

# Scope of Article 114 TFEU in the fields of environmental, health, consumers, workers protection and telecommunication networks

## CJEU

### **Case C-426/13 P(R) *Inuit Tapiriit Kanatami* [2015] C:2015:535**

3 September 2015

Appeal - Regulation (EC) No 737/2010 - Regulation laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 - Trade in seal products - Restrictions on the import and marketing of those products - Validity - Legal basis – Justification of the choice of Article 114 TFEU as a legal basis

Improvement of the conditions for the establishment and functioning of the internal market – A mere finding of disparities between national rules and of the abstract risk of infringements of fundamental freedoms or distortion of competition is insufficient - Divergences between the national rules governing the marketing of seal products and the resulting adverse effect on the operation of the internal market – No requirement that the trade in the products is relatively sizeable

Article 17 of the Charter – Protection of the right to property does not apply to mere commercial interests or opportunities

### **Case C-426/13 P(R) *Commission v Germany* [2013] EU:C:2015:457**

9 July 2015

Appeal –Directive 2009/48/EC – Toys safety – Thresholds for antimoine, arsenic, baryum, lead, mercury in toys – Commission Decision not to approve German provisions to exceed the EU harmonized thresholds – Scientific proof – Assessment of the risk – Divergent assessment – Independence of experts - High level of health protection – Precautionary Principle – Exposure to the risk according to the quantity of toys marketed

### **Case C-426/13 P(R) *Order of the Vice-President of the Court Commission v Germany* [2013] nyr**

19 December 2013

Toys directive - Thresholds for antimoine, arsenic, baryum, lead, mercury – Best scientific knowledge – *fumus bonus juris* - Article 114(3) TFEU -

### **Case C-270/12 *United Kingdom v European Parliament and Council of the EU* [2014] nyr**

22 January 2014

Regulation on short selling and certain aspects of credit default swaps - Powers of intervention conferred on the European Securities and Markets Authority in exceptional circumstances - Regulation (EU) No 236/2012 - Validity of Article 114 TFEU as a legal basis - Discretion to choose the most appropriate method of harmonisation where the proposed approximation requires highly technical and specialist analyses

**Case C-58/08 *Vodafone e.a.* [2010] ECR I-4999**

8 June 2010

Regulation (EC) No 717/2007 – Roaming on public mobile telephone networks within the Community – Validity – Legal basis – Scope of Article 95 EC (now Article 114 TFEU) – Principles of proportionality and subsidiarity

**Case C-518/07 *Commission v Germany* [2010] ECR I-01885**

9 March 2010

Directive 95/46/EC – Ensuring the free movement of data between the Member States is necessary for the establishment of and the functioning of the internal market – Article 28(1) – Right to private life – Protection of individuals with regard to the processing of personal data and the free movement of such data – High level of protection of fundamental rights and freedoms – National supervisory authorities – Independence – Administrative scrutiny of those authorities

**Case C-552/07 *Commune de Sausheim v Azelvandre* [2009] ECR I-987**

17 February 2009

Directive 2001/18/EC – Deliberate release of genetically modified organisms – Placing on the market genetically modified organisms as or in products within the Community – Location of release – Confidentiality

**Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593**

10 February 2009

Action for annulment – Directive 2006/24/EC – Retention of data generated or processed in connection with the provision of electronic communications services – Choice of legal base – Legislative and technical disparities between the national rules governing the retention of data by service providers having a direct effect on the functioning of the internal market – Obligations relating to data retention have significant economic implications for service providers – Objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules – Article 95 EC (now Article 114 TFEU) as the appropriate legal base

**Joined Cases C- 439/05 P and C- 454/05 P *Land Oberösterreich v Commission* [2007] ECR I-7441**

13 September 2007

Appeal – Directive 2001/18/EC – Deliberate release into the environment of genetically modified organisms – Article 95(5) EC (now Article 114(5) TFEU) – National provisions derogating from a harmonisation measure justified by new scientific evidence and by a problem specific to one Member State – Biodiversity – Organic farming – Precautionary principle – Principle of the right to be heard

**Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573**

12 December 2006

Action for annulment – Directive 2003/33/EC – Advertising and sponsorship in respect of tobacco products – Annulment of Articles 3 and 4 – Choice of legal basis – Articles 95 EC (now Article 114 TFEU) and 152 EC (now Article 168 TFEU) – Risk of obstacles to free circulation in the internal market of publications such as periodicals, newspapers and magazines – Where conditions regarding Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on

that legal basis on the ground that public health protection is a decisive factor in the choices to be made – High level of human health protection to be ensured in the definition and implementation of all EU policies and activities (now Article 168(1) TFEU) – Achieving internal market harmonisation requires that a high level of protection of human health should be guaranteed (now Article 114(3) TFEU) Obstacles to trade resulting from different levels of protection – Disparities existing between national rules on advertising and sponsorship in respect of tobacco products – Actual link with free movement – Framework Convention on Tobacco Control – Article 95 EC (now Article 114 TFEU) as an appropriate legal basis – No circumvention of Article 152(4)(c) EC (now Article 168(4) TFEU)

**Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-2467**

30 May 2006

Protection of individuals with regard to the processing of personal data – Air transport – Decision 2004/496/EC – Agreement between the European Community and the United States of America – Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection – Directive 95/46/EC – Article 25 – Third countries – Decision 2004/535/EC – Adequate level of protection

**Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771**

2 May 2006

Regulation (EC) No 460/2004 – European Network and Information Security Agency – Choice of legal basis – Scope of Article 95 EC (now Article 114 TFEU) – Article 95 EC (now Article 114 TFEU) as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market – Meaning of the expression ‘measures for the approximation’ – Conferral on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised – Establishment of an EU Agency as an appropriate means of preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market

**Case C-436/03 *Parliament v Council* [2006] ECR I-3733**

2 May 2006

Action for annulment – Regulation (EC) No 1435/2003 – European Cooperative Society (SCE) – Choice of legal basis – Article 95 EC – Articles 95 EC (now Article 114 TFEU) – Article 308 EC (now Article 352 TFEU) – Preventing the emergence of obstacles to trade resulting from heterogeneous development of national laws

**Case C-533/03 *Commission v Council* [2006] ECR I-1025**

26 January 2006

Regulation (EC) No 1798/2003 – Administrative cooperation in the field of value added tax – Choice of legal basis – Article 95(1) EC (now Article 114(1) TFEU) applies only if the Treaty does not provide otherwise – ‘Fiscal provisions’ expressly excluded from the scope of Article 95 EC (Article 95(2) EC, now Article 114 (2) TFEU) – Exchange of information contributing to the approximation of national procedural provisions in tax matters – Article 95(1) EC constitutes as the correct legal basis

**Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553**

6 December 2005

Foods – Regulation (EC) No 2065/2003 – Smoke flavourings – Authorisation valid throughout the EU – Choice of legal basis – Article 95 EC (now Article 114 TFEU) as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market – Meaning of the expression ‘measures for the approximation’ – Conferral on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised – Choice of the most appropriate harmonisation technique where the proposed approximation requires physical, chemical or biological analyses to be made and scientific developments in the field concerned to be taken into account – No incidental effect of harmonising the conditions of the internal market – Adoption of a positive list of substances authorised throughout the EU subject to two conditions Elements of the harmonising measure determined in the basic act – Mechanism for implementing those elements must be designed in such a way that it leads to a harmonisation

**Joined Cases C-281/03 and C-282/03 *Arch Timber Protection* [2005] ECR I-08069**

15 September 2005

Directive 76/769/EEC – Dangerous substances – Directive based on Article 100 EEC Treaty (now Article 114 TFEU) – Wood preservatives containing copper, chrome and arsenic – Ability of the Member States to lay down additional conditions for the placing on the market and use of a biocidal product the use of whose active substance is restricted by the directive in accordance with Article 95(4) or (5) EC (now Article 114(4) or (5) TFEU)

**Joined Cases C-154/04 and C-155/04 *National Association of Others e.a.* [2005] ECR I-6451**

12 July 2005

Approximation of laws – Food supplements – Directive 2002/46/EC – Prohibition on trade in products not complying with the directive – Validity – Legal basis – Article 95 EC (now Article 114 TFEU) – Where conditions regarding Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made – High level of human health protection to be ensured in the definition and implementation of all EU policies and activities (now Article 168(1) TFEU) – Achieving internal market harmonisation requires that a high level of protection of human health should be guaranteed (now Article 114(3) TFEU) – Articles 28 EC and 30 EC (now Article 34 to 36 TFEU) – Regulation (EC) No 3285/94 – Principles of subsidiarity, proportionality and equal treatment – Right to property – Freedom to pursue an economic activity – Obligation to state reasons

