure was not intended to ensure the free movement of goods in the Community but rather the protection of health. Secondly, article 133 could not be used since the ban on exports of tobacco products not meeting Community requirements did not specifically concern international trade but also affected intra-Community trade.

These arguments were supplemented by Germany, Greece and Luxembourg. Those Member States argued that, as regards the export ban, articles 95 and 133 did not constitute appropriate legal bases. In their view, most illegally imported cigarettes are manufactured outside the EC and in any event such activities primarily raise questions of tax evasion and should be tackled by more effective border controls. Moreover, the export ban is not about external trade but rather protection of public health.

The Council, Commission, Parliament and no less than eight Member States intervened to assert the validity of the choice of legal basis arguing that the objectives of the measure were indeed free movement and the regulation of exports as part of the common commercial policy.

In its reply the Court begins by laying down a statement of principle regarding the scope of article 95, inspired by its judgement in the tobacco advertising case. A measure may be based on article 95 as long as it is genuinely intended to improve the conditions for the establishment of the internal market. It must also consider the effects of the measure – whether it actually contributes to the elimination or prevention of existing or future obstacles to free movement. As long as these conditions are fulfilled, it is irrelevant that public health protection is a decisive factor in shaping the harmonising measures.

In the present case the Court considers that divergences in national legislation regarding packaging requirements and maximum tar, nicotine and carbon monoxide levels constitute obstacles to trade, illustrating the point by reference to the legislative intentions of various Member States. Harmonisation therefore clearly has the effect of eliminating certain obstacles to trade. Curiously, the Court concludes on the basis of this effects analysis that the measure has free movement as its object thus justifying recourse to article 95 as a legal basis.

The Directive also requires that any exported cigarettes conform to the new manufacturing requirements, allegedly because of worries that these may be reimported or illegally placed directly on the EC market. Although, unlike the other provisions in the Directive, this export ban does not contribute *directly* to the functioning of the internal market, it does contribute *indirectly* by preventing circumvention of rules directly aimed at removing obstacles. Thus, the Court concludes that article 95 can also be cited as a legal basis for the export ban provision.

In its reasoning on this point, the Court accepts that it is impossible to evaluate the quantity of cigarettes illegally imported or placed directly on the market. However, it baldly asserts "*the cigarette market particularly lends itself to the development of unlawful trade*"<sup>3</sup> Moreover, in its view, this characteristic of the market will be exacerbated by the Directive itself. While these assertions may be true, absolutely no evidence is given to support them. So, in the case of the export ban the Court identifies an object but then omits to demonstrate any concrete effects.

In addition to the problems of the confused analysis of object and effect, one must also question the way in which the scope of article 95 is widened to include measures contributing *indirectly* to the functioning of the internal market. The tobacco advertising judgement<sup>4</sup> – referred to by the Court as the starting point for its reasoning – requires that even measures intended directly to contribute to the removal of trade barriers are supported by some evidence of the existence of such barriers. However, as noted above, the remote benefits allegedly brought about by indirect measures (i.e. the export ban) are not backed up by any concrete facts.

After concluding that article 95 was in fact an appropriate legal basis, the Court then goes on to consider the problem that the Directive cited article 133 as a second legal basis. This question was dealt with a simple application of classic case law. The Court recalled that "*if examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant,*

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<sup>3</sup> Point 87.

<sup>4</sup> Case C-376/98, Germany v. Parliament and Council.

*whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component*<sup>5</sup>. Since, between the achievement of the internal market (article 95) and the common commercial policy (article 133), the former was the more important in the Directive, article 95 should have been the sole legal basis.

However, the fact that article 133 was incorrectly cited as a legal basis does not affect the validity of the Directive. Since there is no conflict between the legislative procedures used under the two articles, the double legal base is a purely formal defect. Article 95 constitutes an appropriate legal basis and article 133 is simply redundant.

### ***1.2. Fundamental rights and principles***

The applicants assert that the measure violates the principle of proportionality, the fundamental right to property, the duty to state reasons and the principle of subsidiarity. In addition the applicants contend that the measure constitutes a misuse of powers.

#### **a) Proportionality**

According to the applicants and the German, Greek and Luxemburg governments, the article 3.2 ban on manufacture for export, the stringent labelling requirements in article 5 and the article 7 prohibition on the use of certain descriptors all breach the principle of proportionality.

