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Judgment of the Court (Fifth Chamber) of 22 June 1993. - Ministero delle Finanze and Ministero della Sanità v Philip Morris Belgium SA and others. - Reference for a preliminary ruling: Consiglio di Stato - Italy. - Labelling of tobacco products - Placing of health warnings on unit packets of tobacco products. - Case C-222/91.

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Keywords

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1. Approximation of laws ° Labelling of tobacco products ° Directive 89/622 ° General health warning to be featured on unit packets of products other than cigarettes ° Option for Member States to fix, in respect of their domestic production, a percentage of the surface area of unit packets to be reserved for such a warning ° Option introduced by Directive 92/41

(Council Directive 89/622, Art. 4(1) and (5), as amended by Directive 92/41)

2. Approximation of laws ° Labelling of tobacco products ° Directive 89/622 ° Specific health warning to be featured on cigarette packets ° Option for Member States to require the affixing of more than one specific warning ° No option

(Council Directive 89/622, Art. 4(2))

Summary

1. Article 4(5) of Directive 89/622 on the labelling of tobacco products, in its original version, is to be interpreted as meaning that Member States may not require that, so far as national production is concerned, on unit packets of tobacco products other than cigarette packets the general health warning referred to in Article 4(1) must cover at least 4% of the surface on which it is printed. That option is, however, permitted under the version of Article 4(5) which is laid down in Directive 92/41 amending Directive 89/622.

2. Article 4(2) of Directive 89/622 on the labelling of tobacco products requires only one specific health warning to be printed on each cigarette packet and Member States may not require more than one such warning, since the provision in question does not lay down a minimum requirement.

Parties

In Case C-222/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Consiglio di Stato in Sede Giurisdizionale for a preliminary ruling in the proceedings pending before that court between

Ministero delle Finanze

Ministero della Sanità

and

Philip Morris Belgium SA

BAT (Deutschland) Export GmbH & Co.

H.F. and Ph. F. Reemtsma GmbH & Co.

Philip Morris Holland BV

Philip Morris Products Inc.

Arizona Tobacco Products GmbH & Co. Export KG

Les Fabriques de Tabac Réunion SA

R.J. Reynolds Tobacco GmbH and

Turmac Company BV

on the interpretation of Article 4 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),

THE COURT (Fifth Chamber),

composed of: G.C. Rodríguez Iglesias, President of the Chamber, R. Joliet, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: C.O. Lenz,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Philip Morris and the other companies, respondents and appellants on cross-appeal, by Massimo Colarizi, of the Rome Bar, Paolo Ferrari, of the Milan Bar, Massimo Severo Giannini, of the Rome Bar, Riccardo Luzzato, of the Milan Bar, Mario Siragusa, of the Rome Bar, Romano Subiotto, Solicitor of the Supreme Court of England and Wales, and Giuseppe Scassellati Sforzolini, of the Bar of Bologna;

° the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato;

° the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent; and

° the Commission of the European Communities, by Antonio Aresu and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Philip Morris and the other companies, respondents and appellants on cross-appeal, the Italian Government, the United Kingdom, represented by Richard Plender QC and Eleanor Sharpston, Barrister, acting as Agents, Ireland, represented by Richard Nesbitt, Barrister-at-Law, acting as Agent, and of the Commission at the hearing on 14 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 2 March 1993,

gives the following

Judgment

Grounds

1 By order of 27 August 1991, received at the Court on 4 September 1991, the Consiglio di Stato in Sede Giurisdizionale (Council of State sitting as a court of law) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 4 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, hereinafter referred to as "the directive").

2 The questions arose in two actions brought before the Tribunale Amministrativo Regionale del Lazio (Administrative Court for the Lazio Region) by the companies Philip Morris Belgium, BAT (Deutschland) Export, H.F. and Ph. F. Reemtsma, Philip Morris Holland, Philip Morris Products Incorporated, Arizona Tobacco Products, Les Fabriques de Tabac Réunies, R.J. Reynolds Tobacco and Turmac Company (hereinafter referred to collectively as "Philip Morris and the other companies"). Those actions seek annulment of the decree of the Minister of Finance of 31 July 1990, adopted in agreement with the Minister of Health, containing specific technical provisions on the packaging and labelling of tobacco products pursuant to the requirements of Directive 89/622 of the Council of the European Communities (Gazzetta Ufficiale della Repubblica Italiana (Official Gazette of the Italian Republic) No 198 of 25 August 1990, hereinafter referred to as "the ministerial decree").

3 In support of their actions, Philip Morris and the other companies submit that the ministerial decree is unlawful in so far as, contrary to the directive, it lays down an obligation to affix two specific warnings on cigarette packets and extends to all unit packets of tobacco products the condition as to 4% minimum surface area imposed by the directive in respect of cigarette packets. They also observe that the ministerial decree was adopted by the Minister of Finance, by agreement with the Minister of Health, neither of whom was, in their view, competent to adopt the decree.

