

Online marketing of tobacco products

09 April 2021 | Contributed by [Westerberg & Partners Advokatbyrå Ab](#)

Introduction

Key legislative issues

Facts

Decision

Comment

Introduction

Following the introduction of the EU Tobacco Products Directive (2014/40/EU),(1) a review of tobacco legislation resulted in the promulgation of a new Act on Tobacco and Similar Products (LTLP). Despite being heavily regulated, the marketing of tobacco products is rarely subject to judicial review. This article discusses a Patent and Market Court judgment which clarifies the rules which apply to the online sale of tobacco products under the LTLP.

Key legislative issues

Snus, a tobacco product that is typically placed under the upper lip, dates back to the 18th century in Sweden. This longstanding tradition is likely the reason that Sweden was granted an exemption from the general EU prohibition of the sale of tobacco for oral use.

The LTLP prohibits the marketing of tobacco products with the exceptions of:

- marketing that is featured in printed publications or communications covered by the freedom of press and freedom of speech acts;
- marketing that consists solely of offering tobacco products for sale; and
- marketing that is carried out inside a point of sale, where such marketing:
 - comprises commercial communication;
 - is unintrusive; and
 - does not encourage tobacco consumption.

The third exception is often presented as a requirement of 'particular moderation', which means that the marketing of the product must contain no laudatory statements and include only neutral (and relevant) information regarding the product and price.

Facts

Before the Patent and Market Court, the Swedish Consumer Ombudsman (SCO) sought an injunction against a company that sold snus online and through emails to previous customers. The company had used statements such as:

- "[o]rder again"; and
- "[t]ime for something new? See our latest offers here!".

The SCO alleged that such marketing did not fulfil the 'solely offer tobacco for sale' requirement and therefore should be prohibited. The SCO also alleged that the LTLP's prerequisite that permitted marketing must be carried out inside a point of sale did not apply to online shops or sales through emails.

Decision

The Patent and Market Court first examined whether the statements on the website and in the emails could be considered as marketing that consisted solely of offering tobacco products for sale. The court noted that the LTLP does not define an 'offer' but that the provision, being an exemption to the general marketing prohibition, should be interpreted restrictively. Therefore, compliant marketing should include only necessary information (eg, the product's price).

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The website in this case included statements such as "Snusbolaget – cheap snus online", which was centrally positioned and presented in a bold font. It also featured a pop-up window that contained a discount offer. The emails included an option for recipients to purchase products directly, without having to go via the website, but also included the aforementioned marketing statements. According to the court, such statements exceeded the information necessary for a consumer to make an informed purchasing decision. Therefore, it found that the second LTLP exemption applied neither to the statements made on the website nor to the emails.

Regarding the exemption for commercial communications at points of sale, the court noted that it was unclear from the LTLP, or the preparatory works thereto, whether the term 'point of sale' relates only to physical stores. It also noted that retail licences may be granted for online sales and that a government bill states that the online marketing of tobacco products should be allowed, provided that it constitutes only an offer for sale. Lacking a clear legal provision and unambiguous case law, the court therefore held that digital points of sale are not excluded from the point of sale exemption. The court expressly stated that it had considered the fact that the injunction under a penalty fine had been made against a private subject.

However, the court found that the marketing statements in this case (ie, "[o]rder again" and "[t]ime for something new? See our latest offers here!") did not fulfil the particular moderation requirement. The defendant was thus enjoined from using such marketing statements and other statements with essentially the same meaning.

Comment

The statements targeted by the SCO clearly go beyond neutral information regarding the products' properties and price. Therefore, the court's conclusion that such statements did not fall within the offers for sale exemption is reasonable. A finding to the contrary would have resulted in commercial communications online being allowed to a greater extent than marketing statements in physical stores.

It would be interesting to see the result of a case that involved a product description which included both neutral information (eg, a product's flavour) and statements that could be considered laudatory – in particular, whether a court would consider the marketing description as a whole or whether parts of such description could be considered an offer for sale.

The judgment establishes that the marketing of tobacco products online and via email is permissible, provided that it fulfils the general requirement of being moderate. The court's assessment of the marketing statements in this case aligns with previous case law regarding the marketing of tobacco products and the particular moderation requirement.

Unfortunately, the Patent and Market Court has often been the first and only instance in similar cases. This may be because the SCO often targets marketing statements that are far from moderate and thus obtains the sought injunctions even where the court disagrees with its first-hand line of arguments (in this case, the court disagreed with the SCO's argument that none of the exemptions in the LTLP applied but still considered the marketing statements unlawful).

However, companies targeted by the SCO should consider that the injunctions generally cover only specific marketing statements. The costs for appeal – considering the unlikelihood of completely overturning the first-instance court's judgment – would perhaps be considered unwarranted. At the time of writing, the judgment had not been appealed.

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Endnotes

(1) Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.