IN THE MATTER OF MARKETING OF LOOSE SNUFF IN DENMARK II

OPINION

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1. I have been asked to advise on whether EU law requires Denmark to prohibit the marketing of loose snuff in its national territory. The question arises in the context of enforcement proceedings, currently pending before the European Court of Justice ('ECJ'), brought by the Commission against Denmark for allegedly infringing the ban on marketing oral tobacco which is imposed by EU directives.

2. I will first discuss briefly the export ban on oral tobacco. I will then examine the enforcement proceedings pending before the ECJ and, finally, I will turn to examine whether the prohibition of marketing loose snuff in Denmark is compatible with EU law.

The export ban on oral tobacco

3. The manufacturing, presentation and sale of tobacco products within the European Union is currently governed by Directive 2001/37 on Tobacco Products ('Directive 2001/37' or 'the Directive').[1]

4. The Directive seeks to facilitate the establishment of the internal market by removing obstacles to cross-border trade created by differences between national laws, and also provide a high level of health protection. It was adopted principally on the basis of Article 95 EC (now Article 114 TFEU) which empowers the EU institutions to harmonize the laws of the Member States for the purpose of achieving the establishment and functioning of the internal market.

[1] Directive 2001/37/EC adopted by the European Parliament and the Council on 5 June 2001, OJ 2001, L194/26.

5. Article 8 of the Directive in combination with Article 151(1) of the Act of Accession of Austria, Finland and Sweden impose an export ban on oral tobacco. As a result, snus can be marketed in Sweden but it cannot be lawfully marketed in any other Member State.

6. Tobacco for oral use is defined in Article 2(4) as 'all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or particulate form or in any combination of these forms – particularly those presented in sachet portions or porous sachets – or in a form resembling a food product'.

7. In Case C-210/03 *The Queen on the application of Swedish Match AB v Secretary of State for Health* [2004] ECR I-11893 ('*Swedish Match'* case), the ECJ rejected a challenge to the validity of the export ban. Despite that judgment, there is some uncertainty about the validity of the ban. I refer in this respect to my previous opinions with which instructing lawyers are familiar.

8. The Directive repealed and replaced 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,[2] which had been substantially amended by Directive 92/41/EEC.[3] The ban on oral tobacco was first introduced by Directive 92/41 which added Article 8a to Directive 89/622. It was then included in Article 8 in the Directive.

9. The Directive will be repealed and replaced by 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

[2] OJ 1989 L 359/1.
[3] OJ 1992 L 158/30.

concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.[4]

10. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2014/40 by 20 May 2016.[5] Directive 2001/37 is to be repealed with effect from that date.[6]

11. Directive 2014/40 maintains the export ban on oral tobacco. It is contained in Article 17 which is identical to Article 8 of the Directive. The definition of tobacco for oral use is in all material respects the same as that provided in the Directive: see Article 2(8) of Directive 2014/40.

The Commission's proceedings against Denmark

12. The Commission has brought enforcement proceedings again Denmark arguing that, by allowing the sale of loose snus contrary to Article 8, read in conjunction with Article 2(4), of the Directive, Denmark has failed to fulfill its obligations under the EU Treaties.

13. The commencement of those proceedings has been announced in the Official Journal of the European Union.[7]

14. According to the notice published in the Official Journal, the Commission argues that Denmark has failed to comply with Article 8 by prohibiting only sales of snuff in porous portion sachets and not loose snuff. The Commission also states that Denmark has not disputed that its national rules do not comply with EU law. A legislative proposal which would have introduced a complete prohibition was rejected by the Danish Parliament. Given that Denmark has not provided any

[4] OJ 2014 L 127/1.
[5] Directive 2014/40, Article 29(1).
[6] Op.cit., Article 31.
[7] OJ 2014 C 439/25.

further commitments that it will comply, the Commission concludes that Denmark has still failed to fulfill its obligations under Article 8 of the Directive.

15. The proceedings are based on Article 258 TFEU which enables the Commission, as a guardian of the Treaties, to bring enforcement actions against Member States. The enforcement action is divided into two phases, an administrative phase and a judicial phase. If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it may deliver a reasoned opinion on the matter giving the Member State the opportunity to submit its observations. If the Member State does not comply with the reasoned opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice: see Article 258 TFEU.

