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EDITORIAL COMMENTS

Taking (the limits of) competences seriously

The current debate on the question whether the European Union needs a Constitutional Charter has its roots not only in the expected impact of the forthcoming enlargement of the Union on the institutional set-up and the decision-making process, but also in the long-standing resentment of politically influential quarters in the Member States against the expanding use and the broad interpretation of Community competences by Community institutions. This resentment has been translated by the *Bundesverfassungsgericht* (BVerG), in its famous *Maastricht* judgment,[1] into a legal formula with a potentially explosive impact on the integrity, supremacy and cohesiveness of the European legal order. The BVerfG held that

> "in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes betweeen the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany."

This resentment against the overstretching of Community competences is reflected by the call for a catalogue of competences to be included into a European Constitutional Charter that, for the future, will provide a clear delimitation of the Community sphere *vis-à-vis* the sphere of the Member States. It is open to doubt whether such a catalogue of competences will be able to fulfil the expectations of its proponents – at least as long as such open-ended provisions as Article 95 (ex 100a) EC remain unchanged, inviting an expansive interpretation by the Court of Justice. It is at this point that the argument for a new judicial architecture – the proposal for the establishment of a European Constitutional Court – comes into play. The competences of such a court would be restricted to matters of truly constitutional implications,

1. *Bundesverfassungsgericht*, Judgment of 12 Oct. 1993, (1993) NJW 3047; English Translation in (1994) CMLR, 57, and in part in 31 CML Rev., 251.

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and, as a result of its composition, it would give assurance to the Member States that it will regard its own constitutional role not only as umpire between the (other) Community institutions and as guardian for the Community legal system against the self-interest of the Member States, but also as an institution defending the Member States and their competences against encroachments by the Community, and integrating the national constitutional values and traditions into the European constitutional order. To give the interests of the Member States a fair representation on the bench, it has been argued that such a European Constitutional Court should be composed of or should at least include judges from the highest (constitutional) courts of the Member States.

It is against this background that the long-awaited judgment of the Court of Justice of 5 October 2000 (Case C-376/98), annulling the Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products[2] for lack of competence, may become one of the most important judgments of the decade.

The background to the judgment may be sketched in a few words. In 1998, after years of intensive discussion, Parliament and Council passed Directive 98/43/EC. The Directive was adopted on the basis of Article 47(2) (ex 57(2)) EC, Article 55 (ex 66) EC, and Article 95 (ex 100a) EC. In its Article 3, the Directive 98/43/EC provides that (subject to certain exceptions) all forms of advertising and sponsorship for, and any free distribution of, tobacco products shall be banned in the Community. Germany, having voted in the Council against the adoption of the Directive, brought an action against the Parliament and Council of the European Union, mainly on grounds of lack of competence, and with some other pleas, such as breach of the principles of proportionality and subsidiarity and breach of fundamental rights.

The Court – without touching on the other pleas – struck down the Directive for lack of Community competence based on the following reasoning. Given the clear text ("excluding any harmonization of the laws and regulations of the Member States") of ex Article 129(4) EC,[3] which is designed to protect and improve human health, the Directive 98/43/EC could only be, and in fact was, based on ex Articles 100a, 57(2), and 66 EC. Though ex Article 129(1)(3) EC (now Article 152(1)(1) EC) explicitly provided that health protection requirements are to form a constituent part of the Community's other policies, and ex Article 100a(3) EC (now Article 95(3) EC) required that any harmonization measures were to attain a high level of health protection,

2. O.J. 1998, L 213/9.

3. See now Art. 152(4) lit. c EC. In Art. 152(4) lit. a and b EC, the Community is attributed a restricted competence to take measures with regard to *specific* areas of public health.

recourse to ex Articles 100a, 57(2) and 66 EC as legal bases demands that the very preconditions of *their* application are fulfilled.

The great importance of the judgment of 5 October 2000 lies in the fact that the Court actually exercises its powers to check whether the conditions for the power to enact legislation on the basis of Article 95 (ex 100a) have been met; it resists the temptation to practice judicial restraint *vis-à-vis* the Council and Parliament, not leaving it to these institutions to check whether the preconditions of the relevant legal bases are fulfilled. The Court becomes serious on the *limits of competences*: ex Articles 100a, 57(2), 66 EC did not give the Community institutions a general power to regulate the internal market, but could serve as legal basis only for those measures that were intended to *improve* the conditions for its establishment and functioning. A mere finding of disparities between national rules and the abstract risk of obstacles to the exercise of the freedoms is not enough to convey a competence to the Community legislature. Being serious about the limits of competences means for the Court that it is its function to verify whether the legislative measure in fact pursues the genuine object of improving the conditions for the internal market, either with regard to present impediments or to future obstacles to trade if they are likely to emerge.

