Nafcafe ltd – look at there failing marketing problem

Business, Marketing

Nafcafe Ltd is a UK producer of instant coffee. Recently, it has been experiencing the following problems in marketing its products within the EC.

In the Netherlands, Nafcafe discover that instant coffee is subject to a higher rate of sales tax than ground coffee. A market analysis reveals that 70% of instant coffee is imported whereas 80% of ground coffee, bought by Dutch consumers, is produced by Dutch firms. The Dutch government seeks to justify the differential on the ground that Dutch firms support coffee plantations in developing countries and other producers should be encouraged to follow suit by means of tax incentives.

The Swedish Government introduces a law which requires manufacturers of allfoodand drink stuffs to use biodegradable packaging. Nafcafe uses plastic containers, which are not biodegradable, and investing in new packaging would entail considerable expenditure. However they believe that their packaging can be recycled.

Nafcafe set up a website so as to enable consumers to purchase its products online. The site advertises that Nafcafe will ship to any country. However, Nafcafe are contacted by the German consumer protection authorities who inform them that, in order to sell products in Germany, any producer of food or drink must establish a distribution warehouse in Germany. This is justified on the grounds that it is necessary for the adequate monitoring and inspection of imported foodstuffs.

Following concerns about thehealtheffects of consuming too much caffeine, the Council and the European Parliament, acting on a proposal from the Commission, introduce a directive on labelling requirements for coffee

products. This provides that coffee products must display a prominent warning to the effect that 'caffeine can damage your health'. The preamble to the Directive justifies EC intervention in the following terms:

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof...

Whereas:

(1)... the essential aim of any rules governing the production, distribution and use of any foodstuffs, such as coffee products, must be to safeguard public health.

(2) However, this objective must be attained by means which will not hinder the development of trade in coffee products within the Community.

(3) Trade in coffee products within the Community is hindered by disparities between certain national provisions, in particular between provisions relating to labelling

(4) Such hindrances must accordingly be removed by means of approximating provisions in this field

Nafcafe maintain that there is insufficient scientific evidence, regarding the adverse effects of caffeine on health, to justify such a measure. Nevertheless the UK Government implement the Directive by means of the Coffee Product Labelling Regulations. When Nafcafe fail to comply with the new labelling requirements they are prosecuted before the magistrates' court.

(a) Advise Nafcafe Ltd as to the legality of the measures taken by each of the above states;

(b) Advise Nafcafe as to the legality of the legislation under which they have been prosecuted.

Your answers should include reference to applicable procedures and remedies.

The aim of the free market is to absolve customs, duties, charges and other financial restrictions. The objective is to implement the free circulation of goods within member states and to promote unlimited trade by removing import and export restrictions. The free movement of goods is one of the most important factors, along with people, services and capital.

The Nefcafe is exporting instant coffee to the Netherlands, Sweden ; Germany, all of which are member states within the EU. This requires a definition of goods, which are not defined in the treaty. However, in the case of Commission v Italy (Re: Export Tax on Art Treasures, No. 1)1 it was stated that goods were defined as anything being capable of amoneyvalue, which can be bought and sold. Here, goods are in the form of instant coffee, produced by the UK and exported to countries within the EC.

This part of the question requires an analysis of internal taxation, with regards to Nefcafe. Instant coffee is imported by the Netherlands and is subject to a higher rate of sales tax (indirect tax) in comparison to ground coffee, which is produced domestically. Here the Netherlands is imposing a tariff barrier on goods coming into their country, namely imported goods.

The ECJ held that a tax constitutes a customs duty if the manner in which it is imposed differs between domestic and imported goods2, this is the situation in the scenerio.

Internal taxation originates from Article 90 EC. Article 90 prohibits internal taxation being imposed directly or indirectly of goods from member states, on similar products. The article effectively prevents a member state from imposing a tax on products which discriminate against imported products or inadvertently protect domestic products.

To establish whether or not there isdiscrimination, which is contrary to Article 90, it will depend not only on the rate of charge but also the comparison between the products involved. Article 90 will account for an internal tax to be imposed, providing it is the equivalent of an internal tax and is not discriminatory in its application3. In Denkavit v France4 it was held that, the tax to which an imported product is subject must be imposed at the same rate on the same product. This is clearly not the case here.

Article 90 sets a double test. Article 90 (1) EC states that there must beequalityof fiscal treatment between similar imported and domestic products. And also states that internal taxation must avoid indirect protection to other competing products.