As regards the ban on manufacture for export, the Court considers that the measure is both appropriate and does not go beyond what is necessary for the elimination of barriers to trade within the Community. As noted above, the export ban seeks to prevent circumvention of the rules directly aimed at removing barriers to intracommunity trade. Moreover, the Court esteems that the alternative, less restrictive method of blocking the import of illegal cigarettes by reinforcing border controls would not be as efficient as the export ban laid down in the directive.

This part of the Court's reasoning is not particularly convincing. It fails to address seriously the argument of some of the interveners that most illegally imported cigarettes are manufactured outside the Community. It is true that a blanket ban on manufacture for export may be a cheaper way of tackling the part of illegal imports originally coming from the Community. However, if the Community is serious

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<sup>5</sup> Point 94.

about reducing illegal imports in general then reinforcement of border controls will be necessary, a move which would simultaneously address the problem of illegal reimports and the (allegedly far bigger) problem of imports of illegal third country cigarettes.

The Court also rejects the contention that the article 5 labelling restrictions are disproportionate. Harmonisation of labelling requirements also contributes to the free movement of goods and entails a choice of the appropriate level of health protection. Dedicating a larger surface area of the packets to warnings, ingredients etc, ensures a high level of protection and does not overstep the bounds of the legislatures discretion since "sufficient" space is left on the packet for other material such as trade marks.<sup>6</sup>

The Court is no more receptive to the applicants' arguments that the article 7 restrictions on the use of certain descriptors are disproportionate. It agrees with the institutions and several of the intervening Member States that descriptors which give the impression that some products are less harmful are misleading. Such descriptors are not objective indicators and so tend to undermine the objectives sought-by other labelling requirements such as those on tar and nicotine yield.

One alternative proposed by the applicants was the regulation (rather than the prohibition) of the use of such descriptors, supposedly to make the latter more objective. Interestingly, the Court rejects this proposal, not because the use of such descriptors continues to be misleading but because they nevertheless encourage smoking.

#### b) Fundamental right to property

The applicants argue that the size of the warnings imposed by the directive and the ban on the use of certain descriptors, prevents or restricts their use of certain trademarks thus violating their fundamental right to property as well as articles 295 of the treaty and article 20 of the TRIPS agreement.

The Court rejects these arguments. The Directive only affects the exercise of the parties' trademark rights and thus article 295<sup>7</sup>, which relates to the very existence of the rights, is irrelevant.

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<sup>6</sup> In the case of, for example, a packet of cigarettes, the warnings - depending on the number of official languages used - should cover up to 35% of the front of the packet, 50% of the back with 15% of the sides being taken up with tar, nicotine and tobacco yields.

<sup>7</sup> Article 295 states that the provisions of the Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership".

As for the TRIPS agreement, the Court refers to its classic case law stating that it does not have the jurisdiction to interpret the validity of the directive in light of the WTO agreements.

Moreover, as regards the alleged violation of the fundamental right to property, the latter is not absolute and can be restricted for policy reasons provided that the very substance of the right is not impaired. Reducing the space available to manufacturers to display their trademark does not affect the very substance of the right. As regards trademarks whose use is prohibited because they incorporate certain banned descriptors, there is no impairment of the substance of the right to property since manufacturers can distinguish their product using other trademark (!)

The Court was faced here with two very different sets of facts. Firstly, there were the manufacturers who had a reduced amount of space to display their trademarks. Of course they had certain limits imposed on the size of the trademark they used but they could still use it, so the Court's view that their property rights were not infringed is understandable. Secondly, there was JTI, one of the applicants who owned a trademark incorporating the word "mild" – a descriptor banned under the directive. That applicant was essentially being expropriated by the directive. It is really hard to see how such an expropriation does not affect the very existence of the applicant's trademark rights. It is even harder to see how the fact the applicant could use another sign to distinguish his product makes this expropriation any more acceptable. If the government takes my house away for whatever reason, it is cold comfort that I have the possibility to buy the one next door.

It is strange that the Court does not mention the trademark directive to support its argument. That directive explicitly states that the use of trademarks in a misleading way can be prevented. This would certainly justify prohibiting the use of trademarks on cigarettes, which incorporate terms such as mild, at least to the extent that such use is misleading. However, it would not fully respond to the applicants argument that some form of regulation, rendering the descriptors more objective – and thus less misleading – would be possible.

#### c) Failure to state reasons

The applicants and various interveners raise several different arguments tending to show that the directive fails to respect the obligation to state reasons laid down in article 253 of the Treaty. They point to the absence of new scientific data supporting a tightening of the rules on maximum tar, nicotine and CO yields, to the failure to explain why illegal reimports significantly affect health protection or why the directive improves free movement.

