

JUDGMENT OF THE COURT

5 October 2000

In Case C-376/98,

**Federal Republic of Germany**, represented by C.-D. Quassowski, Regierungsdirektor in the Federal Ministry of Finance, acting as Agent, assisted by J. Sedemund, Rechtsanwalt, Berlin, Federal Ministry of Finance, Referat EC2 Graurheindorfer Straße 108, D-53117 Bonn,

applicant,

v

**European Parliament**, represented by C. Pennera, Head of Division in the Legal Service, and N. Lorenz, of the same 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 in the Legal Service, A. Feeney and S. Marquardt, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel, Directorate for Legal Affairs of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendants,

supported by

**French Republic**, initially represented by J.-F. Dobelle, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Charge de Mission in the same Directorate, and then by K. Rispal-Bellanger, Head of Subdirectorate in the same directorate, and R. Loosli-Surrans, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8b Boulevard Joseph II,

by

**Republic of Finland**, represented by H. Rotkirch and T. Pynna, Valtionasiainmies, acting as Agents, with an address for service in Luxembourg at the Finnish Embassy, 2 Rue Heinrich Heine,

by

**United Kingdom of Great Britain and Northern Ireland**, represented by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and N. Paines QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

and by

**Commission of the European [Union]**, represented by I. Martinez del Peral and U. Wolker; of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

interveners,

APPLICATION for the 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,

composed of: G.C. Rodriguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, A. La Pergola, J.-P. Puissochet, P. Jann, H. Ragnemalm M. Wathelet and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: H. von Holstein, Deputy Registrar, and L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 April 2000, at which the Federal Republic of Germany was represented by C.-D. Quassowski, assisted by J. Sedemund, the Parliament by C. Pennera and N. Lorenz, the Council by R. Gosálbo Bono, A. Feeney and S. Marquardt, the French Republic by R. Loosli-Surrans, the Republic of Finland by T. Pynnii, the United Kingdom of Great Britain and Northern Ireland by G. Amodeo, of the Treasury Solicitor's Department, acting as Agent, and Professor R. Cranston QC, MP, Her Majesty's Solicitor General for England and Wales, and N. Paines, and the Commission by I. Martínez del Peral and U. Walker,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

## Judgment

- 1 By application lodged at the Registry of the Court on 19 October 1998, the Federal Republic of Germany brought an action under [Article 263 TFEU] for the 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 1992 L 213, p. 9, hereinafter 'the Directive').

- 2 By orders of the President of the Court of 30 April 1999, the French Republic, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland and the Commission of the European [Union] were granted leave to intervene in support of the European Parliament and the Council of the European Union.
- 3 The Directive was adopted on the basis of [Article 53(1) TFEU], [Article 62 TFEU] and [Article 114 TFEU].
- 4 Article 2 of the Directive provides:

'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.'

5 According to Article 3 of the Directive:

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

3. (a) Member States shall ensure that no tobacco product bears the brand name, trade-mark, emblem or other distinctive feature of any other product or service, unless the tobacco product has already been traded under that brand name, trade-mark, emblem or other distinctive feature on the date referred to in Article 6(1);

(b) the ban provided for in paragraph 1 may not be circumvented, in respect of any product or service placed or offered on the market as from the date laid down in Article 6(1), by the use of brand names, trade-marks, emblems and other distinguishing features already used for a tobacco product.

To this end, the brand name, trade-mark, emblem and any other distinguishing feature of the product or service must be presented in a manner clearly distinct from that used for the tobacco product.

4. Any free distribution having the purpose or the direct or indirect effect of promoting a tobacco product shall be banned.

5. This Directive shall not apply to:

- communications intended exclusively for professionals in the tobacco trade,
- the presentation of tobacco products offered for sale and the indication of their prices at tobacco sales outlets,
- advertising aimed at purchasers in establishments specialising in the sale of tobacco products and on their shop-fronts or, in the case of establishments selling a variety of articles or services, at locations reserved for the sale of tobacco products, and at sales outlets which, in Greece, are subject to a special system under which licences are granted for social reasons ("periptera"),
- the sale of publications containing advertising for tobacco products which are published and printed in third countries, where those publications are not principally intended for the [Union] market.'

6 Pursuant to Article 4 of the Directive:

'Member States shall ensure that adequate and effective means exist of ensuring and monitoring the implementation of national measures adopted pursuant to this Directive. These means may include provisions whereby persons or organisations with a legitimate interest under national law in the withdrawal of advertising which is incompatible with this Directive may take legal proceedings against such advertising or bring such advertising to the attention of an administrative body competent to give a ruling on complaints or to institute the appropriate legal

proceedings.'