The term similar has been interpreted widely and was defined in the case law5, as those which meet the same needs, from the point of view of consumers and are broadly in competition with each other. It can be argued that ground coffee and instant coffee are similar products because they are

both forms of coffee but are produced differently. In Commission v Denmark (Re: taxation of wine) the ECJ held that fruit wine and grape wine were similar products, the former was domestically produced whereas the latter was imported. A tax was discriminated between these products therefore was contrary to Article 90.

Examining the market analysis given, instant and ground coffee are in competition with each other because the proportion which is sold is extremely similar. However, because instant coffee is taxed higher it is put an unfair advantage, this is why sales of it are not as high as ground coffee. It is not necessary to show a protective effect statistically, but only that the tax mechanism is likely through inherent characteristics to bring about a protective effect6.

The ECJ has permitted higher taxation on products even where the categories of products are largely imported, if the differential can be objectively justified, provided the economic course of actions are compatible with the requirements of EC law and there are exhaustive rules to prevent discrimination and protection7.

The Dutch government's justification cannot be objectively justified on the grounds that they are imposing a higher rate of sales tax specifically applicable to imported goods, in order to support coffee plantations. This is discriminatory and contrary to EC law. However, they are encouraging companies to follow suit by offering them tax incentives if they do support the coffee plantation.

Sweden's introduction of a law requiring manufacturers to use biodegradable packaging could constitute a breach of Article 28 EC. This is because it has the power to restrict the number of imports coming into the country. Article 28 EC is designed to eliminate barriers such as pecuniary and non pecuniary restrictions.

The Swedish government's requirement amounts to a measure having equivalent effect to a quantative restriction (MEEQR)8. This is justified because although it is not restricting the amount of goods into the country, it is trying to make it more difficult for Nefcafe to import its products into Sweden9.

Sweden's restriction represents a selling arrangement under Article 28 EC. This is because it requires the packaging of the product to conform to their regime rather than altering the features of the coffee itself10. However, the ECJ in the case of 'Keck'11 excluded selling arrangements from the ambit of Article 28, provided, they affected both domestic and imported products, in law and in fact, in exactly the same manner. This is true to the scenario because all manufacturers are affected.

The concept of a MEEQR has been given wide interpretation by the ECJ. It has been divided into measures which are distinctly applicable and those which are indistinctly applicable.

Distinctly applicable measures apply to imported goods whereas indistinctly applicable measures are applicable to both domestic and imported goods.

Directive 70/50 gives us non binding guidelines to the interpretation of Article 28. Article 3 of the directive deals with indistinctly applicable measures and the Swedish government requires all manufacturers to use biodegradable packing, therefore, considered to be an indistinctly applicable measure. Such measures as contrary to Article 28 EC if they do not satisfy the principles of proportionality i. e. if the same aim cannot be attained by other measures which are less of an obstacle to trade.

The ECJ introduced its own definition of a MEEQR in the case of Procureur du Roi v Dassonville12. This is referred to as the 'Dassonville formula', the formula stipulates that all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra community trade are to be considered as MEEQR. Thus, it is not necessary to show an actual affect on trade between member states as long as they have the potential of such affects.

In Cassis de Dijon13, the Dassonville formula was extended. Under the '1st Cassis principle' which states that certain measures within the Dassonville formula will not breach Article 28, if they are necessary to satisfy the mandatory requirements of public interest. This is referred to as the 'rule of reason'. Mandatory requirements under Cassis are non - exhaustive unlike those under Article 30, and include the protection of public health, consumer protection and via case law, theenvironment.

Here, Sweden may argue that the requirements of biodegradable packaging are necessary on the grounds of a mandatory requirement of benefiting the environment. A similar occurrence arose in case law14. Here Danish

legislation required drinks to be sold in returnable containers to help reduce litter. It was held that national legislation designed to protect the environment may be regarded as justifying intra - EC trade restrictions. Although, in this case, the measures were justifiable, in principle, certain details of the scheme were unnecessarily restrictive and could not therefore be justified.

However, Sweden's mandatory requirement must not only be justified by an objective public interest taking precedence over the free movement of goods, but is also subject to a further requirement. That they must be justified and proportionate i. e. necessary to achieve the result. Also, that there are no common system of rules and they must neither be arbitrary discrimination nor a disguised restriction on trade.

Moreover, this requirement is not proportionate, although Nefcafe's packaging is not biodegradable; they believe it is recyclable, which is environmental friendly. If Sweden's sole purpose of introducing the law on environmental grounds is to maintain the environment, then they should accept Nefcafe's packing to be adequate to satisfy their requirement.

Another reason why Sweden's requirement is disproportionate is because it means that, Nefcafe will incur considerable expenditure because they need to alter their products packaging. This could prove to be a barrier to the free movement of goods and impede imported goods coming into Sweden, thus, breaching EC law.

