



DIFFERENT ARGUMENTS LEAD TO THE SAME RESULT: THE TOBACCO PRODUCTS DIRECTIVE IS DECLARED VALID BY THE COURT OF JUSTICE

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ABSTRACT: On 4 May 2016, the Court of Justice of the European Union delivered its judgment in the case *Philip Morris*. For the first time, the reasoning of the Court does not focus exclusively on internal market issues but, instead, includes an analysis on fundamental rights and the principles of proportionality and subsidiarity. Following the approach adopted by Advocate General Kokott in December 2015, the Court of Justice considers the Tobacco Products Directive to be in accordance with EU law. A new approach towards the Tobacco Products Directive seems to be emerging in which the protection of human health is increasingly taken into account. This judgment was delivered in the same period as the European institutions made public their decision not to renew the anti-smuggling deal with Philip Morris and the ICSID Arbitral Tribunal delivered its award of 8 July 2016 in the case *Philip Morris and Abal Hermanos v. Oriental Republic of Uruguay*, in which Uruguay won a complaint brought against its tobacco regulations. From this perspective, there seems to be a common understanding that effective measures have to be taken to combat tobacco consumption.

KEYWORDS: harmonisation – tobacco – health – fundamental rights – proportionality – subsidiarity.

I. INTRODUCTION

On 4 May 2016, the Court of Justice of the European Union delivered its preliminary ruling in the case C-547/14 *Philip Morris*.¹ The judgment concerns Directive 2014/40 on Tobacco Products² and puts forward an evolving approach of the tobacco industry towards the Tobacco Products Directive. The focus is not only on the legal basis of this

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¹ Court of Justice, judgment of 4 May 2016, case C-547/14, *Philip Morris Brands and Others (Philip Morris)*.

² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (the Tobacco Products Directive or Directive 2014/40).

piece of legislation; on the contrary, Philip Morris relies in this case on other EU law provisions. The Court of Justice thus departs from its traditional considerations on whether Art. 114 TFEU is the appropriate legal basis to adopt such Directive and adopts an interesting reasoning on the principles of proportionality and subsidiarity and on fundamental rights.

The Court of Justice follows the approach adopted by Advocate General Kokott on 23 December 2015 in her Opinion.³ As a comment was already published in the *European Forum* in this regard,⁴ this *Insight* will be presented as a follow-up to the previous one. The judgment of the CJEU in *Philip Morris* was delivered on the same day as two other similar judgments in cases *Pillbox 38*⁵ and *Poland v. Parliament and Council*.⁶ These two cases concerned specific provisions of the Tobacco Products Directive, namely, those related to electronic cigarettes and menthol cigarettes. Although references to these judgments may appear in this *Insight*, the overall analysis will focus on the case *Philip Morris*, since it is the one that covers Directive 2014/40 as a whole.

II. THE FACTS

The Tobacco Products Directive was adopted on 3 April 2014 and repealed Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products. The subject matter of the Directive is to approximate national laws concerning the ingredients of tobacco products, their labelling and packaging, and the rules related to specific kinds of tobacco products such as electronic or flavoured cigarettes, among others. Under Art. 29, the Directive 2014/40 had to be transposed into the national legal orders of Member States by 20 May 2016. This judgment was therefore strategically delivered right before this deadline.

In those circumstances, two of the world leading tobacco companies, Philip Morris International and British American Tobacco, brought claims before the High Court of Justice of England and Wales in order to avoid the implementation of Directive 2014/40 into national law.

The claimants argued that the Directive 2014/40 was invalid due to the incorrect use of Art. 114 TFEU as a legal basis, the infringement of Art. 11 of the Charter of Fun-

³ Opinion of AG Kokott delivered on 23 December 2015, case C-547/14, *Philip Morris Brands and Others*.

⁴ E. RUIZ CAIRÓ, *Conclusiones de la Abogado General Kokott en los asuntos contra la Directiva de los productos del tabaco: ¿Un paso al frente hacia una verdadera política de salud de la Unión Europea?*, in *European Forum*, 22 April 2016, www.europeanpapers.eu.

⁵ Court of Justice, judgment of 4 May 2016, case C-477/14, *Pillbox 38(UK) Limited*.

