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JUDGMENT OF THE COURT

10 December 2002 (1)

(Directive 2001/37/EC - Manufacture, presentation and sale of tobacco products - Validity - Legal basis - Articles 95 EC and 133 EC - Interpretation - Applicability to tobacco products manufactured in the Community and intended for export to non-member countries)

In Case C-491/01,

REFERENCE to the Court under Article 234 EC by the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

- liable to encourage smoking.
39. Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products.
40. It is not clear that merely regulating the use of the descriptions referred to in Article 7, as proposed by the claimants in the main proceedings and by the German, Greek and Luxembourg Governments, or saying on the tobacco products' packaging, as proposed by Japan Tobacco, that the amounts of noxious substances inhaled depend also on the user's smoking behaviour would have ensured that consumers received objective information, having regard to the fact that those descriptions are in any event likely, by their very nature, to encourage smoking.
41. It follows from the preceding considerations concerning Question 1(c) that the Directive is not invalid by reason of infringement of the principle of proportionality.

Question 1(d)

42. By Question 1(d) the national court asks whether the Directive is invalid in whole or in part by reason of infringement of Article 295 EC, the fundamental right to property and/or Article 20 of the Agreement on the Trade-related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation ('the WTO Agreement'), approved on behalf of the European Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

Observations submitted to the Court

43. The claimants in the main proceedings maintain that Articles 5 and 7 of the Directive infringe Article 295 EC, the fundamental right to property and/or Article 20 of the TRIPs Agreement, which provides that use of a trade mark in the course of trade is not to be unjustifiably encumbered by special requirements such as its use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. They claim that the very large size of the new

health warnings required by Article 5 of the Directive constitutes a serious infringement of their intellectual property rights. Those warnings will dominate the overall appearance of tobacco product packaging and so curtail or even prevent the use of their trade marks by the manufacturers of those products. Likewise, they claim that the absolute prohibition on using the descriptive terms referred to in Article 7 of the Directive will deprive them of a number of their trade marks because they will no longer be permitted to use them.

44. According to Japan Tobacco, Article 7 of the Directive prohibits it from exercising its intellectual property rights by preventing it from using its trade mark Mild Seven in the Community and by depriving it of the economic benefit of its exclusive licences for that trade mark. Such a result entails infringement of the right to property, which is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ('ECHR') and enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.
45. The Greek and Luxembourg Governments submit that Article 7 of the Directive interferes with the intellectual property rights of the manufacturers of tobacco products and causes damage to their financial results since, by prohibiting absolutely the use of certain descriptive terms, its effect is purely and simply to prohibit certain trade marks duly registered by those manufacturers.
46. The United Kingdom, Belgian, French, Netherlands and Swedish Governments, and the Parliament, Council and Commission observe first of all that the provisions of the Directive have no effect on the rules governing the system of property ownership in the Member States within the meaning of Article 295 EC. Then they argue that the fundamental right to property is not an absolute right, but one that may be restricted on grounds of the general interest such as, in the case in the main proceedings, the protection of public health. Lastly, they submit that the TRIPs Agreement does not have direct effect and, in any event, the provisions of the Directive are not contrary to Article 20 of that Agreement, since the latter does not forbid every cigarette manufacturer to continue to use its trade mark by distinguishing it from others by means of words, signs, colours and drawings which are particular to it and which it could present on the available surfaces of the tobacco products' packaging.

Findings of the Court

47. With regard, first of all, to Article 295 EC, it must be borne in mind that

- according to that provision the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'. That provision merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, p. 345).
48. It must be stated that in the circumstances of the present case the Directive does not impinge in any way on the rules governing the system of property ownership in the Member States within the meaning of Article 295 EC which is irrelevant in relation to any effect produced by the Directive on the exercise by the manufacturers of tobacco products of their trademark rights over those products.
49. As regards the validity of the Directive in respect of the right to property, the Court has consistently held that, while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, in particular, Case 265/87 *Schröder* [1989] ECR 2237, paragraph 15; Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78, and Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 54).
50. As paragraphs 131 and 132 above make clear, the only effect produced by Article 5 of the Directive is to restrict the right of manufacturers of tobacco products to use the space on some sides of cigarette packets or unit packets of tobacco products to show their trade marks, without prejudicing the substance of their trade mark rights, the purpose being to ensure a high level of health protection when the obstacles created by national laws on labelling are eliminated. In the light of this analysis, Article 5 constitutes a proportionate restriction on the use of the right to property compatible with the protection afforded that right by Community law.
51. It is made clear in paragraphs 134 to 141 above that Article 7 of the Directive is intended to ensure, in a manner in keeping with the principle of proportionality, a high level of health protection on the harmonisation of the provisions applicable to the description of tobacco products.
52. While that article entails prohibition, in relation only to the packaging of

- tobacco products, on using a trade mark incorporating one of the descriptors referred to in that provision, the fact remains that a manufacturer of tobacco products may continue, notwithstanding the removal of that description from the packaging, to distinguish its product by using other distinctive signs. In addition, the Directive provides for a sufficient period of time between its adoption and the entry into force of the prohibition under Article 7.
53. In light of the foregoing, it must be held that the restrictions on the trade mark right which may be caused by Article 7 of the Directive do in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of that right.
54. With regard, finally, to the validity of the Directive in the light of Article 20 of the TRIPs Agreement, the Court has consistently held that the lawfulness of a Community measure cannot be assessed in the light of instruments of international law which, like the WTO Agreement and the TRIPs Agreement which is part of it, are not in principle, having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions (Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 47; Case C-377/98 *Netherlands v Parliament and Council*, cited above, paragraph 52; Case C-301/97 *Netherlands v Council* [2001] ECR I-8853, paragraph 53, and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 93).
55. It is also clear from that case-law that it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see the judgments cited above, *Portugal v Council*, paragraph 49; *Netherlands v Council*, paragraph 54, and *Omega Air and Others*, paragraph 94).
56. Those conditions are not satisfied in the case of the Directive, with the result that there is no need to examine its validity in the light of Article 20 of the TRIPs Agreement.
57. It follows from the foregoing considerations concerning Question 1(d) that the Directive is not invalid by reason of infringement of Article 295 EC or the fundamental right to property.