7 Article 5 of the Directive provides:

'This Directive shall not preclude Member States from laying down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.'

8 Pursuant to Article 6 of the Directive:

'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.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field covered by this Directive.

3. Member States may defer the implementation of Article 3(1) for:

— one year in respect of the press,

— two years in respect of sponsorship.

In exceptional cases and for duly justified reasons, Member States may continue to authorise the existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006, provided that:

— the sums devoted to such sponsorship decrease over the transitional period,

— voluntary-restraint measures are introduced in order to reduce the visibility of advertising at the events or activities concerned.<sup>1</sup>

- 9 In support of its application, the Federal Republic of Germany puts forward seven pleas in law alleging, respectively, that [Article 114 TFEU] is not an appropriate legal basis for the Directive, infringement of [Article 53 (1) TFEU] and [Article 62 TFEU], breach of the principles of proportionality and subsidiarity, breach of fundamental rights, infringement of [Articles 34 and 36 TFEU] and infringement of [Article 296 TFEU].
- 10 The applicant and the defendants state that their arguments regarding [Article 114 TFEU] also apply to the interpretation of [Articles 53(1) and 62 TFEU],
- 11 It is therefore appropriate to consider the pleas alleging that [Articles 114, 53(1) and 62 TFEU], do not constitute the proper legal basis for the Directive together.

The pleas alleging that the legal basis is incorrect

*Arguments of the parties*

- 12 The applicant, relying both on the characteristics of the tobacco products advertising market and on its analysis of [Article 114 TFEU], considers that [Article 114 TFEU] is not the proper legal basis for the Directive.
- 13 As regards, first, the characteristics of the market, the applicant submits that tobacco products advertising is essentially an activity whose effects do not extend beyond the borders of individual Member States.
- 14 Whilst tobacco products advertising is often conceived by the manufacturer, the specific presentation of advertising media to consumers is the result of a strategy based on the particular features of each market. The decision regarding the specific form of the advertising, musical background, colours and other features of advertising products is taken at national level so that they conform with the cultural idiosyncracies of each Member State.
- 15 Trade in so-called 'static' advertising media (such as posters, cinema advertising and advertising for the hotel and catering sector, for example, via parasols and ash-trays) between Member States is practically non-existent and has to date not been subject to any restrictions. For tax reasons, advertising involving free distribution is also limited to national markets.
- 16 The applicant submits that the press is the only significant form of 'non-static' advertising media in economic terms. Admittedly, advertising magazines and daily papers serve as media for tobacco products, but intra-[Union] trade in such products is very limited. Considerably less than 5% of magazines are exported to other Member States and daily newspapers are used to a much lesser extent than magazines for carrying tobacco advertising. In Germany, in 1997, the share of total advertising revenue of daily papers accounted for by tobacco products advertising

was 0.04%.

- 17 The limited extent of cross-frontier trade in newspapers accounts for the fact that they are not subject to restrictions by Member States which prohibit their national press from accepting advertisements for tobacco products. Belgian and Irish law expressly authorise imported press carrying such advertising and actions before French courts seeking to prohibit such imports have been unsuccessful.
- 18 As regards 'diversification' products covered by Article 3(2) of the Directive, the applicant claims that, as a result of its imprecise nature, different interpretations of that provision may give rise to new restrictions on trade. In any event, the Directive does not contain any free-trade clause preventing Member States which do not take advantage of the opportunity offered by that provision from objecting to the marketing of products from other Member States which have availed themselves of that opportunity.
- 19 The applicant claims that the development of centralised advertising strategies and the intellectual work inherent in advertising services provided by advertising agencies do not fall within the scope of the Directive. Article 2(2) of the Directive defines advertising merely as the actual use of advertising facilities directed towards consumers.
- 20 The applicant also submits that the relationship between the sponsor and the organiser largely operates at national level since both are normally established in the same Member State. Moreover, even where that is not the case, there is no barrier to sponsorship under national legislation since arrangements for making advertising space available at event venues are made locally. Nor is television broadcasting of sponsored events subject to any restrictions.
- 21 As regards distortion of competition as a result of differences between national laws, the applicant claims that, in view of the first recital in the preamble, the Directive does not purport to eliminate such distortion in the tobacco sector.

