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Judgment of the Court in Case C-122/21 | Get Fresh Cosmetics

Effervescent bath bombs: Member States may, under certain conditions, restrict the distribution of cosmetic products which, because they have the appearance of foodstuffs, may be mistaken for foodstuffs and cause health risks

The interest in protecting the health and safety of consumers may, in certain cases, prevail over the right to market certain cosmetic products

Get Fresh Cosmetics Limited markets certain cosmetic products in Lithuania via a website. The Lithuanian authorities carried out an inspection and found that some of those products, namely several types of bath bombs, had the appearance of foodstuffs, posed a risk of poisoning to consumers, in particular children, and compromised consumer safety. The Lithuanian authorities ordered Get Fresh Cosmetics to withdraw them from the market.

The Supreme Administrative Court of Lithuania, hearing the case between Get Fresh Cosmetics and the Lithuanian authorities in this matter at last instance, has asked the Court of Justice for clarification on the interpretation of Directive 87/357/EEC¹ in order to determine whether it must be shown by objective and substantiated data that the placing in the mouth of products which, although not foodstuffs, have the appearance of foodstuffs, may entail risks to health or safety.

In its judgment delivered today, the Court recalls, first of all, that Directive 87/357 applies to products which, appearing to be other than they are, endanger the health or safety of consumers.

The Court further notes that Directive 87/357 is, according to its wording, aimed at products which endanger the health or safety of consumers and which, while not being foodstuffs, have the appearance of foodstuffs and the consumption of which may entail risks such as suffocation, poisoning, or the perforation or obstruction of the digestive tract. However, the Court emphasises that the wording of the provisions of that directive does not establish a presumption that products which may be confused with foodstuffs are dangerous.

The Court observes in that regard that Directive 87/357 provides for a prohibition on the marketing, import, manufacture or export of certain products where four cumulative conditions, imposed by Article 1 thereof, are met, namely, first, the product must be a non-food product possessing the form, odour, colour, appearance, packaging, labelling, volume or size of a foodstuff; second, the characteristics referred to in the preceding point must be such that it is likely that consumers, especially children, will confuse the product for a foodstuff; third, it must be likely that, in consequence, consumers will place that product in their mouths, suck or ingest it, and fourth, placing the product in the mouth, sucking it or ingesting it may entail risks such as suffocation, poisoning, or the perforation or

¹ Council Directive 87/357/EEC of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers (OJ 1987 L 192, p.49).

obstruction of the digestive tract.

However, the Court finds that Directive 87/357 does not contain a provision establishing a presumption that products, appearing to be other than they are, are dangerous, nor does it contain, in particular, a presumption that placing such products in the mouth, sucking or ingesting them entails such risks, but that, on the contrary, the EU legislature requires, in respect of the latter condition, that such risks be assessed on a case-by-case basis.

Next, the Court considers that such a presumption is contrary to the fact that Directive 87/357 does not impose a prohibition on the marketing of products likely to be confused with foodstuffs, but is intended to eliminate obstacles to free movement resulting from national provisions relating to such products while ensuring the protection of the health and safety of consumers.

Furthermore, the Court states that the national authorities must assess, in each individual case, the objective characteristics of the products concerned in order to determine whether the four conditions imposed by Article 1 of Directive 87/357/EEC are met, which would justify the adoption of a decision prohibiting their marketing.

The Court also emphasises that the national authorities must, when making that assessment, take into account the vulnerability of individuals and specific groups of consumers, including in particular children.

According to the Court, the provisions of Directive 87/357 do not, however, require the national authorities to demonstrate, by means of objective and substantiated data, that products which have the appearance of foodstuffs may be confused with such foodstuffs or that the risks to health and safety which that confusion may entail have been established.

Thus, the Court considers that EU law does not permit the imposition of an obligation to demonstrate the certainty that such risks will materialise, as this would not ensure a fair balance between the free movement of products and consumer protection.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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