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On Division of Competence in the EU - The Tobacco Advertising Prohibition Directive Test Case

Note on the ECJ decision of 5 October 2000, C-376/98 –
Federal Republic of Germany v European Parliament and Council of the European Union

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Directive 98/43/EC of the European Parliament and the Council of the European Union of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsoring of tobacco products (Tobacco Advertising Ban Directive)¹ is contrary to Community law. This has now been correctly confirmed by the ECJ in its anxiously awaited judgment of 5 October 2000 which declared the Tobacco Advertising Ban Directive void.² In their decision, the European judges only dealt with the competency issue lying at the core of debate surrounding the Tobacco Advertising Ban Directive. Since the ECJ answered the question in the negative it was well in a position to leave open the question of to what extent the Directive violated other Community legal principles or basic rights. But in actual fact there is a lack not only of an adequate basis in jurisdiction, as literature has repeatedly shown, but also the Directive cannot be reconciled with EC Treaty provisions³ in substantive respects either.⁴

I. Background to the ECJ decision

Notwithstanding vehement criticism not just from the tobacco and advertising industries,⁵ it was adopted on 6 July 1998 as Directive 98/43/EC after a tenacious struggle and was supposed to introduce⁶ an absolute ban on direct and indirect tobacco advertising to Community law. Member States were given a general implementation deadline until 30 July 2001 under Article 6(1) of the Directive.⁷

1. Regulatory content of the Tobacco Advertising Ban Directive

The core of the regulations in the Directive which has now been found to be void is stipulated in its Article 3(1) according to which, apart from TV advertising,⁸ every form of advertis-

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¹ OJ 1998 L 213, at 9; entered into force according to Article 8 of the Directive on the day of its publication, 30 July 1998.

² The judgment thus essentially followed the final plea of the Advocate General Fennelly of 15 June 2000 in the cases C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (see pp. 160 et seq. of this issue) and C-74/99 *The Queen v Secretary of State for Health ex parte Imperial Tobacco* (cf. in particular paras. 58 et seq. and 181 there); both retrievable under <http://curia.eu.int/jurisp/>.

³ All articles of the EC Treaty and the Treaty of the EU hereinafter are cited, unless otherwise indicated, according to the renumbering introduced by Article 12 of the Treaty of Amsterdam of 2 October 1997.

⁴ Cf. especially *Di Fabio*, Werbeverbote - Bewährungsprobe für europäische Grundfreiheiten und Grundrechte, in: AfP, 1998, at 564 et seq.; *B. Wägenbaur*, Das gemeinschaftsweite Verbot der Tabakwer-

bung, Heiligt der Zweck die Mittel?, in: EuZW, 1999, at 144 (147 et seq.); *R. Wägenbaur*, Das Verbot "indirekter" Tabakwerbung und seine Vereinbarkeit mit Art. 30 EGV, in: EuZW, 1998, at 709 et seq. (on the compatibility of indirect tobacco advertising with Article 38 of the EC Treaty).

⁵ References in *Ukena/Opfermann*, Werbung und Sponsoring zugunsten von Tabakerzeugnissen, in: WRP, 1999, at 141 (142).

⁶ Only the Federal Republic and Austria voted against the Tobacco Advertising Ban Directive. On the Directive's background history, cf. *B. Wägenbaur*, *supra* note 4, at 144 as well as the final pleadings of Advocate General Fennelly, *supra* note 2, paras. 14 et seq.

⁷ The application of the advertising ban for press articles could under Article 6(3) of the Directive and by way of exception be deferred by two years for sponsoring. Further exceptions were to apply to already existing cases of sponsoring of worldwide events, such as Formula 1 racing, up through 1 October 2006.

⁸ TV advertising for tobacco products has already been prohibited on the basis of the so-called TV Directive 89/52/EEC of 3 October 1989, OJ 1989 L 298, at 23; cf. *Donner*, Tabakwerbung und Europa, 1999, at 73 et seq., 117 et seq.

ing and sponsoring for tobacco products⁹ was to be banned throughout the European Community.¹⁰ Allowed under Article 3(5) of the Directive were only internal announcements intended for those engaged in marketing tobacco as well as advertising at corresponding points of sale for tobacco products or in press articles coming from third countries.¹¹ The Directive furthermore prohibits any indirect tobacco advertising whatsoever as well as commercial use of tobacco trade-names on another product (such as Davidoff perfume, Camel boots) or for other services (e.g. Marlboro Adventure Holidays). According to Article 3(3)a of the Directive, in the opposite direction, the use of trademarks of other goods or services was prohibited for tobacco products. A single exception was made and a transition period up through 30 July 2000 was granted, thus only making it applicable to products or services brought onto the market after that date, while the prohibition on indirect advertising was only supposed to apply in the event that the product advertising images of the two products were clearly different.¹²

2. Criticism of the Tobacco Advertising Ban Directive

In daily newspapers¹³ and even in academic legal journals¹⁴ the Tobacco Advertising Ban Directive met up with harsh criticism. As a main political argument against the Directive it was contended that this regulation provided grounds for fearing a domino effect which subsequently could lead to prohibitions on alcohol, automobile or sweets advertising. But advertising fulfils an important economic function as a marketing intermediary between suppliers and buyers. Without

the opportunity of advertising even innovations such as the development of cigarettes "friendlier to health" cannot be expected. In addition, the preventive health benefit of a general advertising ban is drawn into doubt. Apparently no causal connection between advertising and tobacco consumption can be proven. Precisely regarding the initiation of young people into cigarette consumption, the stimulus-reaction-scheme imputed to advertising is said to be less important than is the smoking behaviour of parents as well as the frequency of conflict between parents and children.¹⁵ Advertising, finally, is said to be an effective instrument of market distribution competition, theories on the effects of advertising based on causal assumptions are, by contrast, to be rejected as naive and as the result of prejudice.¹⁶

Contributors from the field of legal literature have chiefly criticised the lack of a jurisdictional basis¹⁷ for issuing the Tobacco Advertising Ban Directive. Moreover, a violation of basic EC Treaty freedoms as well as the lack of compatibility with the Fundamental Rights of the Community¹⁸ and with Germany's Basic Law¹⁹ have been cited as well. Supplementally to previous criticism on the planned and then actually issued Tobacco Advertising Ban Directive, voices of praise and agreement in daily newspapers are now being heaped on the ECJ decision of 5 October 2000.²⁰

II. The Directive's lack of compatibility with Community law

In the context of reviewing the Tobacco Advertising Ban Directive's conformity with Community law, the ECJ first studied, in accordance with the applicability of the limited specific authority principle,²¹ if the Community possessed the requisite competency to issue the Directive, for, if there be no legal basis, then the Community law act would be void for

⁹ The concepts "tobacco products", "advertising" and "sponsoring" are legally defined in Article 2, items 1, 2 and 3 of the Directive.