16. In the event that the Court accepts the arguments of the Commission, it will issue a declaratory judgment stating that Denmark has failed to fulfill its obligations under EU law: see Article 260(1) TFEU. Denmark will then need to introduce measures to comply with the judgment.

17. If the Court does not accept the Commission's arguments, it will dismiss the action.

18. Where the Commission brings enforcement proceedings against a Member State for failure to implement a directive, it may also ask the Court to impose a lump sum or a penalty payment on the Member State concerned. If the Court finds an infringement, it may impose a lump sum or penalty payment not exceeding the amount specified by the Commission: see Article 260(3).

19. In the present case, it is not clear from the information available whether the Commission has requested the Court to impose such sanctions. The notice published in the official journal does not refer to such a request.

20. There are two points to note in relation to the enforcement proceedings.

21. First, the defences available to the Member States are, in general, limited. The concept of infringement within the meaning of Article 258 TFEU is an objective one. The Member State may, in principle, not plead objective impossibility to implement EU law or constitutional, institutional or administrative difficulties such as, for example, that the national parliament refused to pass transposing legislation even though it was proposed by the Government.[8]

22. Secondly, according to the case law, where the Commission brings enforcement proceedings against a Member State for failure to comply with a directive, it is not open to the State to raise, by way of defence, the illegality of the directive in question. The reason for this is that Member States have the right to challenge the validity of directives in proceedings for judicial review brought under Article 263 TFEU. Such proceedings must be brought within a period of two months from the publication or notification of the directive in question: see Article 263(6). If a Member State fails to avail itself of that possibility, it cannot then challenge the validity of the directive indirectly in different kind of proceedings.

23. In Case C-194/01 *Commission v Austria*, judgment of 29 April 2004, the ECJ held as follows (para 41):

> The Republic of Austria cannot, outside the period laid down by Article 230 EC [now Article 263 TFEU], contest the lawfulness of an act adopted by the Community legislature which has become final with respect to it. It is settled case-law that a Member State cannot properly plead the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision or comply with that directive (see,

[8] See e.g. Case C-77/69 *Commission v Belgium* [1970] ECR 237; Case C-28/81 *Commission v Italy* [1981] ECR 2577.

inter alia, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10, and Case C-154/00 *Commission* v *Greece* [2002] ECR I-3879, paragraph 28).

24. It follows that, in the pending case against Denmark, the Court will not be drawn into an examination of the validity of the prohibition of snus. This however does not preclude Denmark from presenting arguments pertaining to the interpretation of the Directive. Conceivably, Denmark might argue that the Directive should be interpreted as not extending the prohibition on the marketing of loose snus. I examine this possibility further below.

25. In my view, the prohibition on a Member State to raise the invalidity of a directive by way of defence is problematic and gives rise to odd results. A Member Sate may be required to comply with a directive that, in fact, infringes higher ranking rules of EU law, e.g. the EU Treaties or the general principles of law. The procedural exclusivity imposed by the ECJ relegates illegality to a relative concept: a Member State may not plead the invalidity of a directive by way of defence but a private party may be able to raise such a plea before a national court and that court may or, if it is a court of last instance, must make a preliminary reference to the ECJ which may then annul the directive.

26. In a worst case scenario, a Member State may have to pay a penalty payment in proceedings initiated by the Commission under Article 260(2) or 260(3) TFEU for failing to implement a directive which in subsequent proceedings initiated by a private party the Court finds to be invalid. This, in fact, occurred, in relation to Directive 2006/24/EC on the retention of personal data.[9] In Case C-270/11 *Commission v Sweden*,[10] the ECJ held that Sweden had not taken the requisite

[9] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)

[10] Case C-270/11 *Commission v Sweden*, Judgment of 30 May 2013.

implementation measures to comply with a previous judgment[11] which had found that, by failing to adopt the provisions necessary to comply with Directive 2006/24, Sweden had failed to fulfill its obligations and ordered Sweden to pay a lump sum penalty. Subsequently, however, in Joined Cases C‑293/12 and C‑594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources,*[12] the Court annulled that directive on the ground that it infringed the right to respect for private life and the right to the protection of personal data as protected respectively by Articles 7 and 8 of the EU Charter of Fundamental Rights.

