

Roll Numbers: 336-341
Order no. 17/93 Dated March 4, 1993

ORDER

At issue: the prejudicial questions posed by the Council of State by order dated October 18, 1991 in the issue of Copel Europe Corporation against the Belgian State, and by the Court of Appeals of Antwerp by the order dated November 28, 1991, in the issue of the Public Ministry against J. Mahieu.

The Court of Arbitration,

Composed of the judge exercising the function of president, M. Melchior, and the President F. Debaedts, and Judges K Blanckaert, H. Boel, L. François, Y. de Wasseige, and J. Delruelle, assisted by the clerk H. Van der Zwalmen, presided by the Judge exercising the function of president, M. Melchior,

After having deliberated, issue the following order:

*

* *

I. *Subject*

a. By an order dated October 18, 1991, the Council of State, administration section, posed the following prejudicial question:

“Does Article 7, §2, of the law dated January 24, 1977, modified by the law dated March 22, 1989, 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?”

This case is inscribed under the number 336 of the Court Roll.

b. By an order dated November 28, 1991, the Court of Appeals of Antwerp (7th chamber seated in correctional matters) posed the following prejudicial questions:

1. “Is Article 7, § 2, of the law dated January 24, 1977, related to the protection of the health of consumers with respect to nutritional foodstuffs and other products, in the execution of which the royal order dated December 20, 1982 was taken, contrary to the rules that were established by the Constitution or in virtue of the Constitution for determining the respective authorities of the State, Communities and Regions and/or does it violate article 6, 6bis and 17 of the Constitution?”

2. Is the decree related to the fight against the use of tobacco adopted by the Council of the French Community and sanctioned by the Executive on December 2, 1982, contrary to the rules that are established by the Constitution or in virtue of the Constitution for determining the respective authorities of the State, the Communities, and the Regions, or does it violate articles 6, 6bis, and 17 of the Constitution?”

This case is inscribed under the number 341 in the rolls of the Court of Arbitration.

II. *The facts and the previous proceedings*

Regarding case no. 336

The “European Society for Commerce, Advertising, Industry, and Electricity” corporation (Copel Europe corporation) introduced before the Council of State a petition for the annulment of the royal order dated April 10, 1990, modifying the royal order dated December 20, 1982, pertaining to advertising for tobacco, tobacco-based products, and similar products. The activities of the company introducing the petition include the placement, rental, and utilization of lighted advertising installations. According to this company, the royal order being contested – which imposes harsher conditions with respect to the advertising making use of lighted billboards for tobacco based products and alcoholic drinks – was taken in violation of the article 59bis of the Constitution and article 5, 1st § , I, of the special law for institutional reforms dated August 8, 1980, in that it “was taken by the National state”, while health policy and in particular health education stem from the authority of the Communities, in such a way that the petitioner deemed that there was basis for posing a prejudicial question to the Court of Arbitration. The Council of State did this with compliant notice of the assistant auditor general.

Regarding case no. 341

J. Mahieu is being tried before the Court of Appeals of Antwerp, ruling in correctional matters, on the one hand for presumed infractions against the specific articles of the royal order dated December 20, 1982, regarding advertising of tobacco, tobacco-based products, and similar products, taken in execution of 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, and on the other hand due to the presumed violation of determined articles present in the royal order dated March 5, 1980, concerning advertising related to tobacco, tobacco-based products, and similar products, to which article 13 of the decree issued by the Council of the French Community, dated December 2, 1982, related to the fight against the use of tobacco gave the force of decree.

The Court of Appeals of Antwerp decided, after having objected “that the aforementioned law and the decree can give rise to a conflict concerning the possible violation of this law or this decree of the rules which are established by the Constitution or by virtue of the Constitution to determine the respective authorities of the State, the Communities, and the Regions, (...)”, to ask the Court of Arbitration the prejudicial questions listed above.

The two cases were combined by the order dated May 27, 1992.