¹⁰ On the regulatory content, see altogether *B. Wägenbaur, supra* note 4, at 144 (145 et seq.).

¹¹ See *Caspar, Das europäische Tabakwerbeverbot und das Gemeinschaftsrecht*, in: *EuZW*, 2000, at 237 (243), who derives from this the fact that it is by no means a total prohibition. One would almost have to agree with the cynical criticism advanced by *Stein, Die Grundfreiheiten müssen "Freiheiten" bleiben! - Nochmals zu Tabakwerbeverbot und Gemeinschaftskompetenz*, in: *EuZW*, 2000, at 337 (338).

¹² For more detailed treatment of the trademark issue, see *Rau, Markenrechtliche Probleme bei der Umsetzung der Tabakwerberichtlinie 98/43/EC*, in: *MitttdtPatAnw*, 1999, at 86 et seq.; *Schricker, Zur Werberechtspolitik der EG - Liberalisierung und Restriktion im Widerstreit*, in: *GRUR Int*, 1992, at 347 (350).

¹³ Cf. as examples *FAZ* of 16 May 1998, at 13; also quotations in *Ackermann, Die Bedrohung der Werbefreiheit, Einige kritische Anmerkungen zum Werbeverbot für Tabakwaren*, in: *WRP*, 1998, at 665 (666).

¹⁴ See *Kirchhof/Frick, Werbeverbot und Etikettierungszwang für Tabakwaren, Zur Vereinbarkeit des EG-Richtlinienrechts mit deutschem und europäischem Recht*, in: *AfP*, 1991, at 677 (679), and *Zapka, Gesundheitspolitik durch Werbeverbot? Zur Problematik einer geplanten EG-Regelung*, in: *RuP*, 1994, at 41 (44 et seq.); *idem, Verhältnismässigkeitsprinzip im Gemeinschaftsrecht*, in: *RuP*, 1996, at 95 (holding the Directive to be incompatible with the Basic Law). Further critical views in *Schneider, Tollhaus Europa, Unzeitgemässes zum Werbeverbot für Tabakerzeugnisse*, in: *NJW*, 1998, at 576; *idem, Narrenschiff Staatsrecht oder Tarnkappe Europapolitik*, in: *NJW*, 1998, at 2191 (in response to *Reich, Tollhaus Europa oder Narrenschiff Staatsrecht?*, *Einige Bemerkungen zum Kommentar von Schneider*, *NJW*, 1998, at 576 in: *NJW*, 1998, at 1537); *Schricker, GRUR Int*, 1992, at 347 (348 et seq.); *Stein, Ohne Rechtsgrundlage - Die Tabakwerbeverbotsrichtlinie der EG*, in: *ZLR*, 1998, at 209 (213); *idem, EuZW*, 2000, at 337 et seq.; *R. Wägenbaur, Werbeverbot für Tabakerzeugnisse: Betrachtungen eines Nichtrauchers*, in: *EuZW*, 1998, at 33. In the opposite direction, the Directive was found to be in conformity with Community law by *Caspar, EuZW*, 2000, at 37 et seq. (however only for prohibition on direct tobacco advertising), and *Nolte, Die Kompetenzgrundlage der Europäischen Gemeinschaft zum Erlass eines weitreichenden Tabakwerbeverbots*, in: *NJW*, 2000, at 1144 et seq.

¹⁵ See *Zapka, RuP*, 1994, at 41 et seq.; *idem, RuP*, 1996, 95 et seq., referring in this context to *Bergler, Ursachen gesundheitlichen Fehlverhaltens im Jugendalter, Eine empirische Analyse am Beispiel des Zigarettenkonsums, Einstieg und Gewohnheit*, Cologne (D), 1995. Cigarette consumption is also said to be accompanied by reduced educational and professional achievement orientation.

¹⁶ See in this vein *Zapka, RuP*, 1996, at 95 et seq.

¹⁷ Criticism of the Tobacco Labelling Directive of 1989 (92/41/EEC, OJ L 158, at 30 of 11 June 1992) had already expressed similar views; cf. references in *Donner, supra* note 8, at 74 et seq. ECJ 22 June 1993 - C-222/91 - *Ministero delle Finanze e Ministero della Sanità v Philip Morris Belgium SA et al.*, considered Article 100 a of the EC Treaty (old version) to be the legitimate legal basis. BVerfG, subsequently called on the rule in this case, *NJW*, 1997, at 2871 cited Article 21 of the German Food and Necessities Act as a non-Community authorisation basis in order to avoid conflict with Community law.

¹⁸ Cf. *Di Fabio, supra* note 4, at 564 et seq.

¹⁹ In this vein, *Ackermann, supra* note 13, at 665 (668); *Kirchhof/Frick, supra* note 14, at 667 (679); *Zapka, RuP*, 1994, at 41 (44 et seq.).

²⁰ One need only take the comments published the day after the decision was announced: *Stabenow*, in: *FAZ* of 6 October 2000, at 2: "The latest decision by the judges in Luxembourg has now shown that they see their role as guardians of the law and not as forerunners of a creeping transfer of competencies from the member States to the Community." The Central Association of German Advertising made the announcement that "mislabelling" under the pretext of internal market harmonisation that in fact was the conduct of health and consumer policy would in future no longer be allowed by the ECJ; cf. *ibid.*, at 15.

²¹ According to Article 5(1) of the EC Treaty, the Community may only act "within the bounds of authorisation and objectives given it by the (EC Treaty)," cf. hereon *Schweizer/Hummer, Europarecht*, 5th ed., Neuwied & Berlin (D), 1996, para. 335.

this reason alone. With its judgment in the Tobacco Advertising Ban Directive, the ECJ has for the first time put a check on gradual expansion of EU competencies and done so with astounding clarity. It was fully correct to show this degree of stringency since the principle of limited specific authority is part of the basic pillars of Community law. It signifies in its simplest form an obligation for the Commission to abstain even in regard to subjects for the regulation of which quite understandable grounds can be found, but not any basis for Community competency. Where the EC Treaty does not prescribe any transfer of jurisdiction to act to the EU, then only member States may act.

