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HARMONIZING THE INTERNAL MARKET, OR PUBLIC HEALTH? – REVISITING CASE C-491/01 (*BRITISH AMERICAN TABACCO*) AND CASE C-380/03 (*TOBACCO ADVERTISING II*)

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I. INTRODUCTION

According to settled ECJ case law, including Case C-376/98 (*Tobacco Advertising I*),[1] Article 95 EC cannot be construed as conferring upon the Community a general power to regulate the internal market. Measures that the Community legislature adopts under this Article must rather have the specific objective of improving conditions for the establishment and functioning of the internal market; that is, they must be designed to remove genuine obstacles to free movement or distortions of competition, rather than purely abstract risk.[2] In some respects, however, Article 95 appears to provide a pretext for the Community legislature to implement other policy goals. The most notable examples include measures aimed at harmonizing the treatment of tobacco products, where the Community legislature appears to have abused Article 95 to circumvent Article 152(4)(c), which prohibits the harmonization of Member State laws and regulations governing public health. Referring to criteria in settled ECJ case law, this article examines the aims and measures provided for under Directive 2001/37[3] and Directive 2003/33[4]—both of which were held valid by the ECJ—and argues that neither of the Directives contribute to eliminating barriers to, or distortion of, competition within the internal market.

II. CASE C-491/01 & DIRECTIVE 2001/37

The judgment in Case C-491/01 ("*BAT*")[5] upheld Directive 2001/37, which aims to harmonize tar yields and tobacco product labeling. Referring to *Tobacco Advertising I*, the Court asserted that the challenged Directive genuinely has as its objective the improvement of conditions for the functioning of the internal market and that it was, therefore, possible for the Directive to be adopted on the basis of Article 95 EC. This was true notwithstanding that public health protection was a decisive factor in the choice of harmonizing measures. The Court stated that "if examination of a Community act shows that it has a twofold purpose or twofold component and one of these is identifiable as main or predominant, whereas the other is merely incidental, the act

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1 Case C-376/98, Germany v. Parliament, 2000 E.C.R. I-8419, ¶ 83.

2 *See* ANTHONY ARNULL ET AL., WYATT & DASHWOOD'S EUROPEAN UNION LAW 87 (5th ed., 2006).

3 Parliament and Council Directive 2001/37, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, 2001 O.J. (L 194) 26.

4 Parliament and Council Directive 2003/33, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 2003 O.J. (L 152) 16.

5 Case C-491/01, Queen v. Sec'y of State for Health, *ex parte* British Am. Tobacco (Inv.) Ltd. & Imperial Tobacco Ltd., 2002 E.C.R. I-11453 [hereinafter *BAT*].

must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component."[6] It further held that divergences in national legislation regarding labeling requirements and maximum tar, nicotine, and carbon monoxide yields constitute obstacles to trade, and that the Directive clearly aids in eliminating those obstacles.[7] Moreover, the challenged Directive also requires that any exported cigarettes conform to the new manufacturing requirements, allegedly because of worries that cigarettes may be re-imported or illegally placed on the EC market.[8] Unlike the other provisions of the challenged Directive, this export ban does not contribute directly to the functioning of the internal market but rather contributes indirectly by preventing the circumvention of rules aimed at removing obstacles to trade. Nevertheless, the Court held that Article 95 could provide a legal basis for such an export ban.[9]

On closer examination it seems highly dubious whether Directive 2001/37 could eliminate obstacles to trade in the internal market. First, Article 5 prescribes that tar, nicotine, and carbon monoxide yields be printed on the side of cigarette packets in the official language of the Member State where the product is marketed, and must cover at least 10% of the corresponding surface. This provision, read together with Article 13(2)—which permits Member States to keep or introduce more stringent rules concerning the manufacture, import, and sale of tobacco products—implies that the Member States are granted discretion to require that warnings cover a larger surface area. Suppose a manufacturer wishes to export his tobacco product from Member State A, which imposes the percentage requirement provided under the Directive, to Member State B, which shares the same official language but imposes a more stringent requirement of, for example, 15%. Under these circumstances, the manufacturer must repackage his tobacco product. Apparently, then, the harmonizing measure introduced by Directive 2001/37 is not sufficient to eliminate discrepancies between relevant national tobacco packaging laws.

The foregoing consideration also applies to the interpretation of Article 3 of the Directive. Although this provision prescribes maximum tar or nicotine yields, the Member States retain a wide-ranging discretion to lay down more stringent regulations. Hence, whether and to what extent the policy goal of recitals 7 and 9 of the preamble are achieved—that is, to establish a maximum yield for tar, nicotine, and carbon monoxide in order to smooth the operation of the internal market—is highly contestable. In addition, Article 8 actually creates a new trade barrier. The Article prohibits placing tobacco for oral use on the market; however, neither the Community nor the Court in *BAT* elucidate how such a provision could eliminate obstacles to trade or remove distortions of competition.

As regards Article 13, the Community therein extended the scope of the Directive to include those tobacco products that are exported from the internal market. The Commission merely states that the export regime is part of the common commercial policy but does not further elucidate

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[6] *Id.* ¶ 94.
[7] *Id.* ¶¶ 96–97.
[8] *See* Parliament and Council Directive 2001/37, *supra* note 3, recital 11; *see also* Donald Slater, *The Scope of EC Harmonising Powers Revisited?*, 4 GER. L. J. 137, 141 (2003).
[9] *BAT*, 2002 E.C.R. I-11453, ¶ 82.

how this provision promotes the functioning of the internal market.[10] The Court upheld the provision on the grounds that such a provision could "prevent the undermining of the internal market provisions in the tobacco products sector which might be caused by unlawful re-imports into the Community or by deflections of trade within the Community affecting products which do not comply with the requirements of Article 3(1) of the Directive in respect of maximum yields of certain substances applicable to cigarettes."[11] Neither the Commission nor the ECJ on this score pinpointed how this provision could rely on Article 95 as an appropriate legal basis. One last note is that, based on the general rule of public international law, "a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter."[12] By imposing this requirement, the Community to some extent enforces its policy—be it under the name of harmonization of internal market or of public health—in those jurisdictions to which tobacco products of EU origin are exported and thus this provision has, arguably, extra-territorial effect.