III. *The proceeding before the Court*

a. In the case listed under the number 336 of the court roll

The Court received the prejudicial question in the form of delivery of the decision to send the case back which is mentioned above and was received by the clerk on October 25, 1991.

In an order with the same date, 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 in charge of legal enquiry have deemed that there is no standing in the current case to apply articles 71 and following of the aforementioned special organic law of the Court.

Notification of the decision to send the case back was made by letters registered with the postal service on November 7, 1991, and received by the recipients on November 8, 12, and 13, 1991, in compliance with article 77 of the organic law.

The notice provided for by article 74 of the aforementioned law was published in the Belgian Monitor dated November 9, 1991.

The Belgian State, represented by the State Secretary for Public Health and Disability Policy, whose office is located at 1000 Brussels, rue de la Loi 56, introduced a report by letter registered with the postal service on December 2, 1991.

The European Society for Commerce, Advertising, Industry, and Electricity (abbreviated as Copel Europe corporation), whose headquarters are located at 1150 Brussels, avenue Roger Vandendriessch 33, and at 1150 Brussels, rue St-Hubert 26, introduced a report by letter registered with the postal service on December 23, 1991.

In compliance with article 89 of the organic law, copies of these reports were sent by letters registered with the postal service on January 14, 1992, and were delivered to the recipients on January 15 and 21, 1992.

The Executive of the French Community, represented by the Minister of Social Affairs and Health, whose office is located at 1040 Brussels, rue Belliard 7, transmitted a report by letter dated January 15, 1992.

Copies of this report were transmitted to the other parties by letters registered with the postal service dated February 11, 1992, and delivered to the recipients on February 12, 1992.

No report was submitted in response.

The Executive of the French Community had a "hearing note" sent by letter registered with the postal service on April 10, 1992.

By order dated March 6, 1992, the Court extended until October 25, 1992, the time frame in which the order has to be rendered.

b. In the case listed under the no. 341 of the court roll

The Court received the prejudicial question in the form of delivery of the decision to send the case back which is mentioned above and was received by the clerk on December 2, 1991.

In an order with the same date, 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 in charge of legal enquiry have deemed that there is no standing in the current case to apply articles 71 and following of the aforementioned special organic law of the Court.

Notification of the decision to send the case back was made by letters registered with the postal service on December 27, 1991, and received by the recipients on December 30, 1991, and January 6 and 7, 1992, in compliance with article 77 of the organic law.

The notice provided for by article 74 of the aforementioned law was published in the Belgian Monitor dated December 13, 1991.

The Council of Ministers, represented by the Prime Minister, whose office is located at 1000 Brussels, rue de la Loi 16, introduced a report by letter registered with the postal service dated February 10, 1992.

J. Mahieu, residing at 2650 Edegem, Prins Boudewijnlaan 232, introduced a report by letter registered with the postal service dated February 21, 1992.

In compliance with article 89 of the organic law, copies of these reports were sent by letter registered with the postal service on April 13, 1992 and were delivered to the recipients on April 14 and 15, 1992.

No report in response was submitted.

By the ordinance dated May 25, 1992, the Court extended until December 2, 1992, the time frame by which the order has to be rendered.

c. In the combined cases inscribed under the numbers 336 and 341 of the roll

By order dated May 27, 1992, the Court combined the cases.

In compliance with article 100 of the organic law of the Court dated January 6, 1989, the combined cases were examined by the first assigned court, and the judges in charge of legal enquiries are those who, in compliance with article 68, are designated for the first case the Court received.

In compliance with the Court deliberation dated September 15, 1992, President J. Wathelet, the original seated judge, was replaced in this position by Judge Y. de Wasseige.

By order dated September 15, 1992, the Court extended until April 25, 1993, the time frame within which the order has to be rendered.

By order dated October 1, 1992, the Court declared the case to be ready and set the hearing for October 21, 1992.

The case was postponed indefinitely, and the parties were notified of this decision by letters registered with the postal service on October 12, 1992, delivered to the recipients on October 13 and 14, 1992.

