

Roll Numbers: 253, 261 to 264

Order No. 6/92 dated February, 1992

ORDER

Under examination: The prejudicial question articulated by the tribunal of first instance of Brussels with jurisdiction in terms of corrections, by a judgment issued on November 21, 1990 in the cause of the Public Ministry and Xavier Winkel against David De Courcy-Ireland, Patrick Benoist, Arnold Preneel, Johannes Priem, Jacques Mahieu, the Philip Morris Belgium S.A., the RJ Reynold Tobacco Gosset S.A., the Cinta S.A., the Bat Benelux S.A. and the Tabacofina-Vander Elst S.A.; the prejudicial questions posed by these four decisions by the Court of Appeals of Liège dated January 9, 1991, in the cause of the Public Ministry against David De Courcy-Ireland, Jean-Marie Vandermersch, Jacques Mahieu and Johannes Priem.

The Court of Arbitration

Composed of the presidents I Pétry and J. Delva, and the judges L. De Grève, L.P. Suetens, M. Melchior, H. Boel, and P. Martens,

attended by clerk H. Van der Zwalmen, presided by President I. Pétry, after deliberations render the following decision:

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I. SUBJECT

By a judgment rendered on November 21, 1990, the tribunal of first instance of Brussels (49th chamber with jurisdiction in correctional matters) has asked the Court of Arbitration the prejudicial question “to determine if the Council of the French Community, taking into account articles 59bis, § 2 bis and 4bis of the Constitution and of article 5, § 1st, of the law pertaining to institutional reforms dated August 8, 1980, had authority to pass judgment in the matter.”

By ordinance dated December 5, 1991, the Court reformulated the question as follows:

“Did the article 13 of the decree dated December 2, 1982, related to the fight against the use of tobacco, violate rules that are established by the Constitution or by virtue of the latter in order to determine the respective authorities of the State, the Communities, and the Regions?”

In four decisions handed over on January 9, 1991, the Court of Appeals of Liège (4th chamber) asked the Court of Arbitration the following prejudicial question:

“Does Article 7, § 2, of the law dated January 24, 1977, to the extent that it continues to hold that “the King may in the interest of public health, regulate and interdict advertising pertaining to tobacco and tobacco-based products and similar products”, violate or not violate the rules established by the article 59bis of the Constitution, and by virtue of the latter, by the special law regarding institutional reforms dated August 8, 1980, modified by the law of August 8, 1988, and in particular through its article 5, to determine the respective authorities of the State, the French Community, and the Regions”?

By the aforementioned ruling dated December 5, 1991, the Court reformulated the question as follows:

“Does Article 7, §2, of the law dated January 24, 1977, violate the rules established by the Constitution, or by virtue of the latter, in order to determine the respective authorities of the State, the Communities, and the Regions, in the degree that it continues to hold that “the King may in the interest of public health regulate and interdict advertising regarding tobacco, tobacco-based products and similar products?”

The orders of February 6 and April 30, 1991, were attached to the five cases.

II. THE FACTS AND THE PREVIOUS PROCEEDING

In the court cases that gave rise to the prejudicial question asked by the correctional tribunal of Brussels (case no. 253), the parties were reproached for having infringed upon the provisions of the law dated January 24, 1977 relating to the protection of the health of consumers with respect to nutritional foodstuffs and other products, as well as the provisions of the royal decision dated December 20, 1982, regarding advertising for tobacco, tobacco-based products, and similar products. Five of the six parties were also reproached for having breached the provisions of the royal decision dated March 5, 1980, to which article 13 of the decree of the French Community dated December 2 1982, related to the fight against the use of tobacco, conferred the force of decree. The facts were to have occurred in the judiciary district of Brussels and “elsewhere in the Kingdom”.

In the cases that gave rise to the prejudicial questions posed by the Court of Appeals of Liège (cases no. 261 to 264), the cases are founded only on the provisions

of the aforementioned royal decision dated December 20, 1982.

The facts were to have occurred in the district of Liège and “elsewhere in the Kingdom”.