Sweden also has no scientific evidence to prove that Nefcafe's packing is not environmentally friendly. In the absence of scientific knowledge a member state can implement its own provision with regards to certain products. However, these provisions should not hinder the free movement of goods or services.

The basic rule in Article 28 is referred to here. Article 28 states that all products which have been produced and commercialised in one member state, in accordance with the legal provisions of that state must be admitted into all other member states, each one recognising the legal provisions of the first member state. This is referred to as the concept of 'mutual recognition'. The principle of mutual recognition was reiterated in Cassis and is referred to as 'the second Cassis principle'.

In relation Nefcafe being informed that they must establish a warehouse of distribution, to sell their goods in Germany, constitutes a MEEQR. This requires analysis as above, regarding Sweden. This is because the requirement is a barrier to trade. It also entails a discussion of the freedom to provide services.

Article 49 EC deals with the right to provide services. The provision states that if a company is 'established' in one member state and is providing services of an industrial, commercial or professional nature in another member state, like Nefcafe, the company is within its rights.

Under Article 43 EC, a company has a right to establish themselves in another member state. However, Nefcafe does not have to have an actual

establishment in Germany, as long as it has a 'registered office, central administration or principle place of business within the Community'. Nefcafe will have satisfied this requirement, found in Article 48 (1) EC, if they have a base in the UK. Therefore, they are in breach of article 43 EC by requiring Nefcafe to have a distributional warehouse.

Buying online is an establishment and constitutes a network of services. The right to provide services has been described by the ECJ as 'fundamental community rights'. Germany, by imposing this restriction is hindering the free movement of services to others within the member states, effectively restricting access to the market.

The ECJ has ruled that discriminatory rules are prohibited, but any rules which are liable to prohibit or otherwise impede persons providing a service must satisfy the criteria that they be justified and proportionate. Measures which have an adverse effect on inter- state trade, will fall outsider Article 49 EC even if they are not discriminatory15.

Germany's justification is not proportionate because it is in breach of Article 43 EC and Article 49 EC. Under articles 46 and 55 EC derogations are justifiable on the grounds of public policy, pubic health and public security. The adequate monitoring and inspection of food stuffs may have fallen under protection of public health, but because there are not any harmful foodstuffs, this is not applicable. Also, if the UK have got a licence or their goods have been monitored at the border Germany will be in breach if it requires further inspection.

Nefcafe is able to bring a case against the Netherlands, Sweden and Germany. This will be perused in the national courts. This will be by direct effect as seen in Van Gend en Loos16 in relation to breaches of EC law.

Based on the case of Factortame, the use of Article 234 is applicable here. Due to the fact that it is not clear why the breaches have been justified. If Nefcafe are waiting for a declaration to see if EC law and national law are compatible then the member state is still able to impose the factors. An injunction may be needed because an interim relief is not as strong with regards to the benefit in Factortame Ltd v. Secretary of State for Transport (No. 2)17.

However, Nefcafe can still export to other member states. If the enforcement is sustained then Nefcafe may be entitled to compensation in the form of vertical indirect effect18.

Nefcafe may not want to take all the member states to court because it is difficult and it may be easier to ask the UK to take action using Article 227 EC. However, this is not very likely because it is politically confrontational and not a method which they like to use.

Therefore, an application under Article 226 can be made. Nefcafe would have to write to them and ask them to take action against the breaches made by the member states. The Commission is a powerful body and will be able to insert pressure on the Governments. The Administration phase involving Article 230 would result in a full blown judicial case. If the member states ignore the ECJ regarding Article 226 / 227 EC, then daily fines will be

imposed upon them. The member states are not normally concerned regarding these fines, but if taxpayers find out what the situation is they will not be happy. In turn they will also exert pressure on the government.

If the Commission fails to take action, in which it has a duty to do, this will result in the breach of Article 232 EC an 'Omission to Act'. The Commission may then be challenged under Article 232 EC in failing to fulfil their duty. However, it is difficult to make the Commission act satisfactorily. Article 228 EC is afailureto act. If Nefcafe have lost money due to their incompetence then they can present this breach and recover damages from the Commission under Article 228 EC.

Political remedies subsist in that member states can put pressure on the Commission and the European Parliament. This is under Article 17 - 22, as a right to petition as a European Citizen. They can ask the European Parliament to give them answers from the Commission.

The member states can also get together politically as the Council of Ministers and ask the Dutch, Swedish and German governments as to why they are not letting Nefcafe import its products in their countries.