**Case C-210/03 *Swedish Match* [2004] ECR I-1893**

14 December 2004

Directive 2001/37/EC – Manufacture, presentation and sale of tobacco products – Article 8 – Prohibition of placing on the market of tobacco products for oral use – Validity – Where conditions regarding Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made – High level of human health protection to be ensured in the definition and implementation of all EU policies and activities (now Article 168(1) TFEU) – Achieving internal market harmonisation requires that a high level of protection of human health should be guaranteed (now Article 114(3) TFEU) Interpretation of Articles 28 EC to 30 EC (now Article 34 to 36 TFEU) – Compatibility of national legislation laying down the same prohibition

**Case C-434/02 *Arnold André GmbH & Co. KG* [2004] ECR I-11825**

14 December 2004

Directive 2001/37/EC – Manufacture, presentation and sale of tobacco products – Article 8 – Prohibition of placing on the market of tobacco products for oral use – Validity – Where conditions regarding Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made – High level of human health protection to be ensured in the definition and implementation of all EU policies and activities (now Article 168(1) TFEU) – Achieving internal market harmonisation requires that a high level of protection of human health should be guaranteed (now Article 114(3) TFEU)

**Case C-338/01 *Commission v Council* [2004] ECR I-04829**

29 April 2004

Directive 2001/44/EC – Choice of legal basis – Article 95(1) EC (now Article 114(1) TFEU) applies only if the Treaty does not provide otherwise – ‘Fiscal provisions’ expressly excluded from the scope of Article 95 EC (Article 95(2) EC, now Article 114 (2) TFEU) – Interpretation of the words ‘fiscal provisions’ – All areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules – Detailed arrangements for the collection of taxes of whatever kind cannot be disassociated from the system of taxation or imposition of which they form part – Article 93 EC and Article 94 EC (now Article 113 and 115 TFEU) as relevant legal bases

**Case C-3/00 *Denmark v Commission* [2003] ECR I-02643**

20 March 2003

Approximation of laws - Directive 95/2/EC – Use of sulphites, nitrites and nitrates as food additives – Protection of health - Asthmatic reactions – Stricter national provisions - Conditions of application of Article 95(4) EC (now Article 114(4) TFEU) – No application of the principle of the right to be heard – Maintenance of more stringent national provisions not justified by a problem specific to the notifying Member State – National risk assessment different from that accepted by the Community legislature – Irrelevance of the criterion of the absence of technological need

**Case C-512/99 *Germany v Commission* [2003] ECR I-845**

21 January 2003

Directive 67/548 – Labelling of dangerous substances - Mineral wool - More stringent national provisions – Validity of a Commission decision based on Article 95(6) EC – Application *ratione temporis* of Article 95 EC (now Article 114 TFEU) - Duty of cooperation – Conditions for the approval of new national provisions

**Case-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453**

10 December 2002

Directive 2001/37/EC - Manufacture, presentation and sale of tobacco products - Validity - Legal basis - Articles 95 EC and 133 EC (now Articles 114 and 207 TFEU) - Interpretation - Applicability to tobacco products manufactured in the Community and intended for export to non-member countries – Where conditions regarding Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive

factor in the choices to be made – High level of human health protection to be ensured in the definition and implementation of all EU policies and activities (now Article 168(1) TFEU) – Achieving internal market harmonisation requires that a high level of protection of human health should be guaranteed (now Article 114(3) TFEU)

**Case C-377/98 *Netherland v Parliament and Council* [2001] ECR I-7079**

9 October 2001

Annulment - Directive 98/44/EC - Legal protection of biotechnological inventions - Legal basis - Article 100a of the EC Treaty (Article 95 EC, now Article 114 TFEU), Article 235 of the EC Treaty (Article 308 EC, now Article 352 TFEU) or Articles 130 and 130f of the EC Treaty (now Articles 157 EC and 163 EC, Article 173 and 179 TFEU) - Subsidiarity - Legal certainty - Obligations of Member States under international law - Fundamental rights - Human dignity - Principle of collegiality for draft legislation of the Commission

**Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-08419**

5 October 2000

Directive 98/43/EC - Advertising and sponsorship of tobacco products - Legal basis - Article 100a EC Treaty (Article 95 EC, now Article 114 TFEU) - Prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising – Member States’ right to lay down stricter requirements concerning the advertising or sponsorship of tobacco products – Absence of the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services – No elimination of distortions of competition