III. THE PROCEEDING BEFORE THE COURT

1. In the case inscribed by the number 253 in the roll.

The Court of Arbitration was informed of the prejudicial question by the transmission of an issuance of the decision to return the question which was received by the clerk on November 28, 1990.

In an order issued on the same day, the acting president designated the judges of the seat in compliance with articles 58 and 59 of the special law dated January 6, 1989 on the Court of Arbitration.

The judges charged with legal enquiry deemed that there was no standing for the application of articles 71 and later of the aforementioned organic law dated January 6, 1989.

The notifications provided for in article 77 of the organic law were given by letters registered with the postal service on December 20, 1990 and were handed out to their intended recipients on the 21st, 24th, and 27th of December, 1990, with the delivery addressed to Xavier Winkel having nevertheless been sent back bearing a notation of “unclaimed”.

The notice that is provided for in article 74 of the organic law was published with the Belgian Monitor dated December 21, 1990.

Upon the accession of President J. Sarot to the Emeritate and Madam I. Pétry to the Presidency of the Court, Judge P. Martens was designated to be a

member of the seat by the order dated January 16, 1991.

In compliance with the deliberation of the Court on the same date, Judge P. Martens is tasked with enquiry in the present case.

Jacques Mahieu, residing at Prins Boudewijnlaan 232 in 2650 Edegem, and the Tabacofina-Vander Elst Corporation, whose headquarters is established at Prins Boudewijnlaan 232 at 2650 Edegem whose domicile is chosen as the Law Offices of the Honorable Putzeys, Gehlen, and Leurquin, Esquires, located at Rue St. Bernard 98 in 1060 Brussels, have introduced a joint report on February 1, 1991.

Arnold Preneel, residing at Termereboslaan 16 in Herent-Winksele, and the Cinta corporation, whose headquarters is established at Avenue G. Rodenbach 29, in 1030 Brussels, have introduced a joint report on February 1, 1991.

Patrick Benoist, residing at Uccle (1180 Brussels), avenue Lancaster 10, and the Reynolds Tobacco Belgium corporation, whose headquarters is located at 1210 Brussels, Rue Gabrielle Petit, 6, have introduced a joint report dated February 2 1991.

Johannes Priem, residing in Overijse, Dreef 178, and the B.A.T. Benelux corporation, whose headquarters is established at Molenbeek St. Jean, rue de Koninck 38, have introduced a joint report on February 4, 1991.

David de Courcy-Ireland, formerly residing at 1050 Brussels, rue de la Réforme, 15, and currently on avenue du Général Guisan 30, at 1009

Tuilly (Switzerland), having selected domicile at the office of the Honorable Jean-Pierre van Cutsem, Esquire, lawyer, 137 avenue Louise, bte 1, in 1050 Brussels, and the Philip Morris Belgium corporation, whose headquarters is established at 1170 Brussels, chaussée de La Hulpe, 189, have introduced a joint report on February 4, 1991.

The Council of Ministers, rue de la Loi 16, at 1000 Brussels, introduced a report on February 4, 1991.

The Executive of the French Community, represented by the Minister of Social Affairs and Health, whose cabinet is established on rue Belliard 7, at 1040 Brussels, introduced a report on February 4, 1991.

Copies of these reports were provided in compliance with article 89 of the organic law of the Court by letters registered with the postal service on February 25, 1991, delivered to the recipients on the 26th and 27th of February and March 4th, 1991.

Reports in response were sent to the clerk by:

- Jacques Mahieu and the Tabacofina-Vander Elst corporation dated March 28, 1991;
- Johannes Priem and the B.A.T. Benelux corporation dated March 22, 1991
- David de Courcy-Ireland and the Philip Morris Belgium corporation dated March 27, 1991;
- The Council of Ministers dated March 26, 1991
- The Executive of the French Community dated March 27, 1991.

In an order dated April 30, 1991, the Court extended the deadline by which the order had to be rendered to November 28, 1991.

2. In the cases inscribed under numbers 261 to 264.

The Court of Arbitration was informed of the prejudicial question by the transmission of a shipment of each of the return decisions received by the clerk on February 1, 1991.

