

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
10 September 2002 *

In Case T-223/01,

Japan Tobacco Inc., established in Tokyo (Japan), and
JT International SA, established in Geneva (Switzerland),
represented by O. Brouwer, lawyer, and P. Lomas, Solicitor, with an address for
service in Luxembourg,

applicants,

v

European Parliament, represented by C. Pennera and M. Moore, acting as
Agents, with an address for service in Luxembourg,

and

Council of the European Union, represented by E. Karlsson, acting as Agent,
with an address for service in Luxembourg,

defendants,

* Language of the case: English.

APPLICATION for annulment of Article 7 of Directive No 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194 p. 26),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: H. Jung,

makes the following

Order

Legislative context

- 1 Directive No 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative

provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (hereinafter ‘the Directive’) includes the following provisions:

‘Article 1

Aim

The aim of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the maximum tar, nicotine and carbon monoxide yields of cigarettes and the warnings regarding health and other information to appear on unit packets of tobacco products, together with certain measures concerning the ingredients and the descriptions of tobacco products, taking as a basis a high level of health protection.

Article 2

Definitions

For the purposes of this Directive:

1. “tobacco products” means products for the purposes of smoking, sniffing, sucking or chewing, inasmuch as they are even partly, made of tobacco, whether genetically modified or not;

...

Article 7

Product descriptions

With effect from 30 September 2003, and without prejudice to Article 5(1), texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products.

...

Article 14

Implementation

1. Without prejudice to Article 15, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 September 2002 at the latest. They shall forthwith inform the Commission thereof.'

2 Recital (27) in the preamble to the Directive provides:

‘The use on tobacco product packaging of certain texts, such as “low-tar”, “light”, “ultra-light”, “mild”, names, pictures and figurative or other signs, may mislead the consumer into the belief that such products are less harmful and give rise to changes in consumption.’

Background to the dispute

- 3 The applicants belong to a group of companies involved in the cigarette market. They manufacture and sell cigarettes under the trade mark ‘MILD SEVEN’ and these sales represent over 40% of the sales and profits of the first applicant.
- 4 The first applicant is the registered owner of the trade mark ‘MILD SEVEN’ throughout the world including the European Union, and the second applicant is an exclusive licensee of that mark. The applicants claim that ‘MILD SEVEN’ is the second largest cigarette brand in the world, and that its development has involved them in extensive investment.
- 5 They argue, in essence, that applying Article 7 of the Directive (‘Article 7’) to existing trade marks will have the effect of depriving them of their rights of intellectual property in the ‘MILD SEVEN’ mark and cause extensive damage to the value of their brand throughout the world.

Procedure and forms of order sought

- 6 By application lodged at the Registry of the Court of First Instance on 20 September 2001, the applicants brought this action.
- 7 They seek annulment of Article 7 of the Directive upon five grounds: lack of competence on the part of the European Community to legislate for the approximation of national laws where the emergence of obstacles to trade is unlikely and there are no appreciable distortions of competition; unlawful interference with the existing property rights of the applicants; infringement of the principle of proportionality; insufficient statement of reasons; and infringement of the principle of equal treatment.
- 8 By separate documents lodged at the Court Registry on 12 November 2001 and 26 November 2001 respectively, the European Parliament and the Council raised objections of admissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance.
- 9 On 10 January 2002, the applicants lodged observations on those objections.
- 10 By applications lodged at the Court Registry on 15 February 2002 by the Commission and the Kingdom of the Netherlands, and on 20 February 2002 by the United Kingdom, those parties applied to intervene in support of the forms of order sought by the Parliament and the Council.

11 The parties informed the Court that they had no observations to make on those applications. However, by letters of 7 and 26 March 2002, the applicants requested confidential treatment of certain matters in their written pleadings pursuant to Article 116(2) of the Rules of Procedure.

12 The applicants claim that the Court should:

— declare the action admissible;

— annul Article 7 in its entirety;

— alternatively, annul Article 7 to the extent that it precludes the applicants from using the trade mark 'MILD SEVEN' within the European Union;

— order the European Parliament and/or the Council to pay the costs.

13 The Parliament claims that the Court should:

— dismiss the action in its entirety as inadmissible; and

— order the applicants to pay the costs.

14 The Council claims that the Court should:

- dismiss the action as inadmissible;

- order the applicants to pay the costs.