27. One wonders whether, in an appropriate case, it might be worth asking the Court to reconsider its case law on that point.

The legality of prohibiting the marketing of loose snuff in Denmark

28. In its action, the Commission claims that Denmark has failed to comply with Article 8 of the Directive by prohibiting only sales of snuff in sachets but not loose snuff.

29. An argument could be made that Article 8 must be interpreted as not prohibiting the sale of loose snuff in Denmark. The following paragraphs explain that argument in detail.

30. The Directive imposes a marketing ban outside Sweden on all oral tobacco. It does not provide an exception in relation to Denmark. Nor does it differentiate between loose snuff and packaged snuff. Article 2(4) refers in particular to packaged tobacco but the reference is not exhaustive and includes oral tobacco in loose form.

[11] Case C-185/09 *Commission* v *Sweden* [2010] ECR I-14.
[12] Joined Cases C‑293/12 and C‑594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources*, judgment of 8 April 2014.

31. However, there may be scope for interpreting the Directive restrictively as not including loose snuff.

32. My instructions state that snus is a traditional product in Denmark, its use there dating from the 19th century, and that nowadays it is a marginal product used mostly by the older generation. It apparently accounts to approximately 1% of the tobacco using consumers although I have not seen any official data to this effect.[13]

33. As already stated, the prohibition on the marketing of oral tobacco was first introduced by Directive 92/41 which added Article 8a to Directive 89/622. The preamble to Directive 92/41 seeks to justify the ban on health grounds and on the ground that differences among the laws of the Member States may lead to direct obstacles to trade: see recitals 8, 11, 13, 15 and 16.

34. Recital 17 of Directive 92/41 states as follows (emphasis added):

> 'Whereas, the sales bans on such tobacco already adopted by three Member States have a direct impact on the establishment and operation of the internal market; whereas it is therefore necessary to approximate Member States' laws, regulations and administrative provisions in this area, taking as a base a high level of health protection; whereas the only appropriate measure is a total ban; *whereas, however, such a ban should not affect traditional tobacco products for oral use,* which will remain subject to the provisions of Directive 89/622/EEC, as amended by this Directive, applicable to smokeless tobacco products;'

35. I read this to mean that Directive 92/41 introduces a ban on oral tobacco but that does not affect the marketing of traditional products which remain subject to its provisions relating to smokeless tobacco products. Those provisions pertain to

[13] Email of 15 December 2014 sent by Cecilia Kindstrand-Isaksson, Swedish Match.

warnings: See Article 4(2a)(c) of Directive 89/622 as amended by Directive 92/41.

36. There is clearly ambiguity in that, whilst Article 8a imposes a blanket prohibition on tobacco for oral use, the preamble exempts from that prohibition traditional products.

37. The preamble can be taken into account as an aid to the interpretation of a measure. The case law states that the preamble may explain the content of a measure.[14] However, it cannot be relied upon as a ground for derogating from its actual provisions.[15]

38. In my view, an argument can be made that the ambiguity should be resolved in favour of free trade and subsidiarity which are key EU principles.

39. It is correct that the exemption for traditional products was not included in the preamble to Directive 2001/37. The reason for this however is that that directive did not provide any justification for the prohibition on tobacco for oral use. That justification, part of which is the exemption of traditional products, is only found in the preamble to Directive 92/41.

40. It follows that Directive 2001/37 did not intend to change in any way, i.e. to extend or limit, the prohibition on the marketing of oral tobacco contained in Directive 92/41, apart from the exemption for Sweden which was dictated by the Act of Accession. If that is correct, whatever limitations existed on the prohibition on the tobacco for oral use under Directive 92/41 continued to exist under Directive 2001/37. To the extent therefore that use of loose snuff in Denmark is

[14] See Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, para 91; Case C-594/07 *Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA*, judgment of 22 December 2008, para 17.
[15] See Case C‑344/04 *IATA and ELFAA* [2006] ECR I‑403, para 76; Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, para 54, and Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, para 32.

traditional, it can be argued that its marketing in Denmark by Danish firms is not covered by the prohibition.