In orders issued on the same date, the acting President designated the seated judges in each of the cases in compliance with the articles 58 and 59 of the special law dated January 6, 1989 on the Court of Arbitration.

The judges charged with legal enquiry in each of the cases deemed that there was no standing for application of the articles 71 and following of the organic law of January 6 1989 mentioned above.

In the order dated February 6, 1991, the Court combined the cases.

The notifications provided for in article 77 of the organic law were made by letters registered with the postal service on February 15, 1991 and delivered to the recipients on the 18th, 19th, and 21st of February. 1991. The folder that was sent to David de Courcy Ireland, was nevertheless returned with the notification: "house closed."

The notice provided for in article 74 of the aforementioned law was published in the Belgian Monitor on February 19, 1991.

Johannes Priem, mentioned above, introduced a report dated March 20, 1991.

Jacques Mahieu, mentioned above, and Jean-Marie Vandermersch, residing at Allée du Manège 1 at 4120 Neupré, having elected domicile at the offices of the Honorable Putzeys, Gehlen and Leurquin, Esquires, lawyers, rue St. Bernard 98 at 1060 Brussels, have introduced a joint report dated March 28, 1991.

David de Courcy-Ireland, mentioned above, introduced a report dated March 28, 1991.

The Council of Ministries introduced a report dated April 2, 1991.

The Executive of the French Community introduced a report dated April 3, 1991.

Copies of these reports were transmitted in compliance with article 89 of the organic law by letters registered with the postal service on April 24, 1991, and delivered to the recipients on April 25 and April 29, 1991.

Reports in response were sent to the clerk by:

- Johannes Priem, dated May 14, 1991;
- David de Courcy-Ireland dated May 22, 1991;
- Jacques Mahieu and Jean-Marie Vandermersch dated May 24, 1991.

In the order dated July 2, 1991, the Court extended the deadline by which the order needed to be issued until November 28, 1991.

3. In the cases inscribed under the numbers 253 and 261 to 264.

In the order dated April 30, 1991, the Court combined the cases inscribed under the numbers 261 to 264 with the case inscribed under the no. 253.

The parties were informed of this order by letters registered with the postal service on May 13, 1991 and delivered to the recipients on May 14, 16, and 24, 1991.

In compliance with article 100 of the Court's special organic law, the cases combined are examined by the first seat that was advised, and the reporters are those who were so designated for the first case.

In the order dated October 24, 1991, the Court extended the deadline by which the decisions had to be rendered until May 28, 1992.

In the order dated December 4, 1991, the Court reformulated the prejudicial questions, decided that the case was ready to be heard and set the hearing for January 9, 1992.

The parties were notified of this order, and they and their lawyers were advised of the date of the hearing by letters registered with the postal service dated December 5, 1991, and delivered to the recipients on December 6, 8, 9, 10, 11, and 13, 1991.

In the order dated January 6, 1992, the Court moved the date of the hearing forward to January 8, 1992.

The parties and their lawyers were notified of this order by letters registered with the postal service on January 6, 1992, and delivered to the recipients on the 7th and 8th of January, 1992.

At the hearing on January 8, 1992;

- appeared:

Honorable X. Leurquin, Esq. lawyer at the bar of Brussels, on behalf of J. Mahieu, the Tabacofina-Vander Elst corporation, J. Vandermersch;

Honorable F. de Visscher, Esq. lawyer at the bar of Brussels, for J. Priem and the B.A.T. Benelux corporation;

Honorable J.P. van Cutsem, Esq., and Honorable M. Uyttendaele, Esq., lawyers at the bar of Brussels, on behalf of D. de Courcy-Ireland and the Philip Morris Belgium Corporation;

Honorable A. Puttemans, Esq., loco, Honorable L. Van Bunnan, lawyers at the bar of Brussels on behalf of A. Preneel and the Cinta corporation;

Honorable J. Bourtembourg, Esq., loco, Honorable J.M. Mommens, Esq., lawyers at the bar of Brussels on behalf of P. Benoist and the Reynolds Tobacco Belgium corporation;

Honorable M. Verdussen, Esq., loco, Honorable P. Lambert, Esq., lawyers at the bar of Brussels, on behalf of the Council of Ministries;

- Judges P. Martens and L.P. Suetens made their report

- the attorneys listed above were heard;

- the case was placed under deliberation.