Admissibility

- 15 Pursuant to Article 114(1) of the Rules of Procedure, where a party so requests, the Court may rule on admissibility without going into the substance of the case. Under Article 114(3), the remainder of the proceedings are to be oral unless the Court decides otherwise. In this case, the documents on the court file provide sufficient information to enable the Court to rule upon the request without opening the oral procedure.
- 16 The Parliament and the Council submit that the claim for annulment of Article 7 of the Directive is inadmissible on the ground that the applicants are neither directly nor individually concerned by that article within the meaning of the fourth paragraph of Article 230 EC. The Council further submits that the applicants have no *locus standi* to institute proceedings for annulment of a provision in a directive.
- 17 The applicants dispute the grounds of inadmissibility put forward by the Parliament and the Council. They claim that they have the necessary standing to apply for the annulment of Article 7 and that they are clearly concerned both

directly and individually by that provision. They argue in particular that they are seeking neither the annulment of the Directive in its entirety nor a decision from the Court of First Instance on the interpretation of the Directive, but merely the annulment of Article 7, a provision which they claim is severable from the rest of the Directive.

- 18 The Court will examine first the Council's objection that the applicants lack *locus standi* to seek the annulment of a provision in a directive.

Lack of locus standi to seek the annulment of a provision in a directive

Arguments of the parties

- 19 The Council submits that the applicants have no *locus standi* to apply for the annulment of a provision in a directive. The fourth paragraph of Article 230 EC makes no provision for direct actions against directives by individuals. Unlike regulations, directives produce no legal effects until implemented in national law by the Member States as it is the national rules which confer rights and impose obligations on individuals (Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 15).

- 20 Before transposition of Article 7 into national law, or at least before the expiry of the transposition period (30 September 2003), it is impossible to assess whether that article will be of direct and individual concern to the applicants. In the Council's submission, it is not until that point that Article 7 will produce legal effects as regards the applicants.

- 21 The Member States have powers of discretion in implementing the Directive, so that it is not possible at the present stage to know the exact terms of the future national provisions, including, for example, whether the Member States will lay down a (non-exhaustive) list of terms prohibited on the packaging of tobacco products, and whether, if so, the word ‘mild’ will be included, given that that word does not appear in all language versions of the Directive.
- 22 Moreover, Article 7 is clearly a normative measure of general application which applies in the abstract to objectively determined situations. It cannot therefore be regarded as a disguised decision, and therefore be open to an action for annulment under the fourth paragraph of Article 230 EC.
- 23 The applicants dispute the assertion that directives, including ‘genuine’ directives, are never by their nature open to an action for annulment by natural or legal persons under the fourth paragraph of Article 230 EC. Although no successful application may yet have been brought, the case-law demonstrates the fallacy of that assertion and indicates that the true test to be applied is whether the measure at issue is of direct and individual concern to the applicant (Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605; Case T-135/96 *UEAPME v Council* [1998] ECR II-2335; Joined cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others v Parliament and Council* [2000] ECR II-2487). It is not necessary therefore to demonstrate that Article 7 is a disguised decision.
- 24 Nor, in the applicants’ submission, does the need for a directive, by reason of its nature, to be implemented in national law exclude the possibility of bringing an action against such a measure. If that requirement automatically excluded any action by a natural or legal person, the Court would not have examined, or had to

examine, in the case-law cited in the paragraph above, whether the directives at issue directly and individually concerned the natural or legal persons in question.

- 25 They also maintain that the lapse of time between adoption of the Directive and the entry of Article 7 into force, relied on in argument by the Council, is immaterial. Since Article 7 entered into force on 18 July 2001, the applicants would have found their action statute-barred if they had waited until 30 September 2003, the date on which that article took effect, before challenging it. In support of their argument, they point out that, in Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, the existence of a period of five years between the date the relevant provision entered into force, 1 September 1989, and the date on which that provision produced legal effects in relation to the applicant did not in any way preclude the admissibility of the action, brought on 9 October 1989.
- 26 In the alternative, if it were necessary to show that Article 7 was, in substance, a decision within the meaning of Article 230 EC, it is the substance and not the form of that measure which determines whether it is open to an action under that article. It would be necessary to examine, in particular, the limited nature of the circle of addressees in relation to whom the measure produces effects (Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others v Council* [1962] ECR 471). Although Article 7 applies to all tobacco manufacturers in so far as it is directed against such ‘descriptors’ as ‘light’ and ‘ultra light’, and therefore constitutes a genuine legislative measure of general scope, it is also a de facto decision as regards the applicants in that it produces a ‘specific effect’ on them (as on the manufacturers holding the trade marks ‘Suave’ and ‘Milde Sorte’ who are affected in the same way). The applicants and those latter manufacturers are the only operators whose trade marks contain words characterised as ‘descriptors’ by the Directive.