Besides the issue of competency, the Tobacco Advertising Ban Directive brings many other legal difficulties along with it which will be briefly sketched in connection with comments on the ECJ decision

1. ECJ argumentation and comments thereon

In its legal appraisal, ECJ proceeded on the assumption that the Directive related to national provisions "largely based on public health policy objectives."²² This consideration led it to several basic clarifications in regard to the division of competencies in the context of public health policy and of Article 129(4) of the EC Treaty (old version, currently Article 152(4) of the EU). To this were added general considerations on internal market competency and the principle of limited delegation. The Court then studied whether the Directive met these Community law requirements. In doing so, it first devoted itself to the question of whether the Directive issued on the basis of Articles 95, 47(2) and 55 of the EC Treaty (formerly Articles 100 a and 57(2) in conjunction with Article 66 of the EC Treaty) actually contributed to eliminating obstructions to the free movement of goods and services and then in a second step took up the question whether the Community law act in contention here actually contributed to elimination of "noticeable distortions of competition". Ultimately, the ECJ answered both questions in the negative but hinted that the issuing of a Directive prohibiting only certain forms of advertising and sponsoring for tobacco products might be allowable on the basis of Article 95 of the EC Treaty.²³ The Court rejected a declaration that the Directive was partially void due to its general character.²⁴ It therefore leaves possible amendments of the Directive to the Community legislator which has already announced, via the Commission,²⁵ that there will be a rectification and restructuring of the Tobacco Advertising Ban.

a) Public health policy and Article 152 of the EC Treaty

With Article 152 of the EC Treaty which was introduced in the course of setting up the European Union, for the first time the healthcare system was incorporated into the treaty as a policy field. According to Paragraph 1 of the regulation,

"when determining and carrying out all Community policies and measures, a high level of health protection" is to be ensured. However, this is not done in the way that the Community was provided with its own competencies in the field of public health. If one looks at the catalogue of measures in Paragraph 4 of the regulation, then it becomes quite clear that, as the ECJ stressed,²⁶ the EU was only given, *inter alia*, the authority for "promotional measures (...) excluding any harmonisation of the legal and administrative regulations of the member States (lit. c), while health policy remained an original matter for the member States."²⁷ Two important consequences running in opposite directions emerge from this clarification by the ECJ.

For one thing, a Community measure may obviously have effects on the protection of human health although Community law includes no independent authorisation basis for health protection.²⁸ With this statement, the Court means to say that health protection under the EC Treaty is a component part of the Community's other policies. In conformity herewith, there is furthermore the provision of Article 95(3) of the EC Treaty according to which the Community's harmonisation activities under Article 95(1) of the EC Treaty must be guided by a high level of health protection. The legality of a measure of the Community legislator rightfully supported by an EC Treaty jurisdictional basis is therefore not a barrier to that measure being adopted for pressing reasons of public health policy.²⁹

Secondly, the rationale of the provision in Article 152(4) lit. c of the EC Treaty admittedly does not allow the European legislator to support, for purposes of evasion, a Community measure aiming solely at health protection on some other basis for competency in the EC Treaty the prerequisites of which have obviously not been met. This is expressly emphasised by the ECJ in its decision on the Tobacco Advertising Ban Directive.³⁰ As early as this stage, the Court makes it clear that it indeed considered the possibility that the Tobacco Advertising Ban Directive could extend the (non-relevant) competency norms of Articles 95(2) and 55 of the EC Treaty contrary to the systematic principles described and in that way circumvent the unambiguous prohibition in Article 152(4) of the EC Treaty. The predominant view in literature that sees no jurisdiction for the Community to issue the Tobacco Advertising Ban Directive in Article 152(4) of the EC Treaty³¹ has already been confirmed by the European court judgment, as can already be seen at this stage.

²⁶ ECJ, *supra* note 22, para. 77.

²⁷ Donner, *supra* note 8, at 136; Schweitzer/Hummer, *supra* note 13, para. 1671; Schwartz, EG-Kompetenz für das Verbot der Tabakwerbung?, in: *supra* note 27, at 553 (562); Stein, *supra* note 11, at 337; *idem*, ZLR, 1998, at 209 (214).

²⁸ ECJ, *supra* note 22, para. 78.

²⁹ ECJ, *supra* note 22, para. 88.

³⁰ ECJ, *supra* note 22, para. 79.

³¹ B. Wägenbaur, *supra* note 4, at 144 (147); Donner, *supra* note 8, at 136 et seq.; Schneider, NJW, 1998, at 576 (577); Schwartz, *supra* note 27, at 553 (562); Ukena/Opfermann, *supra* note 5, at 141 (144). But see Nolte, *supra* note 14, at 1144 (1147), who interprets the harmonisation prohibition in Article 152(4) of the EC Treaty as saying that it "only prohibits harmonisation measures in the core fields of health policy."

²² ECJ 5 October 2000 – C-376/98 – *Federal Republic of Germany v European Parliament and Council of the European Union*, para. 76.

²³ ECJ, *supra* note 22, paras. 115-117.

²⁴ ECJ, *supra* note 22, para. 117.

²⁵ Cf. FAZ of 6 October 2000, at 1.

b) Internal market competency under Article 95 of the EC Treaty

The purpose of Directive 98/43/EC consists according to its first article in approximation of laws, regulations and administrative provisions of Member States on advertising and sponsoring to the benefit of tobacco products. This actually does suggest, to the extent that it relates to tobacco advertising attached to *goods*, that Article 95 of the EC Treaty can be used as an authorisation norm.