The proceedings took place in compliance with articles 62 and following of the organic law dated January 6, 1989 pertaining to the use of languages before the Court.

IV. IN LAW

- A.1.1 The parties and the Council of Ministers maintain that only the national legislature has authority to regulate advertising for tobacco. They contest that the matter can be categorized among the customizable matters listed in article 5, § 1st, I, of the special law for institutional reforms dated August 8, 1980, whether it pertains to the policy for the dispensation of care, health education, or activities and services of preventive medicine. They also recall that consumer protection is a responsibility of the national legislature.
- A.1.2 The same parties stress that in the preparatory work that went into the special law dated August 8, 1980, it was specified that the Community is not competent, particularly for regulation related to nutritional foodstuffs and connected activities, which, in their opinion, refer back to the law dated January 24, 1977. They also invoke the opinions rendered by the legislation section of the State Council dated February 16, 1989 on a legal proposal that interdicts advertising in promotion of tobacco (Parl. Doc., 1988-1989, no. 495/2), dated April 6, 1990, on a royal decision regarding the manufacturing and marketing of tobacco-based products and similar products

(L. 19.792) and March 18, 1991, on a decree to modify the law dated February 6, 1987, related to the networks of radio distribution and television distribution and commercial advertising on radio and on television.

(L. 20.538/9). Each of these opinions excludes the competence of the Communities in matters of advertising for tobacco.

- A.1.3. Lastly, the Council of Ministers and the parties deem that in that it confers the value of decree to the penal provisions contained in the royal decision issued on March 5, 1980, article 13 of the decree issued on December 2, 1982, violates article 11 of the special law dated August 8, 1980. The parties add that the same provisions also violated article 7 of the Constitution.
- A.2. The Executive of the French Community analyzes the notion of preventive education and health education and concludes that the subject of the litigious provisions may enter into each of these notions. It deems that national authority in matters of consumer protection only concerns general rules. It contests that the Community specified new forms for the search and pursuit of infractions. It contends that the criticism directed against the technique of legislation by reference is foreign to the authority of the Court.
- A.3. The parties are in opposition again regarding the bearing of an opinion dated March 20, 1985, in which the legislation section of the Council of State admitted competence of the Flemish Community to take a decree "houdende verbod van het verkopen en gratis verstrekken van schadelijk snoepgoed en

suikerhoudende frisdranken in bepaalde onderwijsinstellingen (covering the interdiction of sales and free distribution of harmful sweets and sugary refreshments in certain educational institutions) (Doc. VI. Raad, 194 (1982-1983) N. 1).

The Executive and the French Community deduce from this opinion that the competency of the communities is not excluded in matters of nutritional foodstuffs when it comes to protecting the health of children. The other parties respond that this competence was recognized as belonging to the Communities because it concerns an activity which takes place in the schools and the matter is comparable to scholastic medical inspection, which does come under the authority of the Communities.

- B.1. The prejudicial questions relate to the determination of the competent legislator for regulating advertising for tobacco, the substance that is the subject of the provisions taken both by the national legislature and by a legislative decree.
- B.2. The national norm is article 7, § 2, of the law dated January 24, 1977, related to the protection of consumer health with respect to nutritional foodstuffs and other products. Since its modification by the law dated March 23, 1989, which came into effect on November 5, 1989, with this provision worded as follows:

“The King may, in the interest of public health, regulate and interdict advertising concerning tobacco, tobacco-based products and similar products, as well as advertising

concerning alcohol and alcoholic beverages.”