Findings of the Court

- 27 In the present case, the Court is required to assess the admissibility of an action brought by a legal person under the fourth paragraph of Article 230 EC against a directive adopted by the European Parliament and the Council on the basis of Articles 95 EC and 113 EC.
- 28 Although the fourth paragraph of Article 230 EC of the Treaty makes no express provision regarding the admissibility of actions brought by private persons for annulment of a directive, it is clear from the case-law of the Court of Justice and the Court of First Instance that that fact in itself is not sufficient to render such actions inadmissible (*Gibraltar v Council*, paragraphs 15 to 23; *UEAPME v Council*, paragraph 63). The Community institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which is afforded them by that provision of the Treaty (Order of the Court of First Instance in Case T-122/96 *Federolio v Commission* [1997] ECR II-1559, paragraph 50).
- 29 Moreover, in certain circumstances even a legislative measure which applies to economic operators generally may be of direct and individual concern to some of them (Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207, paragraphs 11 to 32; *Salamander and Others v Parliament*, paragraph 30).
- 30 It follows accordingly that the mere fact that Article 7 is contained within a measure which is, as the applicants accept, of a legislative character and thus a genuine directive, and not a decision labelled 'directive', is not of itself sufficient to exclude the possibility that that article could be of direct and individual concern to the applicants.

- 31 The Council's objection based upon the absence of *locus standi* on the part of the applicants to claim annulment of a provision in a directive must therefore be rejected.

Lack of locus standi in the absence of direct concern

Arguments of the parties

- 32 In the Parliament's submission a genuine directive cannot be the subject of an action for annulment brought by a natural or legal person. The measure in question here is undoubtedly a genuine directive both in substance and in form. It requires the Member States to adopt implementing measures and nowhere imposes obligations directly upon individual operators. The Council adds that a directive such as the present one, cannot, of itself, directly affect the legal position of the applicants before the adoption of national implementing measures.
- 33 The Parliament points out that the directive is addressed to the Member States and, pursuant to Article 249 EC, is binding upon them as to the results to be achieved. It observes that to date there has not been a single case in which the Community judicature has held an annulment action against such a measure to be admissible. The Parliament refers in particular to case C-10/95 P *Asocarne v Council* [1995] I-4149 and to the judgment in *Salamander and Others*. In accordance with that case-law, since a genuine directive can never in itself impose legal obligations upon individuals, it is equally incapable of being of direct concern to an individual for the purposes of Article 230 EC. The Parliament

disputes the applicants' interpretation of paragraph 70 of the judgment in *Salamander*. Correctly construed, the effect of the judgment is that if a Community measure is a genuine directive, it cannot be the subject of an action for annulment on the part of a natural or legal person. It is therefore irrelevant, for the purpose of assessing whether or not an action for the annulment of a directive is admissible, that it leaves no discretion to the Member States.

- 34 Nor can the applicants draw any support from the judgments in *Piraiiki-Patraiki* or *Codorniu*. In the former case the contested measure was a decision while in the latter it was a regulation. Under Article 249 EC, both a decision and a regulation are capable of imposing obligations on individuals and directly concerning legal or natural persons for the purposes of Article 230 EC.
- 35 The Parliament submits that the applicants have misinterpreted the essential reasoning of the Court of Justice in *Codorniu*. The mere fact that the case concerned a legislative limitation on the use of a trade mark does not mean that all such legislative acts can be the subject of an action for annulment by a natural or legal person. In any event, the part of that judgment dealing with admissibility concentrated solely on the issue of individual concern (see, in particular, paragraph 19 of that judgment).
- 36 The Council disputes the relevance of the applicants' references to the *Salamander* judgment. It argues that that judgment supports its own case and that the applicants' present submissions are at variance with those of the applicants in that case.
- 37 According to the applicants, an individual may be 'directly concerned' by a directive even if additional measures are necessary for him to be exposed to legal

effects. Even if Member States have a discretion in implementing Article 7, that does not prevent the applicants from being directly concerned by that article, since there is no doubt how the Member States will exercise that discretion (Case 62/70 *Bock v Commission* [1971] ECR 897).