III. CASE C-380/03 & DIRECTIVE 2003/33

The Tobacco Advertising Directive,[13] annulled in *Tobacco Advertising I*, was replaced by Directive 2003/33.[14] The latter aims to harmonize national laws governing tobacco advertising and sponsorship, and was upheld by the ECJ in Case C-380/03 (*Tobacco Advertising II*).[15]

In *Tobacco Advertising II*, Germany sought to annul those articles which prohibit, first, the advertising of tobacco products in the press, other printed publications, information society services, and radio broadcasts,[16] and second, the sponsorship of radio programs by tobacco companies.[17] Germany claimed that such provisions could not be adopted on the basis of Article 95 EC, for neither of them contributes to eliminating obstacles to free movement of goods or removing appreciable distortions of competition.

The Court asserted that at the time when the Directive was adopted, disparities existed between national laws on advertising and sponsorship of tobacco products which impeded the free movement of goods and freedom to provide services, creating an appreciable risk of distortion of competition.[18] The Court also held that once "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."[19] Hence, the Court found the challenged Directive to be valid.

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[10] Parliament and Council Directive 2001/37, *supra* note 3, recital 11. "This Directive will also have consequences for tobacco products which are exported from the European Community. The export regime is part of the common commercial policy . . . ." *Id.*

[11] *Id.* ¶ 85.

[12] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306–307 (6th ed. 2003).

[13] Parliament and Council Directive 98/43, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 1998 (L 213) 9.

[14] Parliament and Council Directive 2003/33, *supra* note 4.

[15] Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 [hereinafter *Tobacco II*].

[16] Parliament and Council Directive 2003/33, *supra* note 4, arts. 3–4.

[17] *Id.* art. 5.

[18] 2006 E.C.R. I-11573, ¶ 45.

[19] *Id.* ¶ 39.

Article 95 once again masked the real policy goal that the Community legislature intended to pursue—the protection of public health. First, given cultural idiosyncrasies of each Member State, tobacco product advertising usually does not extend beyond each State's borders.[20] Though magazines, daily papers, and the like sometimes serve as media for tobacco product advertising, intra-Community trade in such products is quite limited.[21] To fulfill the goal prescribed by Article 95 EC, the Community should set benchmarks for Member States to comply with—as it did in Directive 2001/37—rather than impose outright bans on publications that carry tobacco advertising. While intending to facilitate limited intra-Community trade benefits, this Directive obstructs the existing and potential benefits that tobacco product advertising might bring in individual Member States. The existing and any prospective tobacco advertisements and sponsorships with cross-border implication in media (other than television), for instance, were banned outright. So, what is the real purpose of this legislative measure? It would seem that it is nothing less than to restrain tobacco product advertising so as to discourage consumers from purchasing tobacco products. This time, however, to prevent the Court from once again invalidating the Directive, the Community legislature confined the scope of the Directive to advertising media that have "cross-border" effects.[22] This succeeded in satisfying the Court.

IV. CONCLUSION

As the ECJ elucidated in *Tobacco Advertising I*, a measure enacted on the basis of Article 95 must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If mere disparities between national rules—and the abstract risk of distortion of competition or obstacles to the exercise of fundamental freedoms—could justify the use of Article 95, then judicial review of whether an enactment has a proper legal basis would be rendered nugatory.

It is evident from the case law discussed, however, that the Community legislature often relies on Article 95 as the legal basis for the implementation of its policies. Based on the critique of the aforementioned tobacco product cases, it suffices to say that Directive 2001/37 and Directive 2003/33 should not be considered justified implementations of Article 95. The main purpose and effect of the two Directives go far beyond what the Community indicated in the preambles—that is, to eliminate obstacles to trade and remove the distortions of competition. The policy considerations behind the Directive—which aimed to set a benchmark for tobacco product regulation, reduce the consumption of tobacco products, and ensure the health of every EU citizen—are clear enough and go beyond the proper reach of Article 95. On this last point, it is also noteworthy that Directive 2001/37, in fact, has a sort of "extra-territorial effect" on countries into which tobacco products of EU origin are imported. Article 13 of the Directive not only sets a benchmark for public health protection for the Member States, but also for those jurisdictions which import tobacco products from the EU. The Community legislature was clever enough,

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[20] *See* Isidora Maletic, *Recent Developments in the European Market: More Public Health and Less Tobacco Advertising*, 19 KING'S L. J. 169, 170 (2008). (In the present case, though Germany argued that the prohibitions concerned only advertising media of a local or national nature without cross-border effects, the Court nevertheless maintained that the disputed articles did have functions to improve the conditions of the internal market.)

[21] This argument was advanced by Germany. *See Tobacco II*, 2006 E.C.R. I-11573, ¶ 134.

[22] *See, e.g.,*Parliament and Council Directive 2003/33, *supra* note 4, art. 5(1).

however, to use Article 95 to disguise its real policy concerns and to therefore successfully side-step examination by the Court. It is envisaged that similar harmonizing measures are likely to emerge in the future. In light of settled ECJ case law, these problems should be solved head-on by Member States through the amendment of the relevant provisions of the EC Treaty.