4 The Tribunale Amministrativo Regionale del Lazio dismissed the ground of action alleging lack of competence and the ground of action challenging the extension to all unit packets of tobacco products of the condition as to 4% minimum surface area imposed by the directive in respect of cigarette packets. On the other hand, the ground challenging the prescribed affixing of two specific warnings on cigarette packets was upheld and the Tribunale accordingly annulled the ministerial decree in that respect.

5 The Consiglio di Stato, to which the Minister of Finance and the Minister of Health appealed and before which Philip Morris and the other companies brought a cross-appeal against the decision of the lower court, decided to stay proceedings until the Court of Justice had given a preliminary ruling on the following questions:

"(a) Is Article 4 of Directive 89/622/EEC of 13 November 1989 to be interpreted as meaning that the national authority may require that on unit packets of tobacco products other than cigarette packets the general warning referred to in Article 4(1) should cover at least 4% of the surface on which it is printed?

(b) Is Article 4(2) of Directive 89/622/EEC of 13 November 1989 to be interpreted as requiring only one specific warning to be printed on each cigarette packet, or as requiring a greater number of specific warnings to be printed thereon?

(c) If the answer to Question (b) is that the aforesaid Community directive in itself requires not more than one specific warning to be printed on each cigarette packet, may the national authority nevertheless require a greater number of specific warnings to be printed on each packet?"

6 Reference is made to the Report for the Hearing for a fuller account of the facts and legal framework of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

The first question

7 It should be borne in mind that the directive, which was adopted pursuant to Article 100a of the EEC Treaty, is designed to eliminate barriers to trade which might arise as a result of differences in national provisions on the labelling of tobacco products and thereby impede the establishment and operation of the internal market. With that end in view, the directive contains common rules concerning the health warnings to appear on the unit packet of tobacco products and the indications of the tar and nicotine yields to appear on cigarette packets.

8 *These common rules are not always identical in nature.*

9 *Some of them give Member States no discretion to impose requirements stricter than those provided for in the directive, or even to impose more detailed or at any rate different requirements, with regard to the labelling of tobacco products.*

10 *According to Article 8(1) of the directive, Member States may not, for reasons of labelling, prohibit or restrict the sale of products which comply with the directive. Under Article 8(2), Member States still have the right to lay down, so far as compatible with the Treaty, requirements concerning the import, sale and consumption of tobacco products which they deem necessary in order to protect public health, but only in so far as such requirements do not imply any changes to labelling as laid down in the directive.*

11 *Other provisions of the directive allow the Member States a degree of discretion to adapt the labelling of tobacco products to the requirements of public health protection. One such provision is Article 4(2), which allows the Member States to select the specific warnings which must appear on cigarette packets by choosing them from those listed in the annex to the directive. Another is Article 4(3), which allows Member States to stipulate that the general warning "Tobacco seriously damages health", as well as the specific warnings, must be combined with the indication of the authority that is their author.*

12 *The existence of provisions containing minimum requirements is accounted for by the Resolution of the Council and of the representatives of the Governments of the Member States, meeting within the Council, of 7 July 1986 on a programme of action of the European Communities against cancer (OJ 1986 C 184, p. 19), to which the fifth recital in the preamble to the directive refers. Under that programme, the measures to be adopted by the Community with a view to limiting and reducing the consumption of tobacco were to be based on the practical experience gained in the various Member States and were to contribute to increasing the effectiveness of national programmes and actions.*

13 *Member States which have made use of the powers conferred by the provisions containing minimum requirements cannot, according to Article 8 of the directive, prohibit or restrict the sale within their territory of products imported from other Member States which comply with the directive.*

14 *With regard to the affixing of the general warning on unit packets of tobacco products other than cigarettes, Article 4(5) of the directive, in its original version, contained rules different from those applicable to cigarette packets. Whereas the warnings, referred to in Article 4(1) and (2), to be affixed to cigarette packets had to cover at least 4% of each large surface of the unit packet, the general warning on tobacco products other than cigarettes had to be printed in, or irremovably affixed to, a conspicuous place on a contrasting background and in such a way as to be easily visible, clearly legible and indelible. It had not in any way to be hidden, obscured or interrupted by other written or pictorial matter.*

15 *It follows that the discretion accorded to Member States by Article 4(5) of the directive, as it originally stood, related only to the conditions therein mentioned with which the general warning had to comply. However, in order to ensure that the warning was clear and legible, Member States could not lay down a criterion such as that at issue, which takes no account of actual scrutiny of those conditions.*