- 22 As regards competition between manufacturers of advertising products, the applicant argues that they operate only to a negligible extent beyond national borders and there is no competitive relationship between them because tobacco advertising strategies are primarily nationally orientated. As far as the press is concerned, imported products do not compete with local products and in any event they do not achieve market shares which may be regarded as significant in the importing Member State.
- 23 With respect, second, to its analysis of [Article 114 TFEU], the applicant submits, first, that [Article 114 TFEU] grants the [Union] legislature competence to harmonise national legislation to the extent to which harmonisation is necessary in order to promote the internal market. A mere reference to that article in the preamble to the measure adopted is not sufficient, otherwise judicial review of the selection of [Article 114 TFEU] as a legal basis would be rendered impossible. The measure must actually contribute to the improvement of the internal market.
- 24 That, the applicant submits, is not the case here. Given that the sole form of advertising allowed, namely advertising at the point of sale, accounts for only 2% of the tobacco industry's advertising expenditure, the Directive constitutes, in practice, a total prohibition of tobacco advertising. Consequently, instead of promoting trade in advertising media for tobacco products and freedom to provide services in that area, the Directive almost entirely negates those freedoms. Moreover, according to the applicant, the Directive creates new obstacles to trade which did not exist previously. Thus, the prohibition of tobacco advertising makes it almost impossible to import and market new products and will result in stagnation of inter-State trade.
- 25 As to whether the harmonisation pursued by the Directive was necessary to remove distortions of competition, the applicant expands upon the above considerations concerning the tobacco products advertising market by asserting that the Directive distorts competition in markets outside the tobacco industry in ways that did not exist beforehand.

- 26 That is also the case with diversification products referred to in Article 3(2) of the Directive, which imposes such restrictive conditions that undertakings manufacturing those products must either close their establishments or bear heavy additional costs, with the possible loss of substantial market shares to competitors.
- 27 Admittedly, as is clear from the case-law of the Court, the harmonisation of laws may legitimately aim to prevent the emergence of future obstacles to trade resulting from heterogeneous development of national laws. However, the Directive has the sole result of introducing new permanent obstacles to trade, whether immediately or in the future.
- 28 Other directives based on [Article 114 TFEU] which prohibit certain activities, in the applicant's contention, differ from the Directive. Thus, the prohibition of misleading advertising is intended to promote cross-border trade by guaranteeing fair advertising across the [Union]; similarly, the prohibition on using product components, manufacturing processes or forms of marketing which are harmful to health is intended to create an internal market for the products concerned by allowing them to be manufactured, marketed or consumed without risk to health.
- 29 The applicant also contends that [Article 114 TFEU] should be available as a legal basis only in cases where obstacles to the exercise of fundamental freedoms and distortion of competition are considerable. The case-law of the Court on [Articles 34 and 36 TFEU] to the effect that those provisions prohibit even minimal obstacles to trade cannot be transposed to an area where it is necessary to define the respective powers of the [Union] and the Member States. If the [Union] legislature were permitted to harmonise national legislation even where there was no appreciable effect on the internal market, it could adopt directives in any area whatsoever and judicial review of the legislation's compliance with [Article 114 TFEU] would become superfluous.
- 30 The applicant submits that its interpretation of [Article 114 TFEU] also finds support in the case-law of the Court (see Case 91/79 *Commission v Italy* [1980] ECR 1099, paragraph 8, and Case C-300/89 *Commission v Council* [1991] ECR I-2867 -the *Titanium Dioxide* judgment - paragraph 23).

- 31 The applicant considers that its views, summarised in paragraphs 13 to 22 of this judgment, clearly demonstrate that there are no appreciable obstacles to trade in tobacco advertising media or to the exercise by advertising agencies of their freedom to provide services and that there is no appreciable distortion of competition between such agencies.
- 32 Finally, the applicant submits that recourse to [Article 114 TFEU] is not possible where the 'centre of gravity' of a measure is focused not on promoting the internal market but on protecting public health.
- 33 According to settled case-law, the [Union] may not rely on [Article 114 TFEU] when the measure to be adopted only incidentally harmonises market conditions within the [Union] (Case C-70/88 *Parliament v Council* [1991] ECR I-4529, paragraph 17; Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraph 19; Case C-187/93 *Parliament v Council* [1994] ECR I-2857, paragraph 25; and Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 45).
- 34 However, both the legislative history of the Directive and its content and purpose show that the 'centre of gravity' of the measure is public health protection.
- 35 The applicant observes that the Directive differs from the one at issue in the *Titanium Dioxide* case, cited above. In that case, implementation of environmental policy and attainment of the internal market were pursued at the same level and each of those [Union] objectives had its own legal basis, namely [Article 191 TFEU] and [Article 114 TFEU] respectively, enabling national laws to be harmonised. However, that is not the case here: public health policy is the 'centre of gravity' of the Directive yet harmonising measures in that field are expressly prohibited by [Article 168(5) TFEU].
- 36 The Parliament, the Council and the parties intervening in support, relying, first, on