(1) Delineation of jurisdiction in the context of Internal Market competency

According to Article 95(1) of the EC Treaty, the Council enacts "(...) the measures for approximation of legal and administrative regulations of member States relating to the establishment and functioning of the Internal Market." A prerequisite for this competency norm to apply is therefore that the Internal Market is being aimed at according to Article 3(1), lit. c and Article 14 of the EC Treaty. The Internal Market in this context means an "area without internal borders," in which "the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty" (Article 14 of the EC Treaty), and which is "characterised by the elimination of obstructions to the free movement of goods, persons, services and capital between the member States" (Article 3(1), lit. c of the EC Treaty). Against the background of this approximation to the prerequisites of Internal Market competency, the ECJ correctly points out that the resulting but far too vaguely worded requirement that a measure which is supposed to be based on Article 95(1) of the EC Treaty must "improve the establishment and functioning of the Internal Market" collides with the principle of limited authorisation under Article 5 of the EC Treaty.³² The authorisation norm in Article 95(1) of the EC Treaty can consequently not establish any *general* competency to regulate the Internal Market. In the case of a preventive measure based on Article 95 the Court considers it to be required that the development of obstructions to trade be "probable" and not merely "the abstract danger of impairments of the Basic Freedoms or distortions of competition possibly arising therefrom."³³ Such clear language on the part of the ECJ is all the more to be welcomed since it has been popular to use this legal basis for "extending" Community competencies. This is naturally explainable in view of the fact that the jurisdictional basis in Article 95 of the EC Treaty must be handled in a simpler procedure (co-decision making process and majority voting according to Article 251 of the EC Treaty) than is allowed by the required unanimity principle in Article 94 of the EC Treaty. Naturally, such a procedure cannot justify this.

(2) Harmonisation achievement of "hidden" purposes in the case of the Tobacco Advertising Ban Directive

In the specific case of the Tobacco Advertising Ban Directive, what was said above means that the functioning of the internal "tobacco advertising" market must be ensured, since a

sector exemption is not allowed.³⁴ The Community's task of promoting "a harmonious, balanced and sustained development of the economy" (Article 2 of the EC Treaty) relates, according to the ECJ's case law,³⁵ to the entire spectrum of the economy within the Community. The achievement of harmonisation required under Article 95(1) of the EC Treaty consequently lies in the elimination of trade barriers and distortions of competition in the sense of a *de facto* contribution of the Tobacco Advertising Ban Directive.

Although even the Internal Market relevance is altogether questionable in the absence of any cross-border effect of tobacco advertising,³⁶ the ECJ makes a distinction between press products and other forms of tobacco advertising. The overwhelming majority of all press products have only a local or a regional radius of effect and even the super-regional press hardly transcends the borders of a member State for linguistic reasons.³⁷ This argumentation, seized upon by the applicant, was likewise acknowledged by the Court. But the ECJ considered it probable that in future obstructions to the free movement of press products will occur, for which reason it considers an advertising prohibition heading in that direction as permissible.³⁸ On the other hand, poster and cinema advertising is an exclusively inter-State matter. Due to the strong dependence on the target constituency for advertising, a uniform advertising design for the EU area can hardly be imagined. It would much rather have to be tailored to each nation so that trade barriers due to the fact that different national prohibitions must be taken into consideration cannot be imagined under any circumstances.³⁹ Surprisingly enough, the ECJ in its decision on the Tobacco Advertising Ban Directive only marginally goes into the argumentation above. In regard to locally bound advertising in the so-called horeca sector (hotels, restaurants, cafes) and in posters or cinemas the judgment limits itself to stating that the corresponding advertising prohibitions did not promote trade in those products.⁴⁰ A further argument against Community jurisdiction under Article 95 of the EC Treaty is seen by the Court in the fact that in the field of diversification products the free movement of products corresponding to the Directive's provisions is precisely not ensured.⁴¹

³⁴ Schwartz, *supra* note 27, at 553 (556); on specifically allowed exceptions, see Donner, *supra* note 8, at 151.

³⁵ ECJ 4 April 1974 – 167/73 – *Commission of the European Communities v French Republic*.

³⁶ Schweizer, Lässt sich ein Tabakwerbeverbot im Hinblick auf die Pressefreiheit rechtfertigen?, in: AfP, 1998, at 571 (572); Stein, *supra* note 11, at 337 et seq.; *idem*, *supra* note 14, at 209 (215 et seq.); Ukena/Oppermann, *supra* note 5, at 141 (144 et seq.); B. Wägenbaur, *supra* note 4, at 144 (148). In a similar vein but critically, Schneider, *supra* note 14, at 576 (577). But see also Donner, *supra* note 8, at 317 (affirming a need for approximation).

³⁷ Thus, in the third quarter of 1998, of all copies of Der Spiegel sold only about 4 % went to other EU countries; cf. the figures in Schweizer, AfP, 1998, at 571. For a critical view, see Nolte, *supra* note 14, at 1144 (1146).

³⁸ ECJ, *supra* note 22, paras. 97 et seq.

³⁹ As the applicant in this case had argued, cf. ECJ, *supra* note 22, para. 14; likewise Stein, *supra* note 11, at 337 et seq.; B. Wägenbaur, *supra* note 4, at 144 (148). But see Nolte, *supra* note 14, at 1144 (1146) who sees a potential barrier to trade in the fact that advertising campaigns must be fashioned differently for each member State.

⁴⁰ ECJ, *supra* note 22, para. 99.

⁴¹ ECJ, *supra* note 22, paras. 101 et seq.

³² ECJ, *supra* note 22, para. 83.

³³ See ECJ, *supra* note 22, paras. 84 and 86.

In the Court's view, the Directive runs counter to Internal Market competency, not just due to a lack of any elimination of trade barriers, but also due to lack of any de facto elimination of noticeable distortions of competition. The settled court practice of Community law and thus the ECJ decision in the present case quite rightfully do not allow minor distortions of competition to suffice for assuming the Community legislator's jurisdiction to act.⁴² Such a way of seeing things would in turn contradict the principle of limited specific authority. In the case reviewed here, in the view of the Community judges, the perceptibility threshold need not even be crossed.⁴³

