

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 9

(facts of the case)

All over the European Union, massive alcohol abuse is spreading up to an alarming scale. At public and private parties, unrestrained consumption of hard drinks high in alcohol content like rum, vodka, Whiskey and Calvados takes place and sometimes even results in consumers' death. Member states' governments as well as parliaments respond to the situation by issuing warnings only, which go unheard, having no effect at all.

Finally, the European Parliament and the Council, having consulted the Economic and Social Committee, adopt in the ordinary legislative procedure a "Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of alcohol products" (so-called Alcohol Advertising Directive). The directive requires the member states to impose an absolute ban on any kind of advertising and sponsoring for beverages of more than 40 % vol. alcohol content. The directive invokes art. 114 FEU Treaty as legal basis. The statement of reasons points out to the differences in the various regulations of the member states on the advertising and sponsoring of alcohol products. It argues that the national provisions need to be harmonised for a better functioning of the internal market, in particular in order to eliminate obstacles for the free movement of goods, and that in this context, concerns of the protection of health need to be taken into account.

Member state A-land duly transposes the directive into its domestic law, confining itself to this objective and not stipulating any further reaching restrictions. The new statute entails limitations to fundamental rights, which by themselves (the European context set aside) are incompatible with the national constitution. However, the national legislator accepts this inconvenience, in order to fulfil the obligation of A-land to transpose the directive into domestic law.

Soon afterwards, an administrative court in A-land has to rule upon a case whose outcome is depending on the application of the transposing statute. The judges do not want to apply the statute but to suspend the proceedings and refer the statute to the national constitutional court for constitutional review. They hold that the legislator was not obliged by European Union law to adopt this statute (and the limitations to fundamental rights set therein) because the Alcohol Advertising Directives violates in multiple respect the Primary Law of the Union and therefore is void. They deem that the European Union was not competent to adopt such directive and that the directive does neither comply with the free movement of goods neither with the fundamental rights as guaranteed by European Union Law.

How shall the Administrative Court proceed and what will be the outcome?

Case variant: The Directive does not provide for an absolute and overall prohibition of advertising and sponsoring, though it interdicts any advertising in broadcasting media, printed media and "services of the information society", which are aimed at the consumer. How shall the Administrative Court proceed and what will be the outcome?

A. On the original case

I. How shall the Administrative Court proceed?

- 1) **Suspension of the proceedings before the Administrative Court and reference to the Constitutional Court for constitutional review (→ "concrete constitutional review"):** (-)
 - in the given case, the statute that transposes the directive is required by EU law, which enjoys primacy over national constitutional law
 - however, the Administrative Court may refer to the Constitutional Court *after* a preliminary ruling of the ECJ if the *constitutional identity* (the fundamental values and ideas, on which the constitution is based) is affected
- 2) **Suspension of the proceedings before the Administrative Court and reference to the ECJ for a preliminary ruling on the validity of the Alcohol Advertising Directive (art. 267 FEU Treaty)**
 - a) **Jurisdiction of the European Court of Justice**
 - b) **Right to refer**
 - c) **Suitable subject-matter for a reference**
 - d) **Relevance of the referred question to the case before the referring court**
 - e) **Question demanding clarification**
 - f) **Suitable formulation of the referred question**

II. What will be the outcome of the preliminary ruling of the European Court of Justice?

- In case of a violation of primary law, the ECJ will declare the Alcohol Advertising Directive to be void (cf. art. 264 FEU Treaty)
- 1) **Lack of competence**
 - art. 114(1) phrase 2 FEU Treaty as legal basis?
 - no doubts concerning the competence of the acting institutions ["Organkompetenz"]
 - a) **Measure**
 - b) **for the approximation of the provisions laid down by law, regulation or administrative action in the member states**
 - c) **which have as their object the establishment and functioning of the internal market**
 - **problem:** the limits of the legislative competences under art. 114(1) (see *ECJ, case C-376/98, Tobacco Advertising Directive I*)
 - does art. 114(1) provide for a general competence to regulate the internal market?
 - can a total ban of advertising for certain products be a regulation to promote the functioning of the internal market? Is it intended to do so? Can it objectively serve this purpose?
 - 2) **Infringement of essential formal or procedural requirements: (-)**
 - 3) **Infringement of substantive law**
 - a) **Violation of the free movement of goods (art. 28 et seq. FEU Treaty)**
 - aa) **Sphere of protection**

bb) Encroachment/interference

- a restriction (apply Dassonville and Keck formulas)

cc) Illegality of the encroachment (no justification by the fundamental freedom's limits)

α) Proportionality

(1) Legitimate aim

(2) Suitability

(3) Necessity

- problem: alternatives to the limitation of advertising?

(4) Proportionality in its strict sense

- a serious encroachment but justified on serious grounds of public health

β) No violation of fundamental rights

- freedom to exercise one's profession (see now art. 15(2) Charter of Fundamental Rights)
- proportionality of the restriction of this fundamental right - proportionality in its strict sense?

b) Violation of the freedom to provide services (Art. 56 et seq. FEU Treaty)

aa) Sphere of protection

bb) Encroachment/interference

- a restriction (apply van Binsbergen formula; apply Keck formula analogously [DISPUTED])

cc) No justification of the encroachment by the fundamental freedom's limits

- proportionality?

4) Misuse of powers: (-)

B. On the case variant

I. How shall the Administrative Court proceed?

- once again: reference to the ECJ for a preliminary ruling under art. 267 FEU Treaty

II. What will be the outcome of the preliminary ruling of the European Court of Justice?

1) Lack of competence

- problem: the limits of the legislative competences under art. 114(1) (see for this case *ECJ, case C-380/03, Tobacco Advertising Directive II*)
 - a regulation on the limitation of advertising in important media as a regulation to promote the functioning of the internal market?

2) Other aspects of illegality