⁶ Court of Justice, judgment of 4 May 2016, case C-358/14, *Republic of Poland v. European Parliament and Council of the European Union*.

damental Rights of the European Union (the Charter), and the infringement of the principles of proportionality and subsidiarity. The High Court of Justice of England and Wales decided to stay the proceedings and to refer a number of questions to the CJEU in accordance with Art. 267 TFEU. Although the request for a preliminary ruling included as well a number of questions on the validity of several provisions related to the adoption, by the Commission, of delegated and implementing acts in accordance with Arts 290 and 291 TFEU, the Court of Justice considered those questions inadmissible. It was stated that those provisions were not addressed to the Member States and thus did not relate to the implementation of the Directive by national legal systems. These questions were considered inadmissible despite Advocate General Kokott having made some comments on them.⁷

Two similar cases were introduced in the same period. In *Pillbox 38*, a company brought claims before, once again, the High Court of Justice of England and Wales seeking judicial review of Art. 20 “Electronic cigarettes” of the Directive. In *Poland v. Parliament and Council*, the Polish government sought the annulment of the Directive in accordance with Art. 263 TFEU.

III. LEGAL ANALYSIS

III.1. ART. 114 TFEU AS A LEGAL BASIS: BUSINESS AS USUAL

The Court of Justice upheld the validity of Art. 114 TFEU as a legal basis to adopt the Tobacco Products Directive. The reasoning of the Court of Justice is not very surprising in this regard and references to its settled case-law are repeatedly made.⁸ Following its traditional formula, the Court of Justice states that “provided that the conditions for recourse to Art. 114 TFEU as a legal basis are fulfilled, the EU 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”.⁹

However, some comments can be added concerning the adequacy of Art. 114 TFEU as a legal basis. Art. 24, para. 2, of the Directive permits Member States to maintain or introduce further requirements relating to aspects of the packaging that have not been

⁷ Opinion of AG Kokott, *Philip Morris Brands and Others*, cit., para. 254.

⁸ Notably, Court of Justice, judgment of 5 October 2000, case C-376/98, *Germany v. Parliament and Council*; Court of Justice, judgment of 10 December 2002, case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*; Court of Justice, judgment of 14 December 2004, case C-434/02, *Arnold André* [GC]; Court of Justice, judgment of 14 December 2004, case C-210/03, *Swedish Match* [GC]; Court of Justice, judgment of 12 December 2006, case C-380/03, *Germany v. Parliament and Council* [GC].

⁹ *Philip Morris*, cit., para. 60. On the extensive use of Art. 114 TFEU, see: S. WEATHERHILL, *Competence Creep and Competence Control*, in *Yearbook of European Law*, 2004, p. 1 *et seq.*; D. WYATT, *Community Competence to Regulate the Internal Market*, in M. DOUGAN, S. CURRIE (eds), *50 years of the European Treaties: Looking Back and Thinking Forward*, Oxford and Oregon: Hart Publishing, 2009.

harmonised by Directive 2014/40. The Court of Justice adopts the interpretation given by Advocate General Kokott in her Opinion, namely that Art. 24, para. 2, “permits Member States to maintain or introduce further requirements only in relation to aspects of the standardisation of the packaging of tobacco products which have not been harmonised by the directive” and not for harmonised ones.¹⁰ The Court acknowledges that this provision “does not guarantee that products whose packaging complies with the requirements of the directive may move freely on the internal market”.¹¹ However, it also notes that the EU legislature can proceed towards harmonisation only in stages that require the gradual abolition of unilateral measures adopted by the Member States. The Court of Justice adds that although a harmonisation measure such as Directive 2014/40 does not eliminate all obstacles to trade, it does eliminate some.¹² This reasoning seems a bit surprising and we can wonder whether a provision that allows the maintenance of obstacles to trade does effectively contribute to the internal market. In any event, while Art. 24, para. 2, of the Directive may be based on Art. 114 TFEU, there is no doubt that this provision might introduce obstacles to trade between Member States. Those obstacles will therefore have to be analysed under the free movement of goods provisions and the proportionality test will undoubtedly play an important role in this regard.