the existence of an internal market in the tobacco products advertising sector and, second, on an analysis of [Article 114 TFEU], consider that the Directive was validly adopted on the basis of [Article 114 TFEU].

- 37 The Parliament, the Council and the Commission contend that there is an internal market in the tobacco products advertising sector in which advertising campaigns are often centralised and designed by agencies established in the [Union]. Although the chosen advertising strategies and the advertising themes are put into effect at national level, the choice of themes and the selection of symbols, logos and other elements are decided upon and offered at cross-border level and reach consumers in several Member States.
- 38 As regards the hotel and catering sector, the Council contends that, even if the effect of such advertising is limited to the local population, identical advertising media can be used in several Member States since the language used is often English.
- 39 The Parliament and the Council draw attention to the cross-border aspects of advertising via free distribution, which forms part of a uniformly defined advertising concept put into effect for a particular brand. The Parliament adds that the prohibition of promotional gifts is justified by the need to prevent circumvention of the rules.
- 40 The free movement of magazines, in particular those which airlines make available to passengers on intra-[Union] flights and newspapers published in one Member State and distributed in other Member States, which contain tobacco advertising, is also likely to be hindered as a result of the existing legislative differences between Member States.
- 41 As far as diversification products are concerned, the Parliament and the Council contend that, contrary to the applicant's assertion, Article 3(2) of the Directive is a precise provision which must be construed as meaning that a Member State may not prevent the marketing of a product lawfully marketed in another Member State

which has availed itself of the exemption provided by that provision.

- 42 The Parliament and the Council contend that sponsorship also involves cross-border elements. They observe that the impact of the advertising media used in sponsored events, such as cars, drivers' clothing and hoardings set up along the circuit, is not confined to the local population. In any event, according to the Council, if the sponsor and the sponsored undertaking are established in different Member States that is sufficient to establish a cross-border context.
- 43 The Parliament, the Council and the Commission emphasise, finally, that in view of the disparate national legislation, advertising agencies cannot devise and offer uniform publishing concepts at [Union] level.
- 44 In their view, the Directive, which, as a result of the approximation of laws, creates a uniform framework for the advertising of tobacco products in the internal market, could validly be adopted on the basis of [Article 114 TFEU].
- 45 In that connection, the Parliament, the Council and the Commission contend that the power conferred on the Council by that provision is not necessarily concerned with the liberalisation of trade but rather with market regulation. That explains why it has been possible for directives containing certain prohibitions to be adopted on the basis of [Article 114 TFEU].
- 46 Thus, Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1992 L 158, p. 30) prohibited the marketing of certain types of tobacco for oral use and Council Directive 91/339/EEC of 18 June 1991 amending for the 11th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1991 L 186, p. 64) imposed a total prohibition on use of the listed substances.

- 47 In the advertising field, directives such as Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18) and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ 1992 L 113, p. 13) were likewise not designed to liberalise trade. The latter directive, in particular, imposed wide-ranging prohibitions on advertising, especially that of medicinal products for which a marketing authorisation complying with [Union] law had not been issued (Article 2(1)) and medicinal products which can be supplied only on prescription (first indent of Article 3(1)).
- 48 The Parliament, the Council and the Commission also mention other directives, which impose partial prohibitions, such as that of television advertising of tobacco products (Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) ) and measures displaying an indirect link to fundamental freedoms, such as those concerning summer time (Seventh Directive 94/21/EC of the European Parliament and of the Council of 30 May 1994 on summer-time arrangements (OJ 1994 L 164, p. 1)) or access to the international telephone network in the [Union] (Council Decision 92/264/EEC of 11 May 1992 on the introduction of a standard international telephone access code in the [Union] (OJ 1992 L 137, p. 21)).
- 49 Recourse to [Article 114 TFEU] is not limited to cases where legislative differences actually give rise to obstacles to the exercise of fundamental freedoms or distortion of competition. As the Court held in Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraph 33, it is sufficient if the disparities between the laws of the Member States are liable to hinder the free movement of goods. Recourse to [Article 114 TFEU] is even possible in order to prevent the heterogeneous development of national laws leading to further disparities (*ibid.*, paragraph 35).
- 50 As regards the applicant's argument that recourse to [Article 114 TFEU] as a legal basis should be possible only in cases where differences in legislation give rise to appreciable obstacles to trade or appreciable distortion of competition, the Council

contends that that distinction, which is based on competition law, cannot be used within the sphere of [Article 114 TFEU]. Objective and universal criteria must be used to define the scope of powers.

