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Vincent Delhomme¹

In spite of its limited competence in the matter², the EU has engaged in an ambitious struggle against lifestyle risks (tobacco, alcohol, diets, etc.)³ using its harmonisation powers under Article 114 TFEU concerning the internal market. While this objective may be laudable, it is also true that when the internal market objective completely disappears behind the public health objective, the EU faces an eminent constitutional problem. Indeed, the question of when the EU can, and cannot, use its broad harmonisation power under Article 114 TFEU⁴ has long agitated the European legal community, for it is a crucial element of the vertical repartition of competences between the Union and the Member States. The two cases dealt with in this case note are the CJEU's most recent answer concerning this contentious matter.

Almost two decades ago, amidst worries of competence creep on the basis of Article 114 TFEU, the Court rendered its landmark judgement in the (in)famous *Tobacco Advertising* case⁵, where it decided that a harmonisation measure would only be considered as an improvement to the functioning or the establishment of the internal market, and therefore legitimately based on what is now Article 114 TFEU, if it “*contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition*”⁶. These distortions must be “*appreciable*”, otherwise the power of the EU would be “*practically unlimited*”⁷.

The judgement was welcomed, and rightly so. A mere link between harmonisation measures and an economic activity would give the EU an almost blanket power to harmonise any given field of law, which is surely not what the “Masters of the Treaties” intended – and which would be incompatible with the fundamental constitutional principle of conferral. In accordance with this initial *Tobacco* ruling, internal market legislation can perfectly well pursue a public policy objective⁸, as long

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² Article 168 TFEU clearly states: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.”

³ ALEMANNO A. and GARDE A., “The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets”, *Common Market Law Review*, (2013), 1745-1786.

⁴ Article 114 TFEU paragraph 1 provides: “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the 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.”

⁵ CJEC, 5 October 2000, *Germany v European Parliament and Council*, C-376/98, ECLI:EU:C:2000:544.

⁶ *Ibid.*, para. 106.

⁷ *Ibid.*, para. 107.

⁸ See B. DE WITTE, “Non-market values in internal market legislation”, p. 73, in N. SHUIBHNE (ed.), *Regulating the Internal Market*, Cheltenham, Edward Elgar, 2006, pp. 64-68; B. DE WITTE, “A

as it effectively removes obstacles to trade or distortions of competition. The use of Article 114 TFEU would otherwise simply be an abuse of power. However, as has been noted by scholars,⁹ ever since its *Tobacco* judgement, the Court has been watering down its case law. The two cases at issue here, *Poland v European Parliament and Council*¹⁰ and *Philip Morris*¹¹ are a perfect example of this regrettable trend.

Both rulings deal with the validity of Directive 2014/40¹² on tobacco products, in an action for annulment brought by Poland in the first case, and following a request for preliminary ruling in proceedings initiated by several tobacco manufacturers in the second case. Among other things, the applicants argued that Article 114 TFEU did not constitute an adequate legal basis for the adoption of the Directive. As will be discussed below, the Court answers by upholding the validity of the Directive despite, for some of its provisions, the sheer lack of evidence of any significant contribution to the free movement of goods. This is the case in at least two instances: the prohibition of tobacco products with a flavour and the minimum harmonisation of some of the packaging requirements.

1. Prohibition of tobacco products with a flavour

Directive 2014/40 prohibits “*the placing on the market of tobacco products with a characterising flavour*”¹³ on grounds that these “*facilitate initiation of tobacco consumption or affect consumption patterns*”¹⁴. The underlying reason for such a ban, as for any anti-tobacco legislation in general, is clear: to reduce the consumption of tobacco. In its previous judgement, *Swedish Match*¹⁵, the Court had already upheld this sort of bans under Article 114 TFEU, claiming that they did contribute to free movement. It is however puzzling. How can the *prohibition* of a product be considered as removing obstacles to trade? On the contrary, it seems to set up new obstacles.

In both cases, the Court fails to provide a convincing answer to this question. It merely uses a circular reasoning by restating its previous case-law. It says that “*in prohibiting the placing on the market of tobacco products with a characterising flavour*”¹⁶, a general ban “*guards precisely against such divergences in the rules of the Member States*”¹⁷ and that “*the elimination of the divergences between the national rules as regards the composition of tobacco products or the prevention of the development of divergences between them, including the prohibition, at EU level,*

competence to protect: the pursuit of non-market aims through internal market legislation”, in P. SYRPIS, *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, pp. 25-48.

⁹ See WEATHERILL S., “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide””, *German Law Journal*, (2011), (12)3, pp. 827-864; WYATT D., “Community Competence to Regulate the Internal Market”, *University of Oxford Faculty of Law Legal Studies Research Paper Series*, (2007), Working Paper No 9/2007, pp. 1-46.

¹⁰ ECJ, 4 May 2016, *Poland v European Parliament and Council*, C-358/14, ECLI:EU:C:2016:323.