Another interesting aspect as regards the reasoning of the Court of Justice is the reference to the World Health Organisation (WHO) Framework Convention on Tobacco Control.¹³ The FCTC is a binding international agreement to which the European Union is a party along with all 28 Member States. This is the first time that the Court of Justice makes an express reference to it. In paras 109 to 120 of the judgment, it is stated that the guidelines for implementation of the FCTC call for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties. Although the guidelines are not binding in themselves, the Court of Justice finds it likely for some Member States to comply with them. Therefore, it concludes that “it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level, the relevant national rules could develop in divergent ways”.¹⁴ In this context, the measures adopted by the EU legislature are considered to be suitable to prevent the emergence of such future obstacles to trade as a result of diverging national laws.

¹⁰ *Ibid.*, para. 73.

¹¹ *Ibid.*, para. 79.

¹² *Ibid.*, para. 81.

¹³ WHO Framework Convention on Tobacco Control (FCTC), signed by the European Union on 16 June 2003 in Geneva.

¹⁴ *Philip Morris*, cit., para. 120.

III.2. THE TOBACCO PRODUCTS DIRECTIVE AND FUNDAMENTAL RIGHTS: THE BALANCE TILTS IN FAVOUR OF THE PROTECTION OF HUMAN HEALTH

The analysis of the impact of fundamental rights on the Directive is one of the most interesting aspects in *Philip Morris*. Indeed, when the Court of Justice ruled on the former Tobacco Products Directive, the Charter of Fundamental Rights did not have the same legal status as the Treaties. However, the situation has evolved since the entry into force of the Treaty of Lisbon. Art. 6, para. 1, TEU is particularly relevant in this respect as it gives the Charter the same legal value as the Treaties. Accordingly, fundamental rights can now constitute a substantial part of the reasoning of the Court of Justice.¹⁵

The referring Court asks whether Art. 13, para. 1, of Directive 2014/40, which prohibits the inclusion of any element that could promote a tobacco product or encourage its consumption on the labelling of the product, violates the freedom of expression.¹⁶

The Court of Justice acknowledges that there is an interference with a business's freedom of expression, which can only be accepted if in accordance with Art. 52, para. 1, of the Charter. According to this provision, a limitation on the exercise of the rights and freedoms laid down by the Charter must fulfil four conditions to be accepted: it must be provided by law, it must respect the essence of those rights and freedoms, it must comply with the principle of proportionality and it must meet an objective of general interest.

The most innovative aspect in this regard is the objective of general interest that is considered to be pursued through Art. 13, para. 1, of the Directive 2014/40, which is the protection of human health. Contrary to its previous case-law concerning the former Tobacco Products Directive, which focused very much on the strengthening of the internal market, the Court of Justice confirms the increasing importance of public health in the European Union across its reasoning.¹⁷ It states that "human health protection – in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic – outweighs the interests put forwards by the claimants in the main proceedings".¹⁸

This statement reveals a strong commitment towards public health. It also confirms that the Court of Justice, in its judgments regarding the Tobacco Products Directives, is

¹⁵ See S. DE VRIES, U. BERNITZ, S. WEATHERHILL (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford and Portland: Hart Publishing, 2013; S. DE VRIES, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, in *Utrecht Law Review*, 2013, p. 169 *et seq.*

¹⁶ The Charter, *cit.*, Art. 11.

¹⁷ *Philip Morris*, *cit.*, paras 153-158.

¹⁸ *Ibid.*, para. 156.

not only pursuing the strengthening of the internal market but also the improvement of public health in the European Union.

This reasoning introduces an important element to the previous case-law of the CJEU regarding the Tobacco Products Directives as it acknowledges that, even if fundamental rights are to be taken into account, the protection of human health will outweigh any economic interests so that limitations in such rights will in principle be accepted.

III.3. ARE MEASURES MANIFESTLY INAPPROPRIATE? THE PROPORTIONALITY TEST APPLIED TO TOBACCO PRODUCTS

The referring Court asks whether a number of articles infringe the principle of proportionality or not. More specifically, the proportionality of the measure is called into question for provisions prohibiting the placing on the market of tobacco products with a characterising flavour (such as menthol cigarettes) and provisions concerning the labelling and packaging of tobacco products.