By order of the Court dated January 7, 1993, President D. André, originally a member of the seated court and judge in charge of enquiry, was replaced in both of these positions by Judge J. Delruelle.

By order dated January 19, 1993, with Judge M. Melchior occupying the position of President because of the impeachment of President D. André, the Court declared that the case was ready and set a hearing for February 11, 1993.

The parties were notified of this ordinance, and they and their lawyeres were served notice of the hearing date by letter registered with the postal service on January 19, 1993, and delivered to the recipients on January 20, 21, and 22, 1993.

At the hearing dated February 11, 1993:

-appeared:

- The Honorable G. Veldekens, Esq., lawyer at the bar of Brussels, on behalf of the Copel Europe, corporation;
- The Honorable M. Verdussen, Esq., loco, the Honorable P. Lambert, Esq., lawyers at the bar of Brussels on behalf of the Belgian State and the Council of Ministers;
- The Honorable Ph. Coenraets, lawyer at the bar of Brussels, on behalf of the Executive of the French Community;
- The Honorable L. Van Hout, Esq., loco, the Honorable X. Leurquin, Esq., lawyers at the bar of Brussels, on behalf of J. Mahieu;
- The Judges J. Delruelle and H. Boel submitted enquiries;
- The aforementioned lawyers were heard;
- The case was set for deliberation.

The proceeding was conducted in compliance with articles 62 and following of the special law dated January 6, 1989 on the Court of Arbitration, related to the use of languages before the Court.

IV. By law

-A-

In case no. 336

1.A.1 In its report introduced on December 3, 1991, the first intervening party, the Belgian State, the opposing party before the Council of State, first reminds parties of the legal and regulatory texts that are applicable in the current case, both with respect to the State as well as the Communities. It then presented that the Court of Arbitration had already received two similar prejudicial questions (rolls no. 253, 261 to 264). To the degree that these cases, based on the examined report that was submitted, have been ruled upon by the Court by an order, no. 6/92 dated February 5, 1992, in the sense of the interpretation proposed by the Belgian State, it does not appear to be useful to undertake here all of the argumentation that it develops in its report. It is sufficient simply to remind the parties of its conclusion: regulation in matters of tobacco, tobacco-based products, and similar products is a matter that remains under the authority of the State.

1.A.2. In its report introduced on December 24, 1991, the Copel Europe corporation, party petitioning before the Council of State and the second party making a presentation before the Court, deems that the regulation of advertising for tobacco, addressed to prevent diseases that the use of tobacco promotes, comes under health education, a matter that the Constituent has reserved for the Communities, and is not included in national prophylactic measures.

Even considering that health education and national prophylaxis measures are closely related notions, since both are intended to prevent diseases and safeguard public health, with a view to avoiding a positive conflict of authorities and clear health education of all of its contents, there is a basis for anticipating that the Constituent reserved authority for health education in general to the Communities, with the exception of national prophylaxis measures, as these should, like any exceptions, be anticipated restrictively and should be limited to the measures that are directly necessary to block the growth of diseases across the national territory. It goes on to provide that there can be no argument that advertising in support of tobacco is not part of measures that are directly necessary to block the development of diseases across the national territory, so that the regulation of advertising in support of tobacco, tobacco-based products and similar products falls under the authority of the Communities.

What's more, based on the definition given in the law dated January 24, 1977 on the notion of "nutritional foodstuff", any product or substance destined for human nutrition, including tonic products, salt, condiment-type products (1st article, 1^o, of the law dated January 24, 1977), the report considers that tobacco is not a nutritional product, and that in these conditions, the Copel Europe company could not rally behind the analysis made by the Belgian State, according to which tobacco is part of the nutritional foodstuffs by reference to existing legislation.

In conclusion, the second party appearing before the court intends to declare that article 7, § 2, of the law dated January 24, 1977, related to the protection of consumer health in matters pertaining to nutritional foodstuffs and other products, modified by the law dated March 22, 1989, violates the rules established by the Constitution or by virtue of the Constitution to determine the respective authorities of the State, the Communities, and the Regions.