The Court rejects these arguments. Through various provision in the Directive the latter clearly discloses the essential objective of free movement that is pursued. The Directive also clearly states the areas of harmonisation (maximum yields, ban on manufacture for export and labelling requirements), which are considered necessary to contribute to that objective. Such justification is sufficient since the duty to give reasons does not require the legislator to give specific reasons for each technical choice made. Moreover, the legislator is not required to justify the level of health protection sought through recourse to scientific data since social and policy arguments are also valid.

d) Violation of the principle of subsidiarity

The Court rejects the applicant's claim that the directive violates the principle of subsidiarity. The removal of obstacles to trade sought by the directive could not have been achieved by Member States acting alone.

e) Misuse of powers

The applicants claim that there has been a misuse of powers since the directive is exclusively aimed at the protection of public health. Not surprisingly, the Court does not accept this, reiterating that once the conditions for application of article 95 are fulfilled, as in this case, it is irrelevant that public health is a decisive factor in the choices made.

Strangely, however, in its reasoning the Court chooses this point, close to the very end of its judgement to mention what it has strenuously avoided mentioning before, that is that article 95 cannot be used to circumvent the exclusion of harmonisation in the field of public health as laid down in article 152.4 of the Treaty. It considers that there is no circumvention in this case because "*the conditions for recourse to article 95 were satisfied in the case of the Directive, and it has not in any way been established that it was adopted with the exclusive, or at least decisive, purpose of achieving an end other than that of improving the conditions for the functioning of the internal market in the tobacco products sector*"<sup>8</sup>

This is the first time in the case that the Court has explicitly considered that the fact that the measure pursues several objectives and the relative importance of those objectives may have an incidence on the validity of article 95 as a legal basis and hence on the very existence of Community competence. It does note, however, dwell on this point.

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<sup>8</sup> Point 191. Emphasis added.

## 2. The second question

In addition to its questions on legal basis and fundamental rights and principles, the national court asks whether the article 7 prohibition on the use of words such as mild or light also applies to cigarettes manufactured for export. The applicants and most of the interveners maintain that article 7 does not apply to such products.

The Court accepts this more restrictive view having regard both to the wording and purpose of the provisions. Whereas a ban on manufacture for export is laid down expressly in article 3 regarding tar, nicotine and carbon monoxide yields, this is not the case for article 7. The latter must also be considered complementary to the other labelling requirements in article 5, which are clearly limited to cigarettes manufactured for sale in the EC.

Moreover, the Court considers that the risks of illicit reimportation of such cigarettes is not as "severe" as in the case of cigarettes manufactured in the EC and not respecting the directive's maximum tar, nicotine and CO yields. Had this risk been considered severe enough, the legislature would have explicitly included a prohibition on manufacture.

While one may accept the Court's view here, it should be reiterated that no evidence was given in the judgement that there really was a risk of circumvention of the provisions on maximum yields. The consequences of circumvention may be more severe but the risk remains undemonstrated.

### **E. Some brief closing comments**

On the question of the scope of article 95, this judgement marks a retreat from the Court's position in the tobacco advertising case<sup>9</sup>. In that case the Court showed a willingness to prevent over extensive recourse to article 95 essentially by limiting its use to measures with a demonstrated positive effect on interstate trade. In the present case that obligation to show some effect has been undermined. The Court's argument in the present case is constructed on future hypothetical barriers to trade and unquantifiable illegal reimports.

In this regard, one point, which is conspicuously absent from the judgement, is that of the impact of linguistic labelling requirements on free movement. The Directive requires cigarette packets to be labelled in all the official languages of the Member State in which they are sold. With such a rule, is interstate trade really anything

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<sup>9</sup> See above note 4

more than hypothetical? Spanish cigarettes obviously can't be sold in France, French cigarettes can't be sold in Belgium (because they don't have a warning in Dutch or German) and Belgian cigarettes can't be sold in Holland (because the Dutch warning will be too small) etc. Unfortunately the Court is silent on this point.

The other key issue in this case is that of the circumstances in which Community law can deprive individuals of their right to trade marks. As noted above the Courts reasoning on this issue is simply not coherent. While extreme examples such as the one in this case where Community law effectively expropriates the holder of their intellectual property rights may remain rare, the case sets a worrying new precedent.