

## Swedish case in the ECJ

### Social rules curb free movement of chemicals

The Court of Justice (ECJ) ruling of 11 July 2000 in case C-473/ 98 *Kemikalieinspektionen v Toolex Alpha AB* raises key issues of principle.

It stemmed from a referral for a preliminary ruling from a Swedish administrative court relating to Sweden's Chemical Products Act 1985/426. Under this, regulations can be enacted to ban the marketing of chemicals on health or environmental protection grounds. Trichloroethylene was banned on 1 January 1996, although the chemicals inspectorate can grant exemptions.

A Swedish company, Toolex Alpha AB, was stopped from using trichloroethylene in March 1997 for failing to submit a plan showing when and how it would be replaced by a less dangerous substance. The chemicals inspectorate decision was appealed to an administrative court, which set the decision aside on the grounds that the Swedish law was not compliant with Community legislation. The chemicals inspectorate appealed, and the Administrative Court of Appeal made a reference for a preliminary ruling.

In its observations to the Court, the Commission took issue with the Swedish regulations, claiming that they effectively applied tighter classification rules to trichloroethylene than Directive 67/548, that Sweden was in breach of the procedure laid down in article 31 of the Directive and the article 30 obligation to allow the marketing of substances which meet the Directive's requirements.

The Commission argued that the existing Community rules (the 1967 Directive, the 1976 Directive on marketing restrictions and the 1993 Directive on risk evaluation of existing substances) between them rendered any national prohibition of trichloroethylene use superfluous or disproportionate.

In its judgement of 11 July 2000, the ECJ followed Advocate-General Mischo's Opinion of 21 March 2000. It rejected the Commission's arguments and focused essentially on the following points.

1. The Court said that the relevant Community legislation essentially comprised three instruments : the Directive of 27 June 1967 on the classification, packaging and labelling of dangerous substances, the Directive of 27 July 1976 relating to restrictions on the marketing and use of certain substances, and the Regulation of 23 March 1993 on the evaluation and control of the risks of existing substances. The Court established that far from harmonizing all the provisions on dangerous substances, these three directives in fact deal with specific aspects. The Classification Directive merely lays down information

requirements for the general public - it does not harmonize the conditions for marketing. The Marketing Directive merely states minimum requirements for a limited number of substances. The Court said that "it clearly presents no obstacle to the regulation by the Member States of the marketing of substances that do not fall within its scope, such as trichloroethylene". Finally, the Risk Evaluation Regulation sets out to establish Community procedures for evaluating risks so as to identify substances which require immediate attention at Community level. It does not preclude national risk evaluation and management rules. In the absence of specific Community rules on trichloroethylene, therefore, Sweden was able to enact national provisions which take account of the risks related to it.

2. The Court held that the Swedish ban was justified under article 36 of the EC Treaty (now, after amendment, article 30). The Swedish regulation is undeniably a restriction on trade, but purely to protect the health and life of humans or the environment. The Swedish government put forward scientific evidence about the dangers of exposure to trichloroethylene. It "affects the central nervous system, the liver and kidneys. The fact that it is highly volatile increases the chances of exposure in circumstances that might result in damage to health. Inhaling the substance can cause fatigue, headaches, and difficulties with memory and concentration" (point 41 of the judgement). The Court endorses the Advocate General's submissions on a general principle of substitution. He was clear that "none of these (occupational health) Directives cover the case in hand, but what they have in common is that each places an obligation on the employer to implement measures to protect workers, in particular based on a general principle of prevention which consists in eliminating or reducing risks by replacing a dangerous substance with other less dangerous ones. The substitution principle is not unknown to Community law, so it is difficult to see, where a risk to health and the environment is established, why a national legislator should not base its legislation under article 36 of the Treaty on a recognized principle of Community law" (unofficial translation). The ruling expressly refers to the Framework Directive 1989 and the Carcinogens Directive 1990 to elicit a "substitution principle". As far as we are aware, this is the first ruling ever to entrench a general principle drawn from social directives to justify national measures restricting the free movement of goods.

3. Finally, the ECJ found that the Swedish regulation does not breach the proportionality principle, because it allows exemptions, provided exposure to trichloroethylene is not at unacceptable levels. ■

Laurent Vogel - lvogel@etuc.org