**Case C-269/97 *Commission v Council* [2000] ECR I-2257**

4 April 2000

Regulation (EC) No 820/97 - Article 43 EEC Treaty (now Article 43 TFEU) System for the identification and registration of bovine animals and regarding the labelling of beef and beef products - Bovine spongiform encephalopathy - Legal basis - Health protection objective as a constituent part of the objectives of the common agricultural policy – Irrelevance of Article 100 EEC Treaty (now Article 43 TFEU)

**Case C-209/97 *Commission v Council* [1999] ECR I-8067**

18 November 1999

Regulation (EC) No 515/97 – Protection of the financial interest of the Community – Fight against fraud in the context of the customs union and the common agricultural policy – Legal basis – Article 235 of the EC Treaty (Article 308 EC, now Article 352 TFEU) or Article 100a of the EC Treaty (Article 95 EC, now Article 114 TFEU) - Incidental effect of harmonising market conditions within the Community

**Case C-319/97 *Antoine Kortas* [1999] ECR I-03143**

1 June 1999

Article 100a(4) of the EC Treaty (now, Article 114 (4) to (9) TFEU) – Directive 94/36/EC on colorants in foodstuffs – Notification of national legislation derogating therefrom – No confirmation from the Commission – Direct effect of the directive

**C-112/97 *Commission v Italy* [1999] ECR I-1821**

25 mars 1999

Failure by a Member State to fulfil its obligations - Directive 90/396/EEC - Heaters - Complete harmonisation impedes the application of Article 36 TFEU - Complete harmonisation in the field concerned presupposes compliance with Article 114(4) or (5) TFEU procedure

**Case C-127/97 *Willi Burstein* [1998] ECR I-6005**

1 October 1998

Directive 76/769/EEC - Restrictions on the marketing and use of certain dangerous substances and preparations – Scope of ambit of the directive - PCP-treated products - Article 100a(4) EEC Treaty

**Case C-302/94 *British Telecommunications* [1996] ECR I-6417**

12 December 1996

Telecommunications - Directive on open network provision - Special or exclusive rights - Directive on leased lines - Provision of a minimum set of leased lines

**Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755**

12 November 1996

Council Directive 93/104/EC concerning certain aspects of the organization of working time - Protection of the health and safety of workers - Minimum requirements - Action for annulment - Ancillary effects on the establishment and functioning of the internal market - Article 118a EEC Treaty as the appropriate legal base

**Case C-271/94 *Parliament v Commission* [1996] ECR I-1689**

26 March 1996

Council Decision 94/445/EC – Edicom – Interoperability of national networks for statistics relating to the trading in goods between Member States – Legal basis – Ancillary effects on the functioning of the internal market – Exclusion of Article 100a(4) EEC Treaty

**Case C-426/93 *Germany v Council* [1995] ECR I-3723**

9 November 1995

Action for annulment - Regulation (EEC) N° 2186/93 on Community coordination in drawing up business registers for statistical purposes - Legal basis – Article 231 EEC Treaty basis – Ancillary effects on the functioning of the internal market – Exclusion of Article 100a(4) EEC Treaty

**Case C-350/92 *Spain v Council* [1995] ECR I-1985**

13 July 1995

Action for annulment - Council Regulation (EEC) N° 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products - Article 100a(4) EEC Treaty – Industrial property rights – Disparities existing between national rules liable to hinder the free movement of goods – Prevention of heterogeneous developments of national rules – Necessity to take into consideration the health of the consumers - Exclusion of Article 235 EEC Treaty (Article 308 EC, now Article 352 TFEU) and of Article 100 EEC Treaty (now Article 113 TFEU)

**Opinion 1/94 Commission [1994] ECR I-5267**

15 November 1994

Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) EC Treaty

**Case C-359/92 Germany v Council [1994] ECR I-3681**

9 August 1994

Action for annulment of measures - Directive 92/59/EEC on general product safety - Legal basis - Article 100a (now, Article 114 TFEU)

**Case C-187/93 Parliament v Council [1994] ECR I-2857**

28 June 1994

Regulation No 259/93 on shipments of waste – Relevant legal basis – Choice between the internal market legal basis and the environmental legal basis – Ancillary effects on the functioning of the internal market

**Case C-41/93 France v Commission [1994] ECR I-1829**

17 May 1994

Directive 76/769/EEC - Restrictions on the marketing and use of certain dangerous substances and preparations – Prohibition of Pentachlorophenol - Article 100a (4) – Decision of the European Commission – Statement of reasons (now Article 296 TFEU) – Exercise by the Court of justice of his powers of review