Article 15, §2, 2° of the same law provides for punishment by imprisonment or fines as provided for in the first paragraph of the same article, for anyone who impinges on the royal orders taken in execution of article 7 §2 of the law. This final provision was executed by the royal order dated March 5, 1980, regarding advertising for tobacco, for tobacco-based products, and for similar products. Modified by the royal orders dated September 22, 1980, and January 21, 1982, this royal order was abrogated and replaced by a royal order dated December 20, 1982, and modified on April 10, 1990.

- B.3. The Community standard is article 13 of the decree issued by the French Community on December 2, 1982, which lays out the following:

“The provisions of articles 2 to 6 of the royal decree dated March 5, 1980 concerning advertising for tobacco, tobacco-based products, and similar products, modified by the royal order dated September 22, 1980, and January 21, 1982, have the value of decree.”

- B.4. In the terms of article 59bis, § 2bis, of the Constitution, the Councils of the Communities rule by decree, each on that which concerns it, with the matters customizable.

According to article 5, 1st §, I, 2° of the special law pertaining to institutional reforms dated August 8, 1980, the customizable matters addressed in article 59bis, § 2bis, of the Constitution include, in particular, with respect to

health policy, “health education as well as the activities and services of preventive medicine, except for national prophylactic measures.”

None of the terms of this list expressly attribute to the Communities the authority to regulate advertising for tobacco.

- B.5. In the decree of the French Community dated December 2 1982, the fight against the use of tobacco was being articulated through three axis points: banning smoking in certain locations, the dissemination of information, and a regulation on advertising for tobacco products.

The preparatory work done for the decree showed that the regulation of advertising was inspired, in the same measure as the other provisions of the decree, by the concern for the protection of public health.

This regulation should be put in line with the authority of the Communities with respect to health policy, such as it has been defined in article 5, § 1st, 1, 2^o of the special law dated August 8, 1980. Indeed, from the preparatory work for the special law, it became apparent that the community authority encompassed, in particular, health information and health education, the health protection of the population, in particular by the prevention (...) of cancer (...), and the improvement of the health status of the population, either in the framework of health education or by other appropriate means (Parl. Doc., Senate, 1979-1980, no. 434-2, 124-125; Chamber, 1979-1980, no. 627-10, 52).

Still, the same preparatory work also showed that the special legislator understood that among other matters, the “regulation related to nutritional foodstuffs” was excluded from the authority of the Communities with respect to health policy. Given that at the time that the special law was prepared, the regulation of advertising for tobacco and similar products was part of the “regulation related to nutritional foodstuffs” meaning that which was part of the law dated January 24, 1977, related to the protection of the health of consumers with respect to nutritional foodstuffs and other products, there is cause to consider that the national legislature remains competent to regulate advertising with respect to tobacco products.

- B.6. Concerning the measures of preventive medicine or information campaigns regarding the consumption of tobacco, it is without doubt that they would belong to the customizable matters listed in article 5, 1st §, 1, 2^o, of the special law dated August 8, 1980. Such is however not the case of a regulation or an interdiction that is addressed exclusively against those who engage in commercial advertising for the promotion of tobacco.
- B.7. It follows that the matter remained within the authority of the national legislature and that the French Community exceeded its authorities by taking article 13 of the decree dated December 2, 1982. There is no standing for examining separately the validity of the penal provisions of the decree, since the Community called as an infraction a lapse regarding a provision over which it is

itself lacking in authority.

BY THESE REASONS,

THE COURT

Rightly states:

- 1) Article 13 of the decree of the French Community dated December 2, 1982, regarding the fight against the use of tobacco violates the rules that are established by the Constitution or by virtue of the latter to determine the respective authorities of the State, the Communities, and the Regions.
- 2) Article 7, §2, of the law dated January 24, 1977, does not violate the rules established by the Constitution or by virtue of the latter to determine the respective authorities of the State, the Communities, and the Regions, in the sense that it continues to contend that the “King may, in the interest of public health, regulate and interdict advertising regarding tobacco, tobacco-based products, and similar products.”

Thus pronounces the court in Dutch and French languages in compliance with article 65 of the special law dated January 6, 1989 on the Court of Arbitration, at the public hearing dated February 5, 1992.

The Clerk

H. Van der Zwalmen

The President

I. Pétry