The Court's judgment in the Tobacco Advertising Ban Directive case ultimately deserves to be unqualifiedly welcomed. Despite the goals pasted to its banner, the Directive obviously does not take aim at the functioning of the tobacco advertising market but at its exact opposite. With its absolute ban on advertising for tobacco products it eliminates the Internal Market for this sector of merchandise. In addition, an advertising ban solidifies existing market structures and can thus not be any appropriate means of eliminating inhibitions on trade.⁴⁴ The possibility of unrestricted advertising is precisely one of the essential preconditions for the Internal Market's functioning.⁴⁵ All circumstances surrounding the enactment of the Directive, thus its entire background history, rather suggest that what is being sought is not the Internal Market but that the *protection of public health* is the real motive for having issued the Directive.⁴⁶ Article 95(3) of the EC Treaty admittedly provides for ensuring a high level of public health protection, but this refers to measures taken to establish an Internal Market⁴⁷ and does not mean, as already suggested, any independent competency for the Community in matters of health policy. But where there is even a lack of harmonisation to be performed, as it is in the case of the Tobacco Advertising Ban Directive, then the Community law imperative of ensuring a high standard of public health protection cannot apply either.⁴⁸ In regard to Article 3, lit. p of the EC Treaty as well, there is no extension of competencies.⁴⁹ The catalogue in Article 3 of the EC Treaty is to be understood rather as an aid to interpretation of norms in the EC Treaty and has only de-

claratory effect.⁵⁰ The argumentation engaged in by the Commission with the principles of the Titanium Dioxide decision⁵¹ is likewise without effect. The objective of that recourse to the ECJ's jurisprudence on an environmentally oriented directive for titanium dioxide production was to establish that even a whole set of motivations would not be an impediment to Internal Market competency.⁵² But this does not succeed simply for the reason that the Tobacco Advertising Ban Directive case differs in a decisive point from the case with which it is being compared: unlike the case of environmental protection⁵³ and as discussed above, there is basically a lack of a jurisdictional basis for public health protection. The situation with competing jurisdictional bases where the presence of a further one does not exclude competency for the Internal Market is precisely what does not obtain with the Tobacco Advertising Ban Directive. There is thus ultimately a lack of congruent objectives between the Directive which apparently pursues the main goal of public health protection and Article 95 of the EC Treaty.⁵⁴ Article 95 of the EC Treaty can thus not be cited as the basis of authority.

c) Article 47(2) and Article 57 of the EC Treaty as a basis for competency

In connection with the authorisation norm of Article 47(2) as well when read in conjunction with Article 55 of the EC Treaty which is supposed to serve the establishment of a free movement of services and thus is feasible for the dissemination of advertising via radio, cinema, Internet, etc., the question of its relevance for the Internal Market is immediately raised. Due to the specifics of advertising as a time-related, venue-related and target group-related medium, a cross-border validity of different national regulations appears extremely questionable in this case as well.⁵⁵ It must moreover be argued, similar to what was said in the context of free movement of goods, that in the rigorous and general prohibition on tobacco advertising it is impossible to see any "facilitation" of the movement in services.⁵⁶ It does not exactly contribute to the elimination of barriers to free movement of services to establish the highest level of protection existing in the Union, to wit a general ban on advertising.

The same applies to the field of independent work in the advertising sector. The ECJ admittedly assumed that it would favour such companies which were located in member States with less restrictive tobacco advertising regulations, but even these advantages "only remotely and indirectly" affect com-

⁴² Thus the ECJ, *supra* note 22, paras. 106 et seq.

⁴³ See again under Item I d on sponsoring.

⁴⁴ *Di Fabio*, *supra* note 4, at 564 (567); *Schricker*, *supra* note 12, at 347 (349); *Stein*, *supra* note 11, at 337 (338); *idem*, *supra* note 14, at 209 (215).

⁴⁵ *Stein*, Freier Wettbewerb und Werbeverbote in der Europäischen Union, in: EuZW, 1995, at 435.

⁴⁶ *Di Fabio*, *supra* note 4, at 564 (567); *Perau*, Werbeverbote im Gemeinschaftsrecht, 1997, at 225; *Reber/Schöner*, Das Werbeverbot für Tabakerzeugnisse - geht das Prinzip der Einzelermächtigung im Rauch auf? in: RWS, 1998, at 294 (296); *Schneider*, *supra* note 14, at 576 (577); *Schricker*, GRUR Int, 1992, at 349; *Schwartz*, *supra* note 27, at 553 (555 et seq.); *Stein*, *supra* note 45, at 435 (437); *idem*, ZLR, 1998, at 209 (213); *R. Wägenbaur*, *supra* note 4, at 709 (710, 713); *B. Wägenbaur*, *supra* note 4, at 144 (148).

⁴⁷ *Donner*, *supra* note 8, at 140.

⁴⁸ *Di Fabio*, *supra* note 4, at 564 (567); *Reber/Schöner*, *supra* note 4, at 294 (297 et seq.); *Schneider*, *supra* note 14, at 576 (577); *Stein*, *supra* note 14, at 209 (214). *B. Wägenbaur*, *supra* note 4, at 144 (147), consequently refers to Article 100 a(3) of the EC Treaty (old version) as purely accessory.

⁴⁹ *Stein*, *supra* note 14, at 209 (214), but see *Caspar*, *supra* note 11, at 237 (240).

⁵⁰ Cf. *Donner*, *supra* note 8, at 137 et seq.

⁵¹ ECJ 11 June 1991 - C-300/89 - *Commission of the European Communities v Council of the European Communities*, in: EuZW, 1991, at 473.

⁵² Cf. *Nolte*, *supra* note 14, at 1144 (1145, 1147).

⁵³ See Article 175 of the EC Treaty.

⁵⁴ *Schwartz*, *supra* note 27, at 553 (555 et seq.). According to *Schneider*, *supra* note 14, at 576 (577), a "non-existing authority of the Community to establish law has been 'usurped' in violation of the Treaty."

⁵⁵ *Caspar*, *supra* note 11, at 237 (239), on the contrary assumes interference in the free movement of services due to the "varying opportunities for sales and profits." See hereon, critically, *Stein*, *supra* note 11, at 337 (338).