**Case C-155/91 Commission v Council [1993] ECR I-939**

17 March 1993

Framework Waste Directive – Directive intended to implement the principle that damage to the environment should be rectified at source – Relevant legal basis – Choice between the internal market legal basis (Article 100A EEC, now Article 114 TFEU) and the environmental legal basis (Article 130s EEC, now Article 192 TFEU) – Incidental effects on the functioning of the internal market – No effect

**Case C-70/88 Parliament v Council [1991] ECR I-4529**

4 October 1991

Radioactive contamination of foodstuffs as a result of the Tchernobyl accident - Regulation No 3954/87 laying down maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs - Article 31 of the European Atomic Energy Community Treaty (EAEG) – Only

incidental effect of harmonizing the conditions for the free movement of goods - Not an internal market measure based on Article 100a EC (Article 114 TFEU)

**Case C-300/89 *Commission v Council* [1991] ECR I-2867**

11 June 1991

Directive on waste from the titanium dioxide industry – Directive intended to eliminate distortions of competition in an industrial sector deriving from measures adopted individually by the Member States with a view to safeguarding the environment – Choice between the internal market legal basis (Article 100A EEC, now Article 114 TFEU) and the environmental legal basis (Article 130s EEC, now Article 192 TFEU) – Distortions of competition – Internal market legislation seeking a high level of environmental protection – Internal market procedure markedly more democratic than that laid down in Article 130s (now Article 192 TFEU) – Joint basis prejudicial to the Parliament's participation in the legislative process

## General Court

**Case T-198/12 R *Germany v Commission* [2013] nyr**

15 May 2013

Toys directive - Thresholds for antimoine, arsenic, baryum, lead, mercury – Refusal by the European Commission to fully approve more stringent national standards – Interlocutory proceedings – Admissibility – Urgence – Fumus boni juris – Wheiging of interests

**Case T- 526/10 *Inuit Tapiriit Kanatami e.a. v Commission* [2013] nyr**

25 April 2013

Trade in seal products – Regulation (EC) No 1007/2009 – Detailed rules for implementation – Regulation (EU) No 737/2010 – Prohibition on placing such products on the market – Exception in favour of Inuit communities – Plea of illegality – Legal basis – Article 114 TFEU - Subsidiarity – Proportionality – Misuse of powers

**Case T- 69/08 *Poland v Commission* [2010] ECR II-5629**

9 December 2010

Approximation of laws – Directive 2001/18/EC – – Deliberate release of genetically modified organisms – Placing on the market genetically modified organisms as or in products within the Community – National provisions derogating from a harmonisation measure – Commission decision rejecting those provisions – Not notified within the six-month period laid down in the first subparagraph of Article 95(6) EC (now Article 114(6) TFEU)

**Case T- 326/07 *Cheminova e.a. v Commission* [2009] ECR II-02685**

3 September 2009

Plant-protection products – Directive 91/414/EEC – Active substance ‘malathion’ – Non-inclusion in Annex I to Directive 91/414/EEC – Action for annulment – *Locus standi* – Admissibility – Evaluation procedure – Assessment by EFSA – Plea of illegality – Article 20 of Regulation (EC) No 1490/2002 – Submission of new studies – Article 8(2) and (5) of Regulation (EC) No 451/2000 – Legitimate

expectation – Proportionality – Equal treatment – Principle of sound administration – Rights of the defence – Principle of subsidiarity – Article 95(3) EC (now Article 114(3) TFEU)

**Case T-234/04 *Netherlands v Commission* [2007] ECR II-4589**

8 November 2007

Action for annulment – Decision 2004/01/EC – Dangerous substances – Authorisation by the Commission required to maintain notified national provisions – Position adopted by the Commission on the extent of harmonisation – Challengeable act – Inadmissibility

**Case T-182/06 *Netherlands v Commission* [2007] ECR II-1983**

27 June 2007

Approximation of laws – Derogating national provisions – Rejection by the Commission of a draft decree advancing the lowering of the EU limit on emissions of particulate matter produced – Emissions from new diesel-powered vehicles – Duty of care and to state reasons – Specificity of the notifying Member State’s problem in complying with the EU limits on concentrations of particulate matter in ambient air

**Joined Cases T-366/03 and T-235/04 *Land Oberösterreich* [2005] ECR II-4005**

Case 5 October 2005

Approximation of laws – National provisions derogating from a harmonisation measure – Ban on the use of genetically modified organisms in Upper Austria – Conditions for application of Article 95(5) EC (now Article 114(5) TFEU)