In case no. 341

2.A.1 The Council of Ministers introduced a report on February 11, 1992. For the same purposes as those expressed under 1.A.1, it simply bears repeating here that the Council of Ministers intends in this case for the Court to declare that:

-article 7, § 2, of the law dated January 24, 1977, related to the protection of consumer health with respect to nutritional foodstuff and other products does not violate the rules that are established by the Constitution or by virtue of the Constitution for determining the respective authorities of the State, the Communities, and the Regions;

-article 13 of the decree from the French Community dated December 2, 1982, pertaining to the fight against the use of tobacco violates the rules that are established by the Constitution or by virtue of the Constitution to determine the respective authorities of the State, the Communities, and the Regions.

2.A.2. In its report introduced on February 24, 1992, the Party being litigated against in the Court of Appeals permits itself to suggest that in the interest of legal security and by reason of the relevant legal considerations raised that the party concerned has made its own, the Court refers to its order dated February 5, 1992 (roll no. 253 and 261 to 264).

-B-

On the admissability of the presentation made by the French Community

1.B.1 The Executive of the French Community, to whom the prejudicial question in case 336 was addressed on November 8, 1991, introduced a report, by ordinary mail, on January 17, 1992. Without taking into account the breach in proper form, the time limitation of 45 days set forth by article 85 of the special law dated January 6, 1989 not having been complied with, according to the terms of article 86 of the same law, it needs to be kept out of the arguments. As a result, the "hearing note" introduced by the same Executive on April 14, 1992, may also be kept out.

On the merits

2.B.1. In the terms of the article 59bis, § 2bis, of the Constitution, the Councils of the Community rule by decree, each on the issues that concern that community, with the issues being customizable.

According to article 5, 1st §, I, 2°, of the special law for institutional reforms dated August 8, 1980, the customizable issues intended in article 59bis, § 2bis, of the Constitution include in particular with respect to health policy, "health education as well as preventive medical activities and services, with the exception of national prophylaxis measures."

None of the terms of this list expressly assign to the Communities the authority for regulating advertising for tobacco.

What's more, from the preparatory work of the special law, it emerges that if the community authority covers in particular information and health education, the protection of the health of the population, in particular the prevention of cancer, and the improvement of the state of health of the population, either in the framework of health education or by other appropriate means (Parl. Doc., Senate, 1979-80, no. 434-2, pp. 124-125; Chamber, 1979-1980, no. 627-10, p. 52), the special legislator has in particular excluded from community authority the matter of "regulation related to nutritional foodstuffs." This term designated the subject of the law dated January 24, 1977, related to the protection of consumer health with respect to nutritional foodstuffs and other products. Given that at the time when the special law was written, the regulation of advertising for tobacco and similar products was included in what was called the "regulation related to nutritional foodstuffs", there is basis for considering that the national legislator remained competent for regulating advertising pertaining to tobacco products.

With respect to article 7, §2, of the law dated January 24, 1977

2.B.2 Following its modification by the law dated March 23, 1989, which took effect on November 5, 1989, 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, reads as follows:

"In the interest of public health, the King may regulate and ban advertising related to tobacco, tobacco-based products, and similar products, as well as advertising related to alcohol and alcoholic beverages."

The national legislator has remained competent to regulate advertising related to tobacco products. The result is that article 7, § 2, of the law dated January 24, 1977, does not violate the rules established by the Constitution or by virtue of the Constitution to determine the

respective authorities of the State, the Communities, and the Regions.

Due to the fact that the objective of the legislator is to protect public health, article 7, § 2, of the law dated January 24, 1977, does not differentiate treatment, which would be contrary to the rules of equality and non-discrimination. Additionally, it does not appear to the Court in what way the provision would mistake article 17 of the Constitution.