⁵⁶ In this vein as well *Reber/Schöner*, *supra* note 46, at 294 (296 et seq.); *Schwartz*, *supra* note 27, at 553 (557); *Stein*, *supra* note 11, at 337 (338); *idem*, ZLR, 1998, at 209 (215).

petition.⁵⁷ Even if, for an example, a transfer of sports competition could be imagined due to differing regulation of sponsoring, that is its prohibition or acceptance, this by no means justifies, in the apposite view of the European judges, the legality in Community law of a general ban on tobacco advertising in commercial respects.⁵⁸ An appreciable distortion of competition is therefore ultimately rejected by the Court. Since the general prohibition enunciated by the Tobacco Advertising Ban Directive completely prohibits such activities, there can be no talk of facilitating and harmonising self-employed work in the EU. The competency basis of Article 47(2) of the EC Treaty is consequently likewise eliminated as a legal basis for Tobacco Advertising Ban Directive.⁵⁹

d) Catchall competency under Article 308 of the EC Treaty

Finally, Article 308 of the EC Treaty is also eliminated as a basis for authority. The highly controversial norm,⁶⁰ which the ECJ surprisingly enough does not fall back on, admittedly authorises the Community to issue appropriate regulations if it appears that it must take action to achieve its objectives in the context of the Common Market and the Treaty does not stipulate any authority to do so. But the EU may not expand its scope of tasks by these means. If the task of harmonisation is lacking in the range of the jurisdictional basis in Article 95 of the EC Treaty, then this deficit cannot be compensated for by falling back on Article 308 of the EC Treaty.⁶¹ The regulation in Article 308 is likewise not an apposite basis for authority for issuing the Tobacco Advertising Ban Directive.

2. Further arguments for the Community law illegality of the Tobacco Advertising Ban Directive

The Directive's illegality in terms of Community law due to its other violations of European law, as already mentioned, was left open by the ECJ. Several imaginable collision possibilities of the Directive with Community law should nonetheless be addressed here. Considerable space has thus far been devoted to them in doctrinal discussions.

a) Compatibility with the Fundamental Freedoms of the EC Treaty

(1) The constituency of those to whom the Fundamental Freedoms apply under the EC Treaty

The Fundamental Freedoms in the EC Treaty are subjective, "constitution-like" rights of Union citizens in relation to the Member States.⁶² In view of the increasing assumption of political tasks by the European Union,⁶³ leading to the danger

of stronger interference with the rights of Union citizens, the question has been raised whether the Basic Freedoms could not also restrict legislative work of Community organs. In this matter, solid grounds suggest the ongoing interpretive development of economic freedoms in the direction of a restriction on the Community legislator's action. The development of a purely economic community to a community which is increasingly taking political action must be followed by the enforceability of its own liberal rights of Union citizens against such actions. An analogous application of the Fundamental Freedoms to Community legislation is therefore quite feasible.⁶⁴

(2) Interference with the free movement of goods and services

First of all, it is in itself somewhat a matter of doubt whether any measure of the same effect in the sense of the "Dassonville" formula is present in a comprehensive ban on advertising.⁶⁵ There could be doubts about this here in view of the "Keck" case decision according to which a distinction must be made between "product-related regulations" and "modalities of sale".⁶⁶ Regulations which, without discrimination, regulate the modalities of cross-border advertising in the sense of sale modalities and, in doing so, impose certain restrictions do not accordingly fall within the ambit of Article 28 of the EC Treaty.⁶⁷ According to Article 3(1) of the Directive, every form of advertising is to be banned. One can hardly see in this any regulation of a pure modality of sale. The comprehensive advertising prohibition stipulated by the Tobacco Advertising Ban Directive which de facto blocks access to the market can thus ultimately not be classified as a "sales modality" so that one could assume a measure with the same effect in the terms of Article 28 of the EC Treaty.⁶⁸

growth must be accompanied on the flank by further development of European basic rights. For a very critical view of this, see *Stein*, *supra* note 11, at 337 (338) who fears the conversion of basic freedoms into "basic restrictions."

⁶⁴ See also in this vein *Caspar*, *supra* note 11, at 237 (240); *Di Fabio*, *supra* note 4, at 564 (566); *Perau*, *supra* note 46, at 249 et seq.; and *R. Wägenbaur*, *supra* note 4, at 709 (712 et seq.), who bases his position here on ECJ jurisprudence (in particular ECJ 9 August 1994 – C-51/93 – *Meyhui NV v Schott Zwiesel Glaswerke AG*).

⁶⁵ According to ECJ 11 July 1974 – C 8/74 – *Public Prosecutor's Office v Benoit and Gustave Dassonville*, this is "any commercial arrangement of member States likely to obstruct inter-Community trade directly or indirectly, actually or potentially." See hereon *Leible*, in: *Grabitz/Hilf*, *Das Recht der Europäischen Union*, vol. 1, January 2000 ed., Article 28, paras. 12 et seq.

⁶⁶ ECJ 24 November 1993 – C-267 and C-268/91; *Strafverfahren gegen Bernhard Keck und Daniel Mithouard*, in: *EuZW*, 1993, at 770, *Keck und Mithouard*. For details, see *Leible*, in: *Grabitz/Hilf*, *supra* note 65, Article 28, paras. 28 et seq.

⁶⁷ ECJ 9 February 1995 – C-412/93 – *Société d'importation Édouard Leclerc-Siplec v TF1 Publicité et M6 Publicité SA*, para. 22; *Leible*, in: *Grabitz/Hilf*, *supra* note 65, Article 28 para. 38. On the current state of debate on this issue, see *Meyer*, *Europäischer Binnenmarkt und produktspezifisches Werberecht*, in *GRUR Int*, 1996, at 687 (701 et seq.).

⁶⁸ See also ECJ 9 July 1997 – joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen v De Agostini (Svenska Förlag AB) and Konsumentombudsmannen v TV-Shop i Sverige AG*, in: *EuZW*, 1997, at 654; *Leible* in *Grabitz/Hilf*, *supra* note 65, Article 28, paras. 12 et seq.; *R. Wägenbaur*, *supra* note 4, at 709, 715 et seq. Similar to prohibitions under German advertising law specific to certain products, see *Meyer*, *supra* note 67, at 687 (700).

⁵⁷ ECJ, *supra* note 22, para. 109.

⁵⁸ See in this vein ECJ, *supra* note 22, paras. 110 et seq.

⁵⁹ Cf. only *Schwartz*, *supra* note 27, at 553 (558).

⁶⁰ On the status of this controversy, see *Donner*, *supra* note 8, at 144 et seq.

⁶¹ *Stein*, *supra* note 14, at 209 (217).

⁶² *Caspar*, *supra* note 11, at 237 (240); *Di Fabio*, *supra* note 4, at 564 (565).