41. I note that the Directive does not define the term 'traditional' product. But on the basis of the information provided in my instructions, it appears that snus can be classified as such in Denmark, since it has been available there alreqady from the 19th century. I also note that the Commission's Impact Assessment carried out in connection with the revision of the Directive, which resulted in the adoption of Directive 2014/40, defines as traditional use the continuous use of a smokeless tobacco product in a Member State or part thereof for at least 30 years.[16] This definition does not necessarily bind the interpretation of the Directive but the consumption of snus in Denmark would be classified as traditional according to that definition.

42. The argument would become even stronger if it could be claimed that loose snus, in particular, is traditionally used in Denmark.

43. The counter-argument against the above reasoning is that it makes too much of the preamble. It relies heavily on a statement in the preamble which contradicts the express provisions of the Directive. I am not however persuaded that there is contradiction. The preamble is here used to narrow the scope of application of Article 8 in the light of fundamental principles of EU law.

44. There are additional, powerful, arguments to support the view the prohibition of Article 8 does not extend to the marketing of loose snus in Denmark.

45. First, such an extension runs counter to the principle of non-discrimination in that it would treat less favourably loose snuff vis-à-vis other traditional products such

[16] See Commission Staff Working Document, Impact Assessment SWD(2012) 452 final, Brussels, 19.12.2012, p. 6 under 'glossary of terms'.

as chewing tobacco. Such difference in treatment is not justified nor has the EU sought to justify it.

46. Secondly, it runs counter to the principle of proportionality. The Commission has not proved why such prohibition might be necessary in order to achieve the avowed objectives of the ban which are to prevent the emergence in the market of a new product: see Directive 92/14, recital 13. As I understand it, loose snuff in anything but new in Denmark. Nor is it justified on the ground that it is particularly attractive to young people: see Directive 92/14, recital 13. My instructions state that it is used mostly by old people.

47. Thirdly, it is undermined by the legislative choices made by the EU institutions in Directive 2014/40, recital 32 of which states as follows (emphasis added):

> 'Council Directive 89/622/EEC…prohibited the sale in the Member States of certain types of tobacco for oral use. Directive 2001/37/EC reaffirmed that prohibition. Article 151 of the Act of Accession of Austria, Finland and Sweden grants Sweden a derogation from the prohibition. The prohibition of the sale of tobacco for oral use should be maintained in order to prevent the introduction in the Union (apart from Sweden) of a product that is addictive and has adverse health effects. *For other smokeless tobacco products that are not produced for the mass market, strict provisions on labelling and certain provisions relating to their ingredients are considered sufficient to contain their expansion in the market beyond their traditional use.'*

48. It is not clear to me why loose snuff in Denmark cannot benefit from the same treatment, provided that it is traditional and is not produced for the mass market. Its differential treatment would amount to prohibited discrimination.

49. Fourthly, it runs counter to the principle of subsidiarity which is enshrined in Article 5(3) TEU. I simply cannot see how the ban can be justified in relation to a

product which accounts for less than 1% of the market of a Member State where it is marketed, especially if there is no intra-EU State element.

50. Finally, the extension is a disproportionate interference with the freedom to trade which is enshrined in Article 16 of the Charter and the limits on EU competence imposed by Article 114 TFEU.

51. According to an established principle of interpretation, EU measures must be interpreted, as far as possible, so as to comply with the EU Treaties, including the Charter, and the general principles of EU law.[17] It follows that, to the extent that such interpretation is possible, Article 8 of Directive 2001/37 must be construed as not extending to the marketing of loose snus in Denmark by a Danish company.

52. The above argument would need to be made in the context of the prevailing political climate which is in favour of limiting tobacco consumption and in the aftermath of the *Swedish Match* case which upheld the export ban on snus. In my view, the argument would be most persuasive if it were expressed in narrow terms, namely, if it were argued that Article 8 of the Directive does not prohibit the sale in Denmark of loose snus sold by Danish undertakings.

[17] See e.g. Case C-218/82 *Commission v Council* [1983] ECR 4063, para 15; Case C-392/93 *The Queen v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631, para 28.

Conclusion

53. It follows from the above that there is a reasonably good argument to be made that Article 8 of the Directive must be interpreted as not prohibiting the sale of loose snuff in Denmark.

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