

# MARKET? A FINE BALANCING ACT

operator, but the product or service at stake and the indispensable requirements to be defined under “responsible gaming”. Thus, suitable public measures, albeit restrictive, should streamline these products and services, irrespective of their carrier.

## ALCOHOL

In the case of alcohol the European Court of Justice issued a recent preliminary ruling (dated June 5, 2007): Under Swedish Law on alcohol, Systembolaget and wholesalers authorised by the State exercise a monopoly over the importation of alcoholic beverages. In the *Klas Rosengren* case (C-170/04), Mr. Rosengren and other Swedish nationals ordered by correspondence cases of bottles of Spanish wine which were imported into Sweden without being declared to customs. Criminal proceedings were brought against Mr. Rosengren and the others for unlawful importation of alcoholic beverages.

The Swedish Supreme Court referred the case to the European Court of Justice to ask whether Swedish legislation was compatible with Community law and the principles of free movement of goods in particular.

The European Court of Justice held that the prices imposed by Systembolaget, which the consumer would not have to pay if he imported goods himself, and the fact that Systembolaget could refuse orders from consumers to import alcoholic beverages amounted to quantitative restrictions on imports on the free movement of goods. Quantitative restrictions on imports may be justified most notably on grounds of protection of the health and life of humans since the health and life of humans rank foremost among the assets or interests protected by the European Communities Treaty (art. 30 EC).

Within the limits imposed by the Treaty, the Member States will decide what degree of protection they wish to assure.

However, national rules having a restrictive effect are only compatible as long as they are deemed necessary to effectively protect the human life and health. On these grounds, the Court deemed the prohibition of importation as “unsuitable” for attaining the health and life protection of EU citizens. The reason was that the prohibition of importation appeared as a means of ‘favouring Systembolaget as a channel for the distribution of alcohol’ rather than one aiming at preventing the harmful effects of alcohol and tackling alcohol abuse.

Moreover, the prohibition went too far over what was necessary to protect young persons from the negative effects of alcohol. Therefore, the restriction of alcoholic beverages’ import could not be justified on grounds of protection of the life and health of humans.

As it comes out from the reasoning of the Court, at the center of this case was the notion of necessity-effectiveness against the suitability concept that was used in the gambling case law. The former is more restrictive than the latter since a suitable measure may not always be necessary while a necessary measure might or not be suitable. If this were the reading of the different wording, then consumer policy would be, as a policy objective, more protected than human health despite its prior-ranking (“the health and life of humans rank foremost among the assets or interests protected by Article 30 EC”).

## SUITABILITY

However, such a conclusion would be wrong. All EC policy objectives are equally concurring and the defi-

inition of the Community interest is the outcome of their systemic convergence. Hence, it would be rather premature to consider that the use of different wording and terms in the respective cases was indeed meaningful. Besides, the concluding consideration in the alcohol case sticks to the principle of suitability: “(...) [I]n the light of the alleged objective, that is to say, limiting generally the consumption of alcohol in the interest of protecting the health and life of humans, that prohibition, because of the rather marginal nature of its effects in that regard, must be considered unsuitable for achievement of that objective” (47). Also, the EFTA Court in the gambling case puts the emphasis on the effectiveness of the restrictive measure as far as gambling addiction is concerned. In other words, there are no boundaries in the use of terminology per sector. Each of them should be understood as a parameter of the proportionality principle. From this point of view, it all comes down to inasmuch the measure is appropriate, suitable, effective and indispensable.

## NECESSITY

The notion of necessity was first used in the field of tobacco case, namely on the issue of cigarettes’ taxation: According to the ECJ (C-216.98, ECR 2000, I-08921), national provisions that restrict intra-Community trade in order to protect the health and life of humans cannot be justified unless they are necessary in order to attain the objective pursued by article 30 (36) EC. In addition, that objective should not be attainable by measures which are less restrictive of intra-Community trade such as increased taxation, the Court considered on that occasion. In this way, the principle of free formation of prices would be safeguarded and

no legislative provisions which require minimum retail selling prices for manufactured tobacco would be adopted or maintained.

In a more recent tobacco case (C-434/02), the Court referred to a high level of protection of human health which takes into account new developments based on scientific facts, laid down in article 95 (3) EC. In this context, the principle of proportionality requires that measures implemented through Community provisions are appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.

## SCIENCE

Consequently, the questions to be answered when it comes to measures that restrict the Internal Market in favour of consumer protection or public health are whether the restrictive measures are suitable and are not exceeding what is necessary to attain the protection of consumers and of human health. Suitable also means: effective in the sense that the restrictive measures should not be abrogated by other parallel public policy objectives.

Regardless of the measure considered, i.e. if it is banning sales of some products, private imports or services, the reasoning should always be based on objective, scientific criteria, demonstrating the need to take or uphold such prohibitive measures beyond dispute. Protecting the public from potential negative effects of gaming addiction, tobacco et cetera, may only revoke internal market considerations when duly substantiated. Last but not least, the existing case law should be reviewed in the light of the newest scientific knowledge; the state-of-the-art of science should constantly be taken into account.