- 51 The Commission also contends that, in this case, there is real distortion of competition. Because of existing differences in legislation, the potential profit of advertising agencies differs according to the place where they are established or the market in which they carry on business. Where newspapers or periodicals from other Member States are simply tolerated, despite restrictive legislation affecting the press in the Member State in question, there is distortion of competition in that State.
- 52 As regards sponsorship, such differences have an impact on the choice of venue for events sponsored by tobacco manufacturers, which has significant economic repercussions in the case of sports events such as Formula 1 racing.
- 53 Finally, producers and sellers of tobacco products do not enjoy the same conditions of competition which have an influence on their market position. In Member States with restrictive legislation, economic operators can only maintain or improve their market position by price competition.
- 54 In response to the applicant's argument that public health protection is the 'centre of gravity' of the Directive, the Parliament, the Council and the Commission state that it is clear from the case-law of the Court that the essential factor to be relied on in assessing the choice of the legal basis for a measure is the text of the measure in question. It is clear from the wording of the third and fourth recitals in the preamble to the Directive and the place occupied by them that the protection of human health is one of its objectives, pursued in the context of the provisions of [Article 114(3) and (4) TFEU], but that it is not the principal one.
- 55 Similarly, the second recital and Article 5 of the Directive, by recognising the right of Member States to adopt provisions more stringent than those laid down in the Directive to ensure public health protection, also clearly demonstrate that the

concern for the protection of human health is an incidental and subordinate one.

- 56 The Commission observes, in that connection, that the emphasis on public health protection in the Directive can be explained by the fact that it constituted the main, or indeed even the sole, objective of the national measures being harmonised, but, in the context of that harmonisation, it became a secondary objective.
- 57 The Parliament, the Council and the Commission state, finally, that the fact that the Directive imposes a broad prohibition on tobacco advertising derives from the obligation imposed by [Article 114(3) and (4) TFEU], to take as a base a high level of human health protection and from the need to prevent circumvention of the prohibition.
- 58 The United Kingdom Government challenges the applicant's assertion that the Directive is incorrectly based on [Article 114 TFEU] because its principal objective is not the elimination of obstacles to trade in advertising media and associated services but the protection of human health.
- 59 According to the case-law of the Court, the choice of the legal basis for a measure must be guided by objective factors which are amenable to judicial review, including, in particular, the aim and content of the measure.
- 60 Objectively, the Directive pursues objectives which are inseparably linked with the protection of human health and others linked with elimination of disparities in conditions of competition and liberalisation of trade. The applicant's approach of seeking to determine which of those objectives is most important is not only contrary to the objective test propounded by the Court but also unworkable.
- 61 The United Kingdom Government submits that [Article 114 TFEU] confers power

on the Council and the Parliament to adopt measures concerned with the establishment and functioning of the internal market and considers that in this case the measure concerned falls into that category.

- 62 For a measure to be validly based on [Article 114 TFEU], it is not necessary to demonstrate that it has the effect of increasing the volume of cross-border trade. It is sufficient for the measure to eliminate disparities in conditions of competition.
- 63 The Directive is intended to remove distortion of competition not only in the advertising market but also in the tobacco products market, by harmonising the conditions under which manufacturers may promote their products. It also harmonises the conditions under which cultural and sports events can be sponsored by the tobacco industry.
- 64 Professional sports teams are undertakings competing with each other; and the conditions of such competition would be affected if teams in different Member States could not receive the same subsidies from the tobacco industry, which is particularly willing to sponsor sports events in order to counteract the association of those products with bad health.
- 65 The Court has held that a measure may be adopted with a view to anticipating the adoption of disparate national rules involving serious obstacles to trade. The present situation of tolerating publications which contain tobacco advertising may change in view of the evolution of national regulations, which are becoming more strict. There is, therefore, a risk of increased obstacles to trade which the Directive is intended to eliminate.
- 66 With regard to the applicant's argument that recourse to [Article 114 TFEU], should be possible only where there are appreciable restrictions on the exercise of fundamental freedoms or appreciable distortion of competition, the United Kingdom Government observes that no specific criterion is capable of being used to draw such a distinction.