⁶³ *Caspar*, *supra* note 11, at 237 (243), speaks of a "significant shift in meaning of Community law" and a "conversion of the Community from an economic union fixated on market freedom to a social and environmental union." This addition to the Community's development

(3) Justification

With its sealing off of the market, the advertising ban runs counter to harmonisation so that a restriction of the freedom of movement for goods can be justified.⁶⁹ Without the possibility of establishing new sales opportunities with the medium of advertising there can be no more talk of a free advertising market in Europe. Existing consumer habits are in this way cemented, market shares are consolidated and thus ultimately markets are sealed off. It would contradict the logic of the Internal Market to see any justification for interference with the free movement of goods and services in spite of such consequences.⁷⁰ Gauged on the basis of Article 28 of the EC Treaty, the Tobacco Advertising Ban Directive would at least have to fail in regard to the possibility of justifying it.

b) Compatibility with the Community's Fundamental Rights

The Fundamental European Rights as they emerge from the ECHR and the common constitutional traditions of the member States are according to Article 6(2) of the Treaty of the European Union also binding on the Community.⁷¹ The growing significance of European Fundamental Rights can be read out of the formulation of a European Charter of Fundamental Rights⁷² in autumn of last year. According to recent decisions by the Federal Constitutional Court⁷³ confirming the precedence of application of Community law even over the German fundamental rights in the terms of the so-called "As long as II",⁷⁴ there is no longer any reason to review legal acts by the Community against the background of fundamental rights in the German Basic Law. The Issue of Fundamental Rights cannot be taken up in detail here but will briefly be sketched.⁷⁵

(1) Freedom of expression and freedom of the press

On the European level, Article 10(1) of the ECHR is the measure of control which, when used, gives rise to the question of whether commercial advertising falls within the protective ambit of the fundamental right of free expression of one's opinion. By now this controversial issue has been largely fought out and it has been recognised that even commercial advertising ("commercial speech") constitutes a form

of communication and can therefore basically be protected by the right to free speech under Article 10(1) of the ECHR.⁷⁶ The protective scope of Article 10(1) of the ECHR is therefore understood very broadly.⁷⁷ The prohibition on advertising affects freedom of the press in the same way since its protective scope is not limited to editorial content but to the advertising sections as well.⁷⁸ Definitive for the question of the Tobacco Advertising Ban Directive's violation of fundamental rights is the test of its proportionality. But simply in regard to the suitability of an absolute ban on tobacco advertising there are serious doubts. Whether the consumption of cigarettes actually recedes if the latter are no longer advertised is improbable.⁷⁹ In this sense, tobacco advertising leads more to brand selection but not basically to a decision to smoke or not to smoke. The proportionality of the measure ultimately fails on the criterion of necessity due to the voluntary self-restrictions imposed by the tobacco industry in its advertising⁸⁰ and because of the obligatory warning notices on cigarette packs.⁸¹ In this context, it should additionally be pointed out that, according to the settled case law of the ECJ, even measures restricting trade cannot be justified for purposes of consumer protection if this purpose can be achieved by education as well.⁸² If one would prefer not to block argumentation recourse to the goal of public health protection (legitimate in terms of Article 10(2) of ECHR) simply on grounds of legal competency, then due to the lack of proportionality in an absolute ban on both direct and indirect advertising for tobacco products in view of its public health objectives, ultimately then a violation of freedom of expression and freedom of the press must be accepted.⁸³

(2) Freedom of occupation and property

Worthy of consideration would additionally be a violation

⁶⁹ *Di Fabio*, *supra* note 4, at 564 (567); *Reher/Schöner*, *supra* note 46, at 294 (297). Similarly on indirect tobacco advertising, *R. Wägenbaur*, *supra* note 4, at 709 (716). In regard to the German tobacco advertising ban under Article 22(1) of the (German) Foodstuff and Necessities Act, see also *Meyer*, *supra* note 67, at 687 (708).

⁷⁰ See in this vein *Di Fabio*, *supra* note 4, at 564 (567).

⁷¹ *B. Wägenbaur*, *supra* note 4, at 144 (149). Strictly speaking, reliance on "general legal principles" has now been obviated with this explicit regulation of the matter in Article 6(2) of TEU; for details, see *Kin-green*, *Die Gemeinschaftsgrundrechte*, in: JuS, 2000, at 857 (859).

⁷² Cf. hereon articles by *Meyer*, *Schwimmer* and *Tillich*, in: FAZ of 25 September 2000, at 9, as well as the historical and substantive survey in *Grigolli*, *The EU Fundamental Rights Charter in current debate: Origins, Positions, Future Prospects*, in: EuLF 2000/01 (E), at 2 et seq.

⁷³ Cf. the decision of 7 June 2000, 2 BvL 1/97.

⁷⁴ BVerfGE, 73, at 339 (387).

⁷⁵ For a thorough treatment of the subject, see *Ackermann*, *supra* note 13, at 665 (668 et seq.); *Donner*, *supra* note 8, at 357 et seq., 366 et seq. On the structure of Community Fundamental Rights in general, see *Kin-green*, *supra* note 71, at 857 (860 et seq.).

⁷⁶ *Caspar*, *supra* note 11, at 237 (241); *Schricker*, *supra* note 12, at 347 (350); *Stein*, *Freier Wettbewerb und Werbeverbote in der Europäischen Union*, in: EuZW, 1995, at 435 (438); *idem*, *Gedächtnis Schrift Grabitz*, 1995, at 777 (792); *B. Wägenbaur*, *supra* note 4, at 144 (149). The Federal Constitutional Court in BVerfGE 95, at 173 (182) on the other hand demands for protection under Article 5(1), sentence 1 of the Basic Law that advertising contains an evaluative, opinion-forming content or information which serves to form opinions; see also hereon *Ackermann*, *supra* note 13, at 665 (669); *Nolte*, *Werbefreiheit und Europäische Menschenrechtskonvention*, in: *RabelsZ*, 1999, at 507 (509 et seq.).

⁷⁷ *Schricker*, *supra* note 12, in 1992, at 347 (350). On the concept of opinion under Article 5 of the Basic Law, see also *Ackermann*, *supra* note 13, at 665 (668 et seq.); *Kirchhof/Frick*, *supra* note 14, at 677 (679); *Zapka*, *RuP*, 1994, at 41 (44 et seq.).

⁷⁸ *Schricker*, *supra* note 12, at 347 (350). On the effects on freedom of the press, see also the unambiguous lecture by *Schweitzer*, *supra* note 36, at 571 (572 et seq.).

