

Contact lenses and coffee shops

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5 March 2013

Contact lenses



<http://cosplays.anim-e-motion.org>

Internet sale (NL)

Multichannel Monitor 2011:

- 2011: Increase of sales via the internet
- 15% → 22% (webshop)
- Most: travels/trips (71% internet, 15% shops)
- Optics: 7% internet, 91% shops. But internet sale is rising: 2% → 4% → 7%
- Jan-June 2012: € 4.6 billion (9% increase (Tritac))

- But there are also negative side effects to internet sales, e.g with non-prescriptive medicines and medical devices

Case Ker-Optika

- Ker-Optika was a Hungarian firm that sells contact lenses and fluids through its website (www.lens.hu)
- Hungarian law stated:
 - 'Medical devices may be sold, repaired and hired ... in a specialist shop, provided that it has an operating licence under a separate provision and that it satisfies the conditions laid down in Points I.1 and I.2 of Annex 2 to this order.'
- The legislation also holds the requirement that the services of an optometrist or an ophthalmologist qualified in the field of contact lenses must be used
- The Hungarian authorities prohibited the internet sales of Ker-Optika because the requirements were not fulfilled

ECJ judgment

- Ker Optika brought proceedings before the national court in order to have the decision annulled
- The national court asked preliminary questions
- Preliminary question (reframed):
 - “whether EU law precludes national legislation, such as that at issue in the main proceedings, which authorises the sale of contact lenses only in shops which specialise in the sale of medical devices and which prohibits, consequently, the sale of contact lenses via the Internet”

Assessment

1. What kind of freedom?
2. Cross-border aspect?
3. Tariff / non-tariff?
4. Selling arrangement?
5. Quantitative restriction or m.e.q.r.?
6. With or without distinction?
7. Treaty grounds?
8. Rule of reason?
9. Suitable, necessary and proportionate?

Coffee shops



radio1.nl

Background information

- Drugs are regulated in the Dutch Opium Act
- Distinction between:
 - hard drugs (list 1) → unacceptable health risks
 - soft drugs (list 2) → acceptable health risks
- List 1: all activities are strictly forbidden and actively prosecuted
- List 2: no priority for public prosecutors, in effect tolerating possession, use and sale
- Cannabis is on list 2

Policy of tolerance

- At first, the only tolerated selling points were youth centres
 - “house dealers” became more involved in selling cannabis
 - They shifted their business from houses to small shops
 - They were left alone by the police as long as they did not disturb public order (guidelines 1980)
 - Youth centres quit selling cannabis (not core activities)
- ➔ Coffee shops emerged

Coffee shop rules

- Catering license
- Comply with AHOJG criteria (1991):
 - ✓ No advertising (modest description allowed)
 - ✓ No hard drugs
 - ✓ No nuisance
 - ✓ No access for minors (<18)
 - ✓ No sale of more than 5 grams pppd
 - ✓ No sale of alcohol
 - ✓ Stock of max. 500 grams

Side effects

- Drugs tourism! Although export is illegal....
- Traffic and parking problems
- Noise
- Nuisance
- Attracts not so fresh people like hard drug dealers

Solutions

- Local authorities are competent regarding the soft drugs policy
 - Zero tolerance (all coffee shops are closed): Bergen op Zoom, Roosendaal
 - Limit the amount of coffee shops: Maastricht
 - Relocation (coffee shops are relocated outside the municipality): Venlo
 - Limit the amount of sale and stock: Maastricht
 - Not within certain distance of schools and such: Rotterdam

Case *Easy Going*



<http://jetzt.sueddeutsche.de>

- In 2006 the mayor of Maastricht adopted a local regulation with a 'residents only' criterion
- Only persons who are resident in the Netherlands have access to coffee shops in Maastricht
- Neglect can be punished with closure
- In the coffee shop Easy Going, 2 non-residents were spotted by the police
- Mayor closed Easy Going for 3 months (decision of 7 September 2006)

Proceedings

- Coffee shop owner Josemans brought proceedings before the Maastricht district court
- Court ruled that the 'residents only' criterion violated Dutch Constitutional law
- Appeal to the Council of State
- Council of State asked preliminary questions to the European Court of Justice

Several legal problems

1. Cannabis is formally illegal but tolerated, so in fact there is no distinction with e.g. alcoholic beverages
2. Also legal products are sold: food and beverages; these are also affected by the 'residents only' criterion
3. The 'residents only' criterion is discriminating

Assessment

1. Cross border aspect?
2. Applicability of EU law?
3. What kind of freedom? Why?
4. Restriction?
5. Measure with or without distinction?
6. Justification?
7. Suitable, necessary, proportionate?

- What statement is **false**?
 - a) The free movement of goods distinguishes between tariff and non-tariff barriers; the other freedoms do not
 - b) The free movement of capital is also applicable to capital movements between member states and third countries; the other freedoms are not
 - c) Restrictions to the free movement of services can only be justified by the grounds listed in the Treaty; restrictions to the other freedoms can be justified both by Treaty grounds and the rule of reason
 - d) Restrictions to the free movement of goods can be justified on grounds of the protection of health of animals, even when it concerns a measure that makes a distinction as to the origin of the goods; restrictions to the other freedoms can only be justified on grounds of the protection of health of animals when the measure is without distinction

- Mrs. Flemminx has Belgian nationality. She works for the Flemish Broadcasting Company. She is entitled to 30 days of holiday leave and a holiday allowance of 8% of her yearly salary. Mrs. Flemminx has decided to spend her holidays in Romania. She books a flight to Bucharest and travels further to Transylvania. There she wants to visit Count Dracula's castle in Bran, which is a national monument managed by the central authorities. She is astonished that non-Romanian nationals have to pay 3 times the price Romanians have to pay. She is pretty sure that this is in violation of her rights under EC law. What rights can she primarily invoke?

- a) Free movement of services
- b) Free movement of capital
- c) Free movement of workers
- d) EU citizenship

- Ever more often, prescriptive medicines are sold online through websites like www.drugstore.com and less often directly at a regular pharmacy. The Dutch government is unhappy with this trend: the supervision of traditional pharmacies is much stricter than the supervision on internet sites. The government therefore fears that unreliable companies will start to operate on the medicine market, as a result of which consumers may receive the wrong medicine or will be left with fake pills, or that consumers may be unaware of the risks of the medicines they order. For this reason the government wants to introduce legislation that determines that selling prescriptive medicines is exclusively allowed at traditional pharmacies; the online sales of prescription medicines will be prohibited. This prohibition applies without distinction to the nationality of online pharmacy owners. The government is aware that the free movement of goods and services is a fundamental principle of the EC. However, the government also knows that exceptions to these freedoms are possible. Which exception will **not** apply in this case?
 - a) Keck (selling arrangements)
 - b) Treaty exception
 - c) Rule of reason
 - d) The Dutch government can call upon all of the exceptions mentioned above.