- 67 It emphasises that its suggested interpretation of [Article 114 TFEU] is confirmed by the case-law of the Court according to which a directive which confines itself to prohibiting certain activities with a view to eliminating distortion of competition may be adopted on the basis of that article (*Titanium Dioxide*, cited above).
- 68 The French Government considers that the Directive was validly adopted on the basis of [Article 114 TFEU]. It bases that view on arguments drawn from legislative precedents relating to harmonisation in the area of public health, the case-law of the Court on [Article 168 TFEU] and, finally, the legal basis chosen for new harmonising measures now in the process of being adopted.
- 69 As legislative precedents, it refers to the directives on pharmaceutical products, from Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-66, p. 20) to Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms ( OJ 1990 L 117, p. 15) and Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169). In those directives, the aims of public health protection co-exist with the objective of free movement of products and the removal of distortion of competition, and the validity of the provisions thereof which harmonise national laws on public health has not been challenged.
- 70 As regards the case-law of the Court on [Article 168 TFEU], the French Government cites Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265 and Case C-269/97 *Commission v Council* [2000] ECR I-2257, in which the Court made it clear that human health protection requirements are a constituent part of other [Union] policies, in particular the internal market policy.
- 71 Finally, the legal basis of the proposal for a directive on the approximation of provisions laid down by law, regulation or administrative action relating to the

manufacture, sale and presentation of tobacco products is [Article 114 TFEU]. Moreover, negotiations have been started under the auspices of the World Health Organisation with a view *inter alia* to concluding a protocol on the advertising of tobacco products. The legal basis of the authority vested in the Commission to participate in those negotiations is [Articles 216(2) and 218(1) to (9) and (11) TFEU].

- 72 The Finnish Government states that, in view of the obstacles to trade and distortion of competition caused by disparate national legislation, the Directive was validly adopted on the basis of [Article 114 TFEU].
- 73 It draws attention to the cross-border features of the advertising market and of sponsorship of tobacco products referred to by the Parliament, the Council and the Commission, and adds that the internationalisation of that market is intensified by electronic communications, in particular advertising on the Internet. With the benefit of media such as television, the advertising of tobacco products penetrates Member States where such advertising is prohibited. Thus, in a Member State like Finland, where direct advertising of tobacco products has been prohibited since 1976, studies show that in 1996, for example, sports programmes broadcast on the three national television channels over a period of one month included four hours of advertising for such products.
- 74 The Finnish Government also refers to distortion of competition in the tobacco products and sponsorship sectors. Sponsorship, which is not available to small undertakings, creates inequality which is incompatible with the common market.
- 75 As regards the importance of health protection in the Directive, the arguments put forward by the Finnish Government are the same as those expounded by the Parliament, the Council and the Commission, which are summarised in paragraphs 54 to 57 of this judgment.

*The Court's analysis*

The choice of [Articles 114, 53(1) and 62 TFEU] as a legal basis and judicial review thereof

- 76 The Directive is concerned with the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. The national measures affected are to a large extent inspired by public health policy objectives.
- 77 The first indent of [Article 168(4) TFEU] excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.
- 78 But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of [Article 168(1) TFEU] provides that health requirements are to form a constituent part of the [Union]'s other policies.
- 79 Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in [Article 168(4) TFEU].
- 80 In this case, the approximation of national laws on the advertising and sponsorship of tobacco products provided for by the Directive was based on [Articles 114, 53(1) and 62 TFEU].
- 81 [Article 114(1) TFEU] empowers the Council, acting in accordance with the procedure referred to in [Article 294 TFEU] and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have

as their object the establishment and functioning of the internal market.

- 82 Under [Article 3 TEU], the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital. [Article 26 TFEU], which provides for the measures to be taken with a view to establishing the internal market, states in paragraph 2 that that market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.
- 83 Those provisions, read together, make it clear that the measures referred to in [Article 114(1) TFEU] are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the [Union] legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in [Article 5 TEU] that the powers of the [Union] are limited to those specifically conferred on it.
- 84 Moreover, a measure adopted on the basis of [Article 114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of [Article 114 TFEU] as a legal basis, judicial review of compliance with the the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by [the second sentence of Article 19(1) TEU] of ensuring that the law is observed in the interpretation and application of the Treaty.
- 85 So, in considering whether [Article 114 TFEU] was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the [Union] legislature (see, in particular, *Spain v Council*, cited above, paragraphs 25 to 41, and Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 10 to 21).