⁷⁹ Even in member States which have a ban on advertising, no decrease in tobacco consumption has yet been recorded; cf. *Stein*, *supra* note 76, at 777 (784 et seq.).

⁸⁰ See references in *Ukena/Opfermann*, *supra* note 5, at 141 (144). In the absence of possibilities of control, see the critical comments of *Caspar*, *supra* note 11, at 237 (242).

⁸¹ Cf. *Ackermann*, *supra* note 13, at 665 (670); *Di Fabio*, *supra* note 4, at 564 (570). *R. Wägenbaur*, *supra* note 4, at 709 (716) likewise sees a violation of the principle of proportionality in regard to indirect advertising of tobacco.

⁸² Cf. ECJ 18 May 1993 – C-126/91 – *Schutzverband gegen Unwesen in der Wirtschaft v Yves Rocher GmbH*, EuZW, 1993, at 420 (*Yves Rocher* case). See also *Stein*, *supra* note 76, at 777 (785 et seq.).

⁸³ The proportionality principle is applied, *inter alia*, by *Schricker*, *supra* note 12, at 347 (351), and *Zapka*, *RuP*, 1994, at 41 (44 et seq.) and its exigencies are found to be not met.

of freedom of occupation and property. The ECJ has always included these fundamental rights in the general legal principles of Community law.⁸⁴ A violation might be considered here in view of the fact that all persons engaging in business are restricted in their commercial freedom to develop. The ban on tobacco advertising must be qualified as a regulation of the practice of a profession.⁸⁵ In regard to the prohibition on the use of diversification trademarks (apart from the fact that this would run counter to the provisions of the Paris Convention for the Protection of Industrial Property⁸⁶), here freedom of property is affected.⁸⁷ This does not involve the protection of future income opportunities (which of course cannot be protected) but already existing legal interests in intangible objects of legal protection.⁸⁸ Ultimately decisive is once again the issue of the proportionality of such interference.⁸⁹ But if one also directs attention to the distribution of competencies between the EU and the member States, then it becomes clear that the Community has exceeded its competence with the Tobacco Advertising Ban Directive, because Article 295 of the EC Treaty leaves the property law system of the member States untouched so that the Community could never be entitled to expropriate property.⁹⁰

III. Final assessment

The fight against nicotine-related diseases by reducing tobacco consumption is, considered from a public health vantage point, certainly to be endorsed as a desirable objective. Whether or not means used to achieve that goal are suitable can be doubted. On this question, only a more or less vague prognostic decision can be reached. More recent studies refute a causal connection between tobacco advertising and tobacco consumption, in particular the initiation of young people into a "smoking career".⁹¹ If the purported advertising effect on consumer behaviour were actually correct then we would not have any drug problem in the absence of legal advertising for drugs. If one pursues the analogy with illegal drugs then an advertising campaign against drugs or smoking by well-known personalities of public life, idolised by large numbers of young people, might possibly be more successful. It must furthermore be basically queried to what extent development of the European Economic Community into a "caring soli-

arity community"⁹² still does justice to the Community's objectives. The danger of interfering with economic freedoms with these or similar bans on advertising, say for alcohol or sweets, should not be dismissed out-of-hand. From a legal point of view, the Tobacco Advertising Ban Directive ultimately suffered from a serious deficit: there was a lack of any mandatorily required jurisdictional basis for the Community's involvement. This violation of the basic principle of limited specific authority resulted in the Directive being void, as the ECJ has now pointedly confirmed. The clear position taken by the European judges on the knotty issue of Community law delineation of competencies must therefore be expressly welcomed.

ECJ 5 October 2000 – C-376/98 – Federal Republic of Germany v European Parliament and Council of the European Union¹

Article 100a EC Treaty² (now, after amendment Article 95 EC): Directive 98/43/EG – Advertising and sponsorship of tobacco products – Legal basis

Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products³ is annulled. (*Editors' introduction*)

Facts: The Federal Republic of Germany brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (hereinafter "the Directive"). The Directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

According to Article 3(1) of the Directive, all forms of advertising and sponsorship shall be banned in the Community. According to Article 3(2), Member States shall not be prevented from allowing a brand name already used in good faith both for tobacco products and for other goods or services traded or offered by a given undertaking or by different undertakings prior to 30 July 1998 to be used for the advertising of those other goods or services. However, this brand name may not be used except in a manner clearly distinct from that used for the tobacco product, without any

⁸⁴ For an example, see ECJ 14 May 1974 – C-4/73 – *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*.

⁸⁵ *Di Fabio*, *supra* note 4, at 564 (570). In connection with Article 12 of the Basic Law, see *Ackermann*, *supra* note 13, at 665 (670); *Zapka*, RuP, 1994, at 41 (45).

⁸⁶ See hereon *Rau*, *supra* note 12, at 86 (89); *Schricker*, *supra* note 12, at 347 (350).

⁸⁷ *Di Fabio*, *supra* note 4, at 564 (570); *Caspar*, *supra* note 11, at 237 (241); *Schricker*, *supra* note 12, at 347 (350). On Article 14 of the Basic Law, see *Ackermann*, *supra* note 13, at 665 (670); *Rau*, *supra* note 12, at 86 (90).

⁸⁸ BVerfG includes trademarks in its settled case law in constitutionally protected property; cf. BVerfGE, 51, at 193 (Vineyard roller case). See *Fezer*, *Markenrecht*, 2nd ed., Munich (D), 1999, Introduction, para. 24.

⁸⁹ On the prohibition on direct advertising, *Caspar*, *supra* note 11, at 237 (242 et seq.) affirms the proportionality of the Tobacco Advertising Ban Directive.

⁹⁰ *Schricker*, *supra* note 12, at 347 (350).

⁹¹ See in more detail on this *Zapka*, RuP, 1994, at 41 et seq.; *idem*, RuP, 1996, at 95 et seq. with further references.

⁹² Expression used by *Di Fabio*, *supra* note 4, at 564 (565).

¹ See also ECJ 5 October 2000 – C-74/99 – *The Queen v Secretary of State for Health, ex parte: Imperial Tobacco*.

² The ECJ uses the previous numbering of Articles of the EC Treaty instead the new numbering according to the Treaty of Amsterdam.

³ OJ 1992 L 213, at 9 et seq.