16 *Article 4(5) was amended by 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), which provides that, on tobacco products other than cigarettes, each warning, general and specific, must cover at least 1% of the total surface of the unit packet and must, in any event, be easily visible, clearly legible and indelible.*

17 *As is established in the judgment delivered today in Case C-11/92 *The Queen v Secretary of State for Health, ex parte Gallaher Ltd and Others*, Articles 3(3) and 4(4) of the directive confer on Member States a discretion allowing them to require that the indications of tar and nicotine content and the general and specific warnings should each cover an area greater than 4% of the relevant surface. The new version of Article 4(5) of the directive is also a minimum provision and it does not therefore prohibit a Member State from requiring manufacturers of tobacco products to ensure that the general warning covers a minimum of 4% of the surface to which it is affixed. As pointed out*

above (paragraph 13), such a requirement cannot be imposed with regard to imported products which comply with the directive.

18 It is for the national court, when assessing the legality of the ministerial decree in question, to take account of one or the other version of Article 4(5) in accordance with the rules of its domestic law.

19 The answer to the first question submitted by the national court must therefore be that Article 4(5) of Directive 89/622 is to be interpreted as meaning that Member States may not require that, so far as national production is concerned, on unit packets of tobacco products other than cigarette packets the general warning referred to in Article 4(1) must cover at least 4% of the surface on which it is printed. Member States may, however, impose such a requirement under the version of Article 4(5) laid down in Directive 92/41 amending Directive 89/622.

The second and third questions

20 By its second and third questions the national court essentially seeks to ascertain whether Article 4(2) of Directive 89/622 requires one or more than one specific warning to be affixed to each cigarette packet and, if the affixing of only one specific warning is prescribed, whether it is none the less open to Member States to require more than one such warning.

21 Article 4(2) of the directive provides as follows:

"With regard to cigarette packets, the other large surface of the packet shall carry, in the official language or languages of the country of final marketing, specific warnings alternating in accordance with the following rule:

° each Member State shall draw up a list of warnings taken exclusively from those listed in the Annex,

° the specific warnings selected shall be printed on the unit packets so as to guarantee the appearance of each warning on an equal quantity of unit packets, with a tolerance of around 5%."

22 The interpretation advocated by the Italian Government, to the effect that the use of the plural term "warnings" in Article 4(2) of the directive indicates that Member States are free to require the printing or affixing of one or more warnings, cannot be accepted.

23 As the Commission has pointed out, the plural term "warnings" is used owing to the structure of the sentence, which begins "With regard to cigarette packets ...", and does not therefore mean that Member States may require more than one specific warning.

24 The exclusion of that possibility follows from a number of interpretative criteria based on the literal meaning of Article 4(2) of the directive and on its context.

25 First, according to Article 4(2) the specific warnings must alternate "so as to guarantee the appearance of each warning on an equal quantity of unit packets ...", which would appear to concern only one specific warning.

26 Second, Article 4(4) of the directive regulates in identical fashion the space to be devoted to the general warning and the specific warnings, that is to say, at least 4% of each large surface of the unit packet, a percentage to be increased to 6% for countries with two official languages and to 8% for countries with three official languages. If Member States were to be allowed to require the use of more than one specific warning, those warnings would have to be printed on the abovementioned surface area of 4%, which would run counter to the purpose of the directive, which is to make clear, so as to attract the attention of individuals, the risks to health arising from consumption of these products.

27 Finally, Article 4(2a), introduced by Directive 92/41, cited above, provides that unit packets of tobacco products other than cigarettes must carry a single specific warning. However, as the Commission has correctly pointed out, it is not possible to explain why this rule should apply only to unit packets of products which are sometimes more dangerous than cigarettes, as in the case of smokeless tobacco products referred to in Article 4(2a)(c).

28 Since Article 4(2) of the directive provides only for the use of a single specific warning and that provision does not lay down a minimum requirement, Member States are not authorized to require more than one warning.

29 The answer to the second and third questions must therefore be that Article 4(2) of Directive 89/622 requires only one specific warning to be printed on each cigarette packet and that Member

States may not therefore require more than one such warning.

Decision on costs

Costs

30 The costs incurred by the Italian Government, the United Kingdom, Ireland and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Consiglio di Stato in Sede Giurisdizionale, by order of 27 August 1991, hereby rules:

- 1. Article 4(5) 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, in its original version, is to be interpreted as meaning that Member States may not require that, so far as national production is concerned, on unit packets of tobacco products other than cigarette packets the general warning referred to in Article 4(1) must cover at least 4% of the surface on which it is printed. Member States may, however, impose such a requirement under the version of Article 4(5) laid down in Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622.*
- 2. Article 4(2) of Directive 89/622 requires only one specific warning to be printed on each cigarette packet and Member States may not therefore require more than one such warning.*