The Court of Justice follows the traditional analysis of proportionality looking at the appropriateness of the measure to pursue a legitimate interest, its necessity and the existence of less onerous measures to attain that legitimate interest.¹⁹ However, a certain margin of appreciation is always needed when analysing the principle of proportionality. The Court of Justice notes that in an area that involves “political, economic and social choices” a broad discretion has to be allowed to the EU legislature.²⁰ As a consequence, the standard adopted for the assessment of the proportionality of the measure is one of a manifest inappropriateness of the measure. This broad interpretation allows the Court of Justice to consider all the contested provisions proportionate to the interest pursued, namely, ensuring a high level of human health protection.²¹

An interesting aspect of the proportionality test carried on by the Court of Justice concerns the balance between the objective pursued, namely the protection of human health, and the negative economic consequences for certain operators.²² While Art. 5 of the Protocol on the application of the principles of subsidiarity and proportionality²³ requires any burden on economic operators to be minimised, it does not seem to the Court of Justice that this provision has been violated. Thus public health seems once again to outweigh economic interests.

¹⁹ On the principle of proportionality, see: T. TRIDIMAS, *The General Principles of EU law*, Oxford: Oxford University Press, 2007; G. DE BÚRCA, *The Principle of Proportionality and its Application in EC Law*, in *Yearbook of European Law*, 1993, p. 105 *et seq.*

²⁰ *Ibid.*, para. 166.

²¹ On the manifestly disproportionate test, see: W. SAUTER, *Proportionality in EU Law: A Balancing Act?*, in *Cambridge Yearbook of European Legal Studies*, 2014, p. 439 *et seq.*

²² *Ibid.*, paras 185-190.

²³ Protocol no. 2 on the application of the principles of subsidiarity and proportionality (Protocol no. 2).

The Court of Justice carries on an in-depth analysis of the proportionality principle going through each of the contested measures in a very detailed manner. In so doing, it has followed very much the reasoning of the Advocate General as we can see, for instance, in the analysis of the available less restrictive measures. This part of the judgment is also notorious because of the references to the FCTC showing again that the European Union is strongly committed to implementing this international Convention.

IV.4. THE OBLIGATION TO MOTIVATE UNDER EU LAW: WHAT IS THE APPROACH FOLLOWED BY THE COURT OF JUSTICE?

There seems to be some inconsistency regarding the obligation to motivate that the Court of Justice requires through its judgment. On the one hand, when analysing the admissibility of the preliminary questions, the Court adopts quite a strict position. It states that “it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers a reply to its questions concerning the interpretation or validity of certain provisions of EU law to be necessary to enable it to give judgment”.²⁴ The Court of Justice further notes that “In the present case, the referring Court does not explain the reasons why it decided [...] to raise a question with the Court concerning the validity of Articles 8(3), 9(3), 10(1)g, 13 and 14 of Directive 2014/40”.²⁵

On the other hand, when analysing the subsidiarity principle, the Court of Justice seems to be much more flexible with regard to the obligation to motivate that rests upon the EU legislature. The referring Court questions the validity of Art. 7 of Directive 2014/40 in the light of the principle of subsidiarity. The EU legislature should explain why the European Union is better positioned than Member States to prohibit the placing on the EU market of tobacco products containing menthol. In this case, the Court of Justice considers that “observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case”.²⁶ After considering the Commission’s proposal for a directive and its impact assessment, the Court of Justice considers that the advantages of taking action at EU level rather than at Member State level have been sufficiently put forward. It seems quite surprising that no further comments have been made by the Court of Justice and that a standard formula has been considered enough taking

²⁴ *Philip Morris*, cit., para. 47.

²⁵ *Ibid.*, para. 51.