- 86 It is true, as the Court observed in paragraph 35 of its judgment in *Spain v Council*, cited above, that recourse to [Article 114 TFEU] as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.
- 87 The foregoing considerations apply to interpretation of [Article 53(1) TFEU], read in conjunction with [Article 62 TFEU] thereof, which expressly refers to measures intended to make it easier for persons to take up and pursue activities by way of services. Those provisions are also intended to confer on the [Union] legislature specific power to adopt measures intended to improve the functioning of the internal market.
- 88 Furthermore, provided that the conditions for recourse to [Articles 114, 53(1) and 62 TFEU], as a legal basis are fulfilled, the [Union] 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. On the contrary, the third paragraph of [Article 168(1) TFEU] provides that health requirements are to form a constituent part of the [Union]'s other policies and [Article 114(3) TFEU] expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured.
- 89 It is therefore necessary to verify whether, in the light of the foregoing, it was permissible for the Directive to be adopted on the basis of [Articles 114, 53(1) and 62 TFEU].

#### The Directive

- 90 In the first recital in the preamble to the Directive, the [Union] legislature notes

that differences exist between national laws on the advertising and sponsorship of tobacco products and observes that, as a result of such advertising and sponsorship transcending the borders of the Member States, the differences in question are likely to give rise to barriers to the movement of the products which serve as the media for such activities and the exercise of freedom to provide services in that area, as well as to distortions of competition, thereby impeding the functioning of the internal market.

- 91 According to the second recital, it is necessary to eliminate such barriers, and, to that end, approximate the rules relating to the advertising and sponsorship of tobacco products, whilst leaving Member States the possibility of introducing, under certain conditions, such requirements as they consider necessary in order to guarantee protection of the health of individuals.
- 92 Article 3(1) of the Directive prohibits all forms of advertising and sponsorship of tobacco products and Article 3(4) prohibits any free distribution having the purpose or the effect of promoting such products. However, its scope does not extend to communications between professionals in the tobacco trade, advertising in sales outlets or in publications published and printed in third countries which are not principally intended for the [Union] market (Article 3(5)).
- 93 The Directive also prohibits the use of the same names both for tobacco products and for other products and services as from 30 July 1998, except for products and services marketed before that date under a name also used for a tobacco product, whose use is authorised under certain conditions (Article 3(2)). With effect from 30 July 2001, tobacco products must not bear the brand name, trade-mark, emblem or other distinctive feature of any other product or service, unless the tobacco product has already been traded under that brand name, trade-mark, emblem or other distinctive feature before that date (Article 3(3)(a)).
- 94 Pursuant to Article 5, the Directive is not to preclude Member States from laying down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.

95 It is therefore necessary to verify whether the Directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.

Elimination of obstacles to the free movement of goods and the freedom to provide services

96 It is clear that, as a result of disparities between national laws on the advertising of tobacco products, obstacles to the free movement of goods or the freedom to provide services exist or may well arise.

97 In the case, for example, of periodicals, magazines and newspapers which contain advertising for tobacco products, it is true, as the applicant has demonstrated, that no obstacle exists at present to their importation into Member States which prohibit such advertising. However, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption, it is probable that obstacles to the free movement of press products will arise in the future.

98 In principle, therefore, a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of [Article 114 TFEU] with a view to ensuring the free movement of press products, on the lines of Directive 89/552, Article 13 of which prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes.

99 However, for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising. That applies, in particular, to the prohibition of

advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafes, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned.

100 Admittedly, a measure adopted on the basis of [Articles 114, 53(1) and 62 TFEU] may incorporate provisions which do not contribute to the elimination of obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented. It is, however, quite clear that the prohibitions mentioned in the previous paragraph do not fall into that category.

101 Moreover, the Directive does not ensure free movement of products which are in conformity with its provisions.

102 Contrary to the contentions of the Parliament and Council, Article 3(2) of the Directive, relating to diversification products, cannot be construed as meaning that, where the conditions laid down in the Directive are fulfilled, products of that kind in which trade is allowed in one Member State may move freely in the other Member States, including those where such products are prohibited.