Given this standard of review, the ban on all advertising and sponsorship for tobacco products, as set forth by Article 3 of Directive 98/43/EC, could not survive. With regard to the object of improving the conditions for the free movement of goods and services, especially with regard to periodicals, magazines and newspapers, the Court admits that though no obstacles exist at present to the import of those products which contain advertising for tobacco products, the trend in national legislation to greater restrictions on advertising for tobacco products may in the foreseeable future lead to obstacles of the free movement of these products. Accordingly, Articles 95, 47(2), 55 EC may be regarded as an appropriate legal basis for legislation dealing with this *specific* obstacle.[4] In contrast, Directive 98/43/EC does not just deal with this specific obstacle, but covers a multitude of settings, such as advertising on posters, on articles used in hotels and advertising in cinemas, in which the total ban on

4. Para 98: "In principle, therefore, a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products ..." The Commission has already announced that it will propose legislation on this basis. It should, however, take notice of the fact that para 98 of the judgment only deals with the question of legal basis. A total ban of advertising for tobacco products in periodicals etc. may run counter the principle of *proportionality*, as it may be easily left to the publisher to decide on his distribution strategy: either to produce a periodical without advertising for tobacco products that can be distributed in all Member States, or to include advertising and to distribute the periodical only in those Member States that allow the advertising.

advertising in no way helps to facilitate the trade in the products or services concerned.

Turning to the object of eliminating distortions of competition which may justify measures based on Article 95 EC, the Court – in some implicit analogy to Article 81(1) EC – restricts the scope of the legal basis to *appreciable* distortions that arise from differences between regulations on tobacco advertising. Such appreciable effect could – on the one hand – be foreseen with regard to certain sports events[5] that may be relocated among the Member States with regard to the varying regulations on tobacco advertising. On the other hand, advantages in terms of economies of scale and increase of profits which undertakings seated in the more liberal Member States may gain are to be considered as "remote and indirect" and therefore not classified as appreciable distortions.

The judgment of 5 October 2000 will have an impact on the legislative process in the Community. Harmonization can no longer be taken as an end in itself. All legislative measures will have to pass a test of judicial scrutiny as to whether the purported object is *actually* pursued by the legislative measure. From now on, it will not do to state an accepted object in the preamble of the legislative act, but the Community legislature will have to make sure that the measure is an apt instrument to pursue the purported end.[6] The Court will not be content merely to look at the legislative measure as a whole in order to verify whether the measure in fact pursues the stated objective, but it will be expected to take a look at each single provision in order to say whether the Community measure in all its aspects is justified by its legal basis. The competence relating to the establishment and the functioning of the internal market does not allow overly broad legislation going beyond the specific obstacles or appreciable distortions in a specific fact-setting. Given these refined standards of judicial review of the legal basis, the Community legislature will, moreover, have to be (more) explicit in the preamble of the legislative act in order to fulfil its duty to state the reasons on which it is based. One may wonder whether, to take one example, the Directive 85/577/EEC[7] could be upheld on the legal basis of ex Article 100 EC (on which it has been based). The preamble refers to divergences in the laws of the Member States concerning doorstep-selling and concludes that these divergences have a direct impact on the functioning of the common market. The preamble gives no explanation as to the specific obstacle created for the free flow of goods or services concerned, nor do we find any indication relating to an appreciable

5. Car and motorcycle racing etc.
6. See paras. 112–113.
7. O.J. 1985, L 372/31.

distortion of competition in doorstep-selling activities with a Community dimension.

From an institutional point of view, the judgment deserves interest – and should be applauded – for two reasons. The judgment displays explicit awareness of the criticism, which has been occurring for a long time, that the Community legislature tends to ignore the basic principle set forth in Article 5 (ex 3b) EC that the powers of the Community are limited to those specifically conferred on it. The Court explicitly refers to Article 5 EC[8] in order to underline the limitations set forth in the legal basis of Article 95 EC. If those limitations were not taken seriously, Article 95 EC would be transformed into a general power to legislate.

In the same context, the Court refers to its function, entrusted to it by Article 220 (ex 164) EC, of ensuring that the law is observed. One may, at first sight, wonder why the Court takes the chance to remind itself and all of us of something which is self-evident. It is probably not too far-fetched to take this statement as an answer to the ongoing discussion (also within the Court?) on the appropriate role of the Court *vis-à-vis* the Community legislature. Given the plea for a further democratization of the Community, the point could be made that the Court should practise judicial restraint with regard to the Community legislature where the European Parliament already plays an influential role. Though this point may seem appealing to some, the Court has rightly (though implicitly) rejected it. The European Parliament has to play its role in the legislative process *within* the scheme of limited Community competences. And there is no reason to assume that a democratically legitimized body such as the Parliament will not tend to overstep the limits of Community competences as set forth by the Treaty. Any overstepping of Community competences amounts to an encroachment on the competences of the Member States – and an encroachment of the power reserved to the parliaments of the Member States. It is only if the Court follows this line of thinking – taking its function to protect the Member States (and their parliaments) against unlawful Community measures seriously – that the call for a truly European Constitutional Court will abate.

8. In paras. 83 and 107.