²⁶ *Ibid.*, cit., para. 225.

into account the importance of the principle of subsidiarity in the EU legal system and the growing role that the Treaty of Lisbon tried to attribute to that principle.²⁷

While there is no doubt that national courts should make more efforts to ask their questions in a clear and detailed way, the same should apply to EU legislators. The Court of Justice seems to be applying double standards in this regard and the Opinion of Advocate General Kokott seems to be more consistent. She scolds national courts for their questions²⁸ but she also draws the attention of the legislator in this regard. Hence, she states in an ironical manner that “such a wording, which ultimately simply reproduces as a standard formula the text of the relevant provision from the EU Treaty, is not exactly a shining example of the frequently invoked technique of ‘better regulation’, to which the EU institutions have for some time been committed”.²⁹ Moreover, she insists on this point by advising the Union legislature to avoid “set formulas” like the one contained in the preamble of the Directive 2014/40 and to include substantial arguments that truly justify an action at EU level.³⁰

The Court of Justice actually answers to this question in quite a concise way, which is regrettable, considering that the Advocate General had analysed this aspect in much detail in her Opinion in *Philip Morris* but, most importantly, in *Pillbox 38*. The Court of Justice instead went much faster through these aspects in both cases. Therefore, although both the Advocate General and the Court of Justice get to the same conclusion, the reasoning of Advocate General Kokott regarding the subsidiarity principle seems more structured, more exhaustive and better argued than the one of the Court.

IV. CONCLUSIONS

This judgment has been very welcome by health advocates as it can be considered as an important step in the fight against tobacco consumption. First, the outcome of this case may have several implications for the challenges that have been brought under national law against standardised packaging legislation in several Member States.³¹

²⁷ On the principle of subsidiarity and the role played by the CJEU, see: P. CRAIG, *Subsidiarity: a Political and Legal Analysis*, in *Journal of Common Market Studies*, 2012, p. 72 *et seq.* See also: G. DAVIES, *Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*

²⁸ Opinion of AG Kokott, *Philip Morris Brands and Others*, cit., paras 23-27.

²⁹ *Ibid.*, para. 290.

³⁰ *Ibid.*, para. 301.

³¹ J. GRIFFITHS, *AG Kokott Rejects Challenges to the Validity of the Tobacco Products Directive – Implications for Standardised Packaging Legislation in the Member States?*, in *EU Law Analysis*, 13 January 2016, eulawanalysis.blogspot.ch. A challenge against standardised packaging in the UK was actually already rejected by the High Court in the United Kingdom, judgment of 19 May 2016, [2016] EWHC 1169 (Admin), *R. (on the application of British American Tobacco UK Ltd) v. Secretary of State for Health*; see Editorial, *Reviewing Harmonization: The Tobacco Products Directive Judgments*, in *European Law Review*, 2016, p. 305 *et seq.*

Second, the outcome can be relevant beyond the European Union and sets a precedent for lawsuits in other countries. Philip Morris is involved in several cases across the world and the outcomes known thus far seem to be in line with some of the conclusions of the CJEU. Indeed, in July 2016 the tobacco company lost a lawsuit against Uruguay in a decision adopted by the World Bank's International Centre for Settlement of Investment Disputes (ICSID).³² The case concerned two regulations adopted by Uruguay, which limited the marketing of tobacco products and established some requirements concerning the labelling of their packaging. In Philip Morris' view, these regulations were inconsistent with the Switzerland/Uruguay Bilateral Investment Treaty³³ but the Arbitral Tribunal dismissed the claim. This trend could encourage other countries to adopt similar tobacco control legislation.

From an internal perspective, this judgment is extremely helpful as it puts forward a new line of reasoning not so much focused on internal market issues but increasingly on the respect for fundamental rights and for the protection of human health. The strong commitment of the European Union in this regard is reinforced by the references to the implementation of the FCTC and the decision, a few weeks ago, not to renew the anti-smuggling deal with Philip Morris.³⁴ All these elements seem to demonstrate that the fight against tobacco products consumption has become a priority also for the EU judicial Institutions.

³² ICSID, award of 8 July 2016, case no. ARB/10/7, *Philip Morris and Abal Hermanos v. Oriental Republic of Uruguay*.

³³ Agreement signed on 7 October 1988 between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments.

³⁴ Q. ARIÈS, *EU to End Anti-Smuggling Deal with Philip Morris*, in *Politico Europe*, 6 July 2016, www.politico.eu.