As for the decree by the French Community dated December 2, 1982

2.B.3 The result of the order of the Court of Appeals of Antwerp dated November 28, 1991, is that the prejudicial question does not concern all of the decree by the French Community dated December 2, 1982, regarding the fight against the use of tobacco; rather it concerns only article 13 of this decree.

Before it was annulled by the Court of Arbitration, this article 13 provided:

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

Articles 2 to 6 of the royal order concerned in article 13 of the decree by the French Community dated December 2, 1982, related to the fight against the use of tobacco carry:

“Art. 2. It is forbidden to engage in advertising for the promotion of tobacco, tobacco-based products, and similar products;

1° on the radio or on television

2° by means of aircraft or boats

3° in the form of films, slides, or other projects in places accessible to the public;

- 4° by means of posters or billboards, except in places where the products covered by the present order are placed in commerce through normal means;
- 5° by lighted advertising except inside or outside the places where the products covered by the present order are placed in commerce through normal means;
- 6° by the distribution or home delivery of separate stickers or advertising brochures;
- 7° by oral recommendations made in public;
- 8° by the distribution of free samples of tobacco, tobacco-related products, and similar products;
- 9° by the use of the brand emblem or the name of the brand of the tobacco, tobacco-based products, or similar products or by the use of any other representation or mention that is likely to refer to it on ordinary objects other than those that are directly linked to the use of tobacco;
- 10° on periodicals for children.

Art. 3. In advertising promoting tobacco, tobacco-based products, and similar products, it is not permitted:

- 1° to make use of the representation of living persons known by the general public;
- 2° to make use of statements or texts that concern a person other than the inventor of the procedure for manufacturing the product concerned;
- 3° to publish pieces of scientific texts;
- 4° to make use of texts related to hygiene or health;
- 5° to plan contests, competitions, or raffles;
- 6° to use more than a half page in newspaper or more than one page per brand in periodicals.

Art. 4. 1st §. Any advertising in the promotion of cigarettes, cigars, cigarillos, and smoking tobacco includes, according to the language in which it is drafted, one of the following statements:

‘Tobacco is harmful to health’.

‘Tabak schaadt de gezondheid’.

‘Tabak schädigt die Gesundheit’.

§ 2. The statement needs to be placed in a way that is clearly visible, very readable, in black 8 point font minimum characters on a white background. It can not be hidden, masked, or interrupted by any other statement or by an image.

§ 3. The present article does not apply to lighted advertising or to sports equipment.

Art. 5. Infractions to the present order will be sought, sued, and punished in compliance with the law dated January 24, 1977, regarding the protection of consumer health with respect to nutritional foodstuffs and other products.

Art. 6. The present order comes into force on the first day of the seventh month that follows the one during which it will have been published in the Belgian Monitor, with the exclusion of article 2, 4°, which enters into effect on January 1, 1982.

B. 4. By order no. 7/93 dated January 27, 1993, the Court has annulled article 13 of the decree by the

French Community dated December 2, 1982. By virtue of article 9, 1st §, of the special law dated January 6, 1989, the orders of annulment issued by the Court have absolute authority as a ruled matter from the time they are published in the Belgian Monitor. Also, the annulment has a retroactive effect.

From this point forward, the prejudicial question no longer has any purpose.

For these reasons,

The Court

declares

article 7, § 2, of the law dated January 24, 1977, related to the protection of consumer health regarding nutritional foodstuffs and other products does not violate the rules established by the Constitution or in virtue of the Constitution to determine the respective authorities of the State, the Communities, and the Regions, nor the articles 6, 6bis, and 17 of the Constitution;

decides

the prejudicial question pertaining to article 13 of the decree of the French Community dated December 2, 1982 related to the fight against the use of tobacco no longer has any purpose.

Thus pronounced in French and Dutch, in compliance with article 65 of the special law dated January 6, 1989 on the Court of Arbitration, at the public hearing on March 4, 1993.

The Clerk

H. Van der Zwalmen

President f.f.,

M. Melchior