103 Under Article 5 of the Directive, Member States retain the right to lay down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.

104 Furthermore, the Directive contains no provision ensuring the free movement of products which conform to its provisions, in contrast to other directives allowing Member States to adopt stricter measures for the protection of a general interest (see, in particular, Article 7(1) of Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes (OJ 1990 L 137, p. 36) and Article 8(1) of Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the

Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1)).

105 In those circumstances, it must be held that the [Union] legislature cannot rely on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services in order to adopt the Directive on the basis of [Articles 114, 53(1) and 62 TFEU].

#### Elimination of distortion of competition

106 In examining the lawfulness of a directive adopted on the basis of [Article 114 TFEU], the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (*Titanium Dioxide*, cited above, paragraph 23).

107 In the absence of such a requirement, the powers of the [Union] legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret [Articles 114, 53(1) and 62 TFEU] as meaning that the [Union] legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in paragraph 83 of this judgment, that the powers of the [Union] are those specifically conferred on it.

108 It is therefore necessary to verify whether the Directive actually contributes to eliminating appreciable distortions of competition.

109 First, as regards advertising agencies and producers of advertising media, undertakings established in Member States which impose fewer restrictions on tobacco advertising are unquestionably at an advantage in terms of economies of

scale and increase in profits. The effects of such advantages on competition are, however, remote and indirect and do not constitute distortions which could be described as appreciable. They are not comparable to the distortions of competition caused by differences in production costs, such as those which, in particular, prompted the [Union] legislature to adopt Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ 1989 L 201, p. 56).

- 110 It is true that the differences between certain regulations on tobacco advertising may give rise to appreciable distortions of competition. As the Commission and the Finnish and United Kingdom Governments have submitted, the fact that sponsorship is prohibited in some Member States and authorised in others gives rise, in particular, to certain sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events.
- 111 However, such distortions, which could be a basis for recourse to [Article 114 TFEU] in order to prohibit certain forms of sponsorship, are not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the Directive.
- 112 Second, as regards distortions of competition in the market for tobacco products, irrespective of the applicant's contention that such distortions are not covered by the Directive, it is clear that, in that sector, the Directive is likewise not apt to eliminate appreciable distortions of competition.
- 113 Admittedly, as the Commission has stated, producers and sellers of tobacco products are obliged to resort to price competition to influence their market share in Member States which have restrictive legislation. However, that does not constitute a distortion of competition but rather a restriction of forms of competition which applies to all economic operators in those Member States. By imposing a wide-ranging prohibition on the advertising of tobacco products, the Directive would in the future generalise that restriction of forms of competition by limiting, in all the Member States, the means available for economic operators to

enter or remain in the market.

114 In those circumstances, it must be held that the [Union] legislature cannot rely on the need to eliminate distortions of competition, either in the advertising sector or in the tobacco products sector, in order to adopt the Directive on the basis of [Articles 114, 53(1) and 62 TFEU].

115 In view of all the foregoing considerations, a measure such as the directive cannot be adopted on the basis of [Articles 114, 53(1) and 62 TFEU].

116 In those circumstances, the pleas alleging that [Articles 114, 53(1) and 62 TFEU].do not constitute an appropriate legal basis for the Directive must be upheld.

117 As has been observed in paragraphs 98 and 111 of this judgment, a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of [Article 114 TFEU]. However, given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down by the Directive, partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the [Union] legislature. It is not therefore possible for the Court to annul the Directive partially.

118 Since the Court has upheld the pleas alleging that the choice of [Articles 114, 53(1) and 62 TFEU] as a legal basis was inappropriate, it is unnecessary to consider the other pleas put forward by the applicant. The Directive must be annulled in its entirety.

## **Costs**

119 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has applied for costs to be awarded against the Parliament and the Council, and the latter have been unsuccessful, they must be ordered to pay the costs. The French Republic, the Republic of Finland, the United Kingdom and the Commission must bear their own costs pursuant to Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

- 1. Annuls 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;**
- 2. Orders the European Parliament and the Council of the European Union to pay the costs, and the French Republic, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland and the Commission of the European [Union] to bear their own costs.**

Rodriguez Iglesias

Moitinho de Almeida

Edward

Sevon

Schintgen

Kapteyn

Gulmann

La Pergola  
Puissochet

Jann

Ragnemalm

Wathelet

Macken

Delivered in open court in Luxembourg on 5 October 2000.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

*Robert Schütze European Union Law Lisbonised Cases*