Message 981

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Procedure for the provision of information EC - EFTA

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Internal forwarding of the observations of a Member State (Austria).

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4. 2024/9015/NO - X40M - Labelling and advertising

5.

6. Opinion on Notification 2024/9015/NO, Amendment to the Norwegian Food Act and draft new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children

I. Introduction:

Austria opposes the Norwegian draft legislation on the Amendment to the Food Act and draft new Regulations on the prohibition of the marketing of certain foods and beverages aimed at children.
The Norwegian proposal covers a wide range of food categories:
- Categories 1 to 6 (products such as chocolate and sugar confectionery; energy bars; sweet toppings/spreads and desserts; cakes; biscuits; other sweet and/or fatty pastries; snacks; edible ices; energy drinks; soft drinks and cordial/squash) may not be marketed to children under 18 years of age.
- For categories 7 to 11 (products such as juices; milk; plant-based milks/beverages; breakfast cereals; yoghurts and similar products; fast food and composite dishes), nutrient thresholds are used to cover the unhealthiest products within these categories.
According to the draft, the following forms of marketing are always considered to be aimed at children: advertising in cinemas in connection with films that are aimed at children under the age of 13 and that start before 6.30pm; competitions for children; tastings and samples for children and special displays that may appeal to children.
It follows that the proposal goes beyond the stated objectives because, for example, films are very often permitted for children under the age of 13 without being frequently attended by children. Pensioners also visit cinemas before 6.30pm.

II. Infringement of Article 34 TFEU:

The Norwegian legislation infringes the principle of the free movement of goods laid down in Article 34 TFEU: The ban on the marketing of certain foods and beverages aimed at children may hinder intra-Community trade and may therefore constitute a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 34 TFEU. 'In accordance with settled case-law, all measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU.' (see CJEU 23.12.2015, Case C-333/14, Scotch Whisky Association, paragraph 31 with further references).
Nor can the legislation in question be justified on the basis of Article 36 TFEU (Articles 34 does not preclude 'prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property'). Under Article 36 TFEU, however, such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. Even if the objective is that of protecting the health of young people, the measures infringe Article 34 as they are not suitable for ensuring the attainment of the objective pursued and go beyond what is necessary to attain it.
The CJEU has held that, in the event of an exception from the principle of the free movement of goods, Member States are required to demonstrate 'that their rules are necessary in order to achieve the declared objective and that this objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade' (see CJEU Case C-198/14 Valev Visnapuu, paragraph 117 with further references).
As certain forms of marketing are always considered to be aimed at children, such as advertising in cinemas in connection with films that are aimed at children under the age of 13 and starting before 6.30pm; competitions for children; tastings and samples for children and special displays that may appeal to children, a complete ban on the marketing of certain foods can be assumed. This measure can also be very detrimental to cinema operators, as advertising is an extremely important economic factor. The measure is therefore not proportionate.
With regard to energy drinks, reference is made to an opinion of the European Food Safety Authority, EFSA. As long as someone is healthy, does not belong to a problem-prone subgroup of the population (persons with cardiac arrhythmias, pregnant/breastfeeding women/breastfed infants), and does not exceed the recommended daily requirement, there is no reason that energy drinks should be classified as harmful to health. The EFSA also considers that the safe caffeine intake (3 mg/kg body weight per day) derived for adult acute caffeine consumption can serve as a basis for deriving single doses of caffeine and safe daily caffeine intake for children.
The Norwegian draft Act therefore constitutes an obstacle to the free movement of goods which cannot be justified on grounds of health protection. Particularly in matters of nutrition, a key factor is how diet as a whole is managed. Many foods in excess, such as olive oil, are harmful to the body. In this respect, it would be a less restrictive means to better educate the population about aspects of nutrition.

III. Infringement of the Unfair Commercial Practices Directive:

Furthermore, advertising of certain foods is a business-to-consumer commercial practice as defined in point (d) of Article 2 of Directive 2005/29/EC on unfair commercial practices. The Unfair Commercial Practices Directive therefore applies in accordance with Article 3(1) of Directive 2005/29/EC.
More specifically, in addition to the general clause and the prohibition on aggressive and misleading commercial practices, the Unfair Commercial Practices Directive contains a list of commercial practices which per se qualify as unfair. Point 28 of Annex I to Directive 2005/29/EC prohibits, as an aggressive commercial practice, the inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. Exhortations in mass media can fundamentally also fall into this category. (Sosnitza, An Kinder gerichtete Online-Werbung für Lebensmittel, WRP 2018, 905 paragraph 16 with further references). The bans on advertising envisaged by the draft go beyond this provision in the Annex to the Directive.
In the context of Directive 2005/29/EC, the Court of Justice has repeatedly emphasised that the Unfair Commercial Practices Directive fully harmonises the rules on unfair business-to-consumer commercial practices and that, as expressly provided for in Article 4 of the Directive, Member States cannot therefore adopt more stringent measures than those laid down in the Directive, even in order to achieve a higher level of consumer protection. (CJEU 14.1.2010, C-304/08, paragraph 41; CJEU 19.10.2017, C-295/16, paragraph 39).

Similarly, the imposition of a penalty for infringement of the prohibition of unfair commercial practices must be preceded by an analysis, undertaken having regard to the facts of each particular case, of whether the sale is to be classified as 'unfair' in accordance with the criteria set out in Articles 5 to 9 of the Directive (CJEU 19.10.2017, C-295/16, paragraph 42). A statutory ban on the advertising of certain foods would run counter to this case-by-case assessment, which is mandatory under the Directive.
Therefore, the Unfair Commercial Practices Directive 2005/29/EC precludes national legislation, such as that in the present notification procedure, which contains a general ban on the advertising of certain foods.

In summary, it must therefore be stated that the present notification does not comply with the provisions of European Union law and that the scientific basis must also be questioned. Austria suggests that the proposed Norwegian regulation be examined with regard to its compatibility with Article 34 TFEU and the UCPD 2005/29/EC in order to avoid obstacles to trade.

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