¹¹ ECJ, 4 May 2016, *Philip Morris Brands SARL e.a. v Secretary of State for Health*, C-547/14, ECLI:EU:C:2016:325.

¹² 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, (OJ 2014 L 127, p. 1).

¹³ Directive 2014/40/EU, Article 7.

¹⁴ Directive 2014/40/EU, Recital 15.

¹⁵ CJEC, 14 December 2004, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, C-210/03, ECLI:EU:C:2004:802.

¹⁶ *Poland v European Parliament and Council*, *supra* note 6, para. 61.; *Philip Morris*, *supra* note 11, para. 121.

¹⁷ *Ibid.*

of certain additives, seeks to facilitate the smooth functioning of the internal market in the products concerned”¹⁸.

In his *Swedish Match* Opinion, Advocate General Geelhoed defended the ban on tobacco for oral use, *snus*, by the diminution of enforcement costs: “*In short, if snus is not on the market of the European Union, the effort to control the marketing of other smokeless tobacco products can be reduced. In this respect, one can say that Article 8 of the 2001 Directive contributes to the removal of barriers to trade in other products.*”¹⁹ However, the link between lowering the costs of public authorities’ missions and removing barriers to trade is far from obvious. Which barriers are being removed? Why would the reduction in enforcement costs increase the trade in other products? This seems far-fetched, to say the least.

In *Philip Morris*, Advocate General Kokott brings forward another argument to justify the prohibition of flavoured tobacco products contained in Directive 2014/40/EC:

“Undoubtedly, the prohibition on tobacco products with characterising flavours is not capable of improving the functioning of the internal market for those products. However, it is recognised in case-law that Article 114 TFEU confers on the Union legislature the power to prohibit the placing on the market of a certain product in the entire European internal market if this helps to improve trading conditions for a class of other products.

*The prohibition under EU law of certain delivery forms of tobacco serves to create uniform trade conditions for all tobacco products throughout the European Union. Thus, the Union-wide prohibition on tobacco products that are mixed with a characterising flavour is, as it were, the price for the free circulation in the European internal market of ‘normal’ tobacco products which comply with the conditions laid down by the Directive, whilst at the same time ensuring a high level of health protection. In other words, tobacco products may in principle still be placed on the market in the European Union, but only without characterising flavours.*²⁰

In the second paragraph, Advocate General Kokott seems to consider normal tobacco products and flavoured tobacco products as one sole category of products whose trading conditions would be harmonised and hence whose trade would be facilitated by the ban. This seems first of all to be in contradiction with the first paragraph, where she mentions ‘*other*’ products. It is, most importantly, a bold statement, as it is easy to imagine that someone smoking a menthol cigarette would not necessarily divert to the ‘normal’ one after the former type having been banned. And it is to be also noted that the Court considered the limitation of the consumption of tobacco arising from the ban on flavoured products as one of the main reason for adopting it²¹. This goes against the idea of a substitutability of flavoured and non-flavoured tobacco products and against the very logic of banning one kind of products to facilitate trade in others. Moreover, Advocate General Kokott’s assumption and the Court’s ruling are not based on any economic evidence regarding the effect of the ban on trade in other products.

The justification for a total ban under Article 114 TFEU appears to be lacking: “*The Community has no legitimate interest in the banning of free standing products. [...] Action at the Community level makes no contribution to the internal market in fact; it*

¹⁸ *Poland v European Parliament and Council*, *supra* note 6, para. 64.; *Philip Morris*, *supra* note 11, para. 125.

¹⁹ Joint Opinion of Mr. Advocate General Geelhoed, 7 September 2004, *Swedish Match* and *Arnold André*, ECLI:EU:C:2004:487, para 79.

²⁰ Opinion of Mrs. Advocate General Kokott, 23 December 2015, *Philip Morris Brands SARL and Others*, Case C-547/14, ECLI:EU:C:2015:853, para. 82-83, (*emphasis added*).

²¹ *Poland v European Parliament and Council*, *supra* note 10, para. 42.

simply asserts Community competence for the sake of an abstract principle; the principle that in a single market it is central authority which decides which products or services may be placed on that market."²²

This is not to say that a prohibition can never be legitimate from a market point of view. This could be the case when a measure sets requirements for a product, prohibiting the commerce of products that do not comply with it, while authorizing the trade of products that do comply with it²³. In this case, the measure does create a market for authorized products and does remove obstacles to trade.

2. Minimum harmonisation of packaging requirements

Even if it does not appear as problematic as a total ban on a product, minimum harmonisation also raises some questions as to its contribution to the removal of barriers to trade. In *Tobacco Advertising*, the Court motivated its decision partly by the failure of the Directive to ensure the free movement of products in conformity with its provisions, while allowing Member States to impose to these products more stringent requirements, thereby barring access to their market for products originating from other Member States²⁴. In subsequent cases, such as *British American Tobacco*²⁵, where the legislator did include a free movement clause in its Directive ensuring that compliant products could not be refused because of stricter national requirements, the Court upheld the measure. But it is not the only problem caused by minimum harmonization.