- 38 The applicants submit that Article 7 will have the effect of prohibiting the use of established trade marks like 'MILD SEVEN' and thus leaves no discretion to the Member States. The present case is distinguishable on that point from *Salamander*, in which the Court of First Instance based its reasoning on the fact that the directive left the Member States a discretion. That judgment, far from establishing a general rule applicable to all directives, was concerned only with analysing the specific consequences of the provisions of the directive at issue for the applicants in that case.
- 39 The applicants deny that any of the examples put forward by the Council represents a discretion left to the Member States as to whether, after 30 September 2003, 'MILD SEVEN' cigarettes might be legally manufactured and sold within the Community. Those examples are concerned only with the form and method of Member States' implementation of Article 7, and not with the substantive scope of that article.
- 40 They challenge the Council's argument that differences between the various language versions of the directive leave national authorities a discretion as to the terms to prohibit. Even if terms such as 'light' and 'mild' could still be used in Member States where the version of the directive in the language of those Member States does not contain those words, Article 7 will still be invalid in relation to Member States where the language version contains the word 'mild' and in which use of the trade mark 'MILD SEVEN' is therefore prohibited.

- 41 Nor does the need for transposition of the directive prevent the applicants from being directly concerned by Article 7. In paragraph 7 of the judgment in *Piraiki-Patraiki*, the Court clearly stated that the need for the government concerned to take measures to implement the contested decision had not broken the causal link between the decision in question and its effects upon those applicants. Prior to the adoption of the directive no Member State had intended to prohibit the use of descriptors or to expropriate trade marks. Article 7 will be the sole cause of such expropriation.
- 42 The test according to the applicants, in determining whether a measure is open to challenge, is whether it is the 'direct cause of an effect' for the applicant. They refer in particular to the Opinion of Advocate General Warner in Case 100/74 *CAM v Commission* [1975] ECR 1393, 1406. There is thus no need to establish that the measure is capable of imposing obligations on individuals.
- 43 In that respect, the applicants dispute the interpretation by the Parliament and the Council of the *Salamander* judgment. For the applicants, the decisive consideration in that judgment was the finding that the challenged provision had 'very general wording' and thus 'the Member States enjoy a broad power of assessment when implementing it' (paragraph 69). That judgment was not therefore concerned with whether an individual could be directly concerned by an unambiguous prohibition in a directive laying down a prohibition, like Article 7.
- 44 Finally, the applicants point out that the Member States have an absolute obligation to implement Article 7, the objective of which is to prohibit the use of certain terms on the packaging of tobacco products.

Findings of the Court

- 45 It is settled case-law that, for an individual to be directly affected, the Community measure challenged must directly produce effects on his legal position and leave no discretion to the addressees of that measure who are entrusted with its implementation, that being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules (to that effect, see, for example, Joined Cases 41/70 to 44/70 *International Fruit Company v Commission* [1971] ECR 411, paragraphs 23 to 29; Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraphs 25 and 26; Case 207/86 *Apesco v Commission* [1988] ECR 2151, paragraph 12; Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 9; Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43).
- 46 This means that, where a Community measure is addressed to a Member State by an institution, if the action to be taken by the Member State in response to the measure is automatic or is, at all events, a foregone conclusion, then the measure is of direct concern to any person affected by that action. If, on the other hand, the measure leaves it to the Member State whether or not to act, it is the action or inaction of the Member State that is of direct concern to the person affected, not the measure itself. In other words, the measure in question must not depend for its effect on the exercise of a discretionary power by a third party, unless it is obvious that any such power is bound to be exercised in a particular way (see, to that effect, the Opinion of Advocate General Warner in *CAM v Commission* at page 1410, and references therein, and the opinion of Advocate General Jacobs in Case C-358/89 *Extramet Industrie v Council* [1991] ECR 2501, 2507).
- 47 In the present case it is clear that, until such time as Article 7 has been transposed into the national law of at least one Member State, or until the expiry of the transposition period on 30 September 2003, it will not bring about any change in

the applicants' legal position. They will remain the owners and licensees of the 'MILD SEVEN' trade mark and will continue to be entitled to use it in order to market cigarettes in the Community. As matters stand therefore, the Directive, and in particular Article 7 thereof, has not produced the least effect upon them.