In the present case, the Directive regulates the size of health warnings²⁶, the shape of the package and the number of cigarettes contained²⁷. The rest of the packaging is not harmonized and the Directive also imposes that health warnings are displayed in the official language of each Member State in which it is marketed²⁸. Ultimately, it remains possible that despite these harmonisation measures, producers would still have to manufacture packages for twenty-eight separate markets with different requirements for each of them. Here, the risk of diverging national rules makes the contribution to free movement purely hypothetical.

The Court answers to this argument rather scantily: "*Whilst it is true that some provisions of Chapter II of Title II of Directive 2014/40 require that certain elements of the labelling and packaging of tobacco products are adapted to take account of, amongst other things, the official language(s) or the tax legislation of the Member State of marketing, the fact remains that the directive harmonises other elements of the labelling and packaging of those products, such as the shape of the unit packets, the minimum number of cigarettes per unit packet and the size and combined nature of health warnings. As the Advocate General has observed in point 98 of her Opinion, those measures thus contribute to the removal of obstacles to trade, since they allow the undertakings concerned to reduce costs through economies of scale.*"²⁹

²² D. WYATT, *supra* note 9, p. 28.

²³ See *Ibid.*, p. 25: "As noted above, the rationale of withdrawal from the market of non-compliant products is to enforce application of the relevant safety standard, and contribute to the elimination of disparities between national rules and their application, and thereby to the free movement of goods between the Member States. Prohibiting non-compliant products as a means of enforcement of a safety standard application of which facilitates the free movement of compliant products is quite different from prohibition outright of a product."

²⁴ *Germany v European Parliament and Council*, *supra* note 5, para. 103-105.

²⁵ CJEC, 10 December 2002, *The Queen contre Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et Imperial Tobacco Ltd*, C-491/01, ECLI:EU:C:2002:741.

²⁶ Directive 2014/40, Article 9.

²⁷ Directive 2014/40, Article 13.

²⁸ Directive 2014/40, Article 8.

²⁹ *Philipp Morris*, *supra* note 11, para. 103.

As Advocate General Kokott puts it: “such partial harmonisation also undeniably offers advantages for the functioning of the internal market, since whilst it does not eliminate all obstacles to trade, it does eliminate some. In the present case, this means, for example, that manufacturers of tobacco products throughout the internal market are able to use cigarette packets which have a uniform basic design and are required to adapt that design to the specificities of their respective national laws, regulations and administrative provisions only in certain details (colours, for example), but no longer in every respect.”³⁰

In short, she acknowledges the fact that products may still need to adopt different standards, but not in every aspect of the packaging. Does it effectively facilitate trade? Would the costs of compliance with various national rules diminish if the packages had a similar design but were to be produced in different colours, with different sizes of health warnings and in different languages? Again, this is far from self-evident and some clarification by the legislator would be much welcome. The recent introduction of plain packaging in some EU Member States is a rather good illustration of the limited harmonization power of the Directive and the hypothetical aspect of its benefits to trade.

Stephen Weatherill writes that “*minimum harmonization might be rejected in particular cases for political or economic reasons but it cannot be rejected for clear and generally applicable constitutional reasons.*”³¹ This is certainly true. But when the facts of the case make contribution to free movement merely hypothetical, the Court should not uphold such a measure without more quantitative elements being brought forward by the legislator.

3. Conclusion

In her Opinion in *Philip Morris*, Advocate General Kokott writes that “*the suitability of Article 114 TFEU (formerly Article 95 EC and Article 100a of the EEC Treaty) as a legal basis no longer plays the central role it did in earlier years, even though certain points of detail continue to be disputed.*”³² It is undoubtedly true. Whether it is because the Court has managed to strike the right balance between market integration and national autonomy remains to be seen. *Poland v European Parliament and Council* and *Philipp Morris* do not point in that direction.

Fighting tobacco or alcoholism is a noble cause. But health policy, especially when regulating lifestyles, also expresses communities’ preferences and political diversity. It is probably why the Union was not given an extensive power in this field and why the Court, while preserving the necessary objective of market integration, should monitor the EU legislator more carefully. Fundamentally, these cases highlight a more fundamental issue: can ‘social’ policies always effectively be pursued by the use of market legislation? This note has sought to provide a, partial, negative answer to this question.

³⁰ Opinion of Mrs. Advocate General Kokott, *Philip Morris*, *supra* note 20, para. 119, (*emphasis added*).

³¹ S. WEATHERILL, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, p. 215.

³² Opinion of Mrs. Advocate General Kokott, *Philip Morris*, *supra* note 20, para. 3.



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