- 48 The applicants argue, however, that Article 7 already forms part of Community law, so that they would be statute-barred under the fifth paragraph of Article 230 EC if they were to wait until 30 September 2003 before bringing their action for annulment. They submit that their legal position is already altered by virtue of the fact that the Member States are already under an obligation to implement a measure which, they say, will expropriate their intellectual property rights.
- 49 In accordance with Article 249 EC, a directive is binding on the addressee Member State as to the result to be achieved, while leaving to the national authorities the choice of form and method. As regards this implementation of Article 7, the result to be achieved is that of ensuring, by means of appropriate national measures, that as from 30 September 2003 the packaging of a tobacco product may not bear any text, name, trade mark or figurative or other sign which suggests that it is less harmful than other tobacco products. Having regard to the terms in which that objective is expressed in Article 7, it is clear that no discretion is afforded to the Member States as to whether or not to act in order to achieve that result.
- 50 However, even if it is assumed that Member States will transpose Article 7 into their national law in its precise terms, it does not follow that an automatic and immediate change is thereby brought about to the applicants' legal position or existing rights.

- 51 In the first place, the mere fact that the word ‘mild’ is one of the adjectives listed by way of illustration in recital 27 of the preamble to the Directive does not necessarily require the Member States to prohibit the use of that specific word in order to give effect to Article 7 in their national law. As the Parliament and the Council correctly point out, the decision as to whether or not to include in the legislation either by way of illustration or specific prohibition a series or words or signs such as those given in recital 27, or their equivalents, forms part of the choice of form and method left to the Member States in accordance with Article 249 EC.
- 52 It would therefore be open to a Member State to transpose Article 7 into national law as it stands, while leaving to the competent national courts or other authorities entrusted with enforcing the legislation in question the function of deciding from case to case whether the words appearing on the packaging of a particular product fall within the scope of the prohibition.
- 53 Secondly, as the applicants have themselves emphasised in their application, they do not accept that the word ‘mild’ as it is used in the trade mark ‘MILD SEVEN’ is a descriptor. The word is not, they point out, used after the brand name (‘Seven Mild’) in the same way, for example, as ‘Marlboro lights’ or ‘Camel lights’. There is an issue to be tried accordingly on the basis of the applicants’ own case as to whether, when implemented, Article 7 will have the effect of prohibiting the continuing use of the ‘MILD SEVEN’ mark upon the ground that the presence of the word ‘mild’ on the packaging does in fact suggest that the product is less harmful than others.
- 54 At all events, that is an issue which cannot be resolved in the present action, but must be determined by the national court once the directive has been implemented, on the basis of the assessment by that court of the evidence adduced and having regard, if appropriate, to any interpretation of Article 7 by the Court of Justice pursuant to Article 234 EC.

- 55 Until the question whether the name 'MILD SEVEN' is prohibited by Article 7 is finally resolved, no material change can take place in the applicants' rights in their trade mark or their marketing of the product by reason only of the adoption of Article 7 in the directive.
- 56 It follows from the foregoing that the effect upon the trade mark 'MILD SEVEN' and upon their business which the applicants contend will flow from Article 7 cannot occur solely as the result of the adoption of the Directive but is dependent upon the subsequent intervention of at least one or other of two acts by third parties, namely: the choice by one or more Member States to include in their national law an express prohibition on the use of certain terms of the kind suggested in recital 27 in the preamble of the Directive, including the word 'mild' in particular; or a decision by a national court that the trade mark 'MILD SEVEN' when used on the packaging of tobacco products marketed by the applicants does in fact suggest that those products are less harmful than other tobacco products.
- 57 The applicants cannot therefore be directly concerned by Article 7.
- 58 The action is therefore inadmissible, and must be dismissed, without there being any need to examine whether the applicants are individually concerned by Article 7.
- 59 In those circumstances, there is no need to rule on the applications to intervene.

Costs

- 60 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful parties' pleadings. As the applicants have been unsuccessful and the Parliament and the Council have applied for costs in the pleadings, the applicants must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. The action is dismissed as inadmissible.
2. The applicants are ordered to pay the costs.
3. There is no need to rule upon the applications to intervene.

Luxembourg, 10 September 2002.

H. Jung
Registrar

J.D. Cooke
President