JUDGMENT OF THE COURT (Fifth Chamber)
30 April 1991 *

In Case C-239/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the French Cour de Cassation (Commercial, Financial and Economic Chamber) for a preliminary ruling in the proceedings pending before that court between

SCP Boscher, Studer et Fromentin

and

SA British Motors Wright and Others

on the interpretation of Articles 59, 30 and 36 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, G. C. Rodríguez Iglesias, Sir Gordon Slynn, F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of

— SA British Motors Wright and Others, by Jean-Pierre Hermant, of the Paris Bar,

* Language of the case: French.

— SCP Boscher, Studer et Fromentin, by Jean Consolo, of the Paris Bar,

— the Commission of the European Communities, by Étienne Lasnet, a member of its Legal Department, and Hervé Lehman, a French official seconded to the Commission's Legal Department under the scheme for exchanges with national officials, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument on behalf of SA British Motors Wright and Others and the Commission of the European Communities at the hearing on 5 March 1991,

after hearing the Opinion of the Advocate General at the sitting on the same day,

gives the following

Judgment

1 By judgment of 3 July 1990, which was received at the Court Registry on 31 July 1990, the French Cour de Cassation (Commercial, Financial and Economic Chamber) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 59, 30 and 36 of the EEC Treaty.

2 The questions were raised in proceedings between SCP Boscher, Studer et Fromentin, a firm of auctioneers ('commissaires-priseurs') operating in Paris, and SA British Motors Wright and Others, which sell luxury second-hand cars, concerning the prohibition of an auction sale.

3 Pursuant to Article 1(1) of the French Law of 25 June 1841 on public auction sales, sale by public auction may not be used as a habitual means of carrying on business. Article 1(3) provides that the voluntary retail sale by that means of any

second-hand goods or articles whatever belonging to or held by a trader who has not been registered for at least two years in the Registre de Commerce (Trade Register) and the Rôle des Patentes (Business Tax Roll) within the jurisdiction of the Tribunal de Grande Instance (Regional Court) in which the sale is to take place is also prohibited.

4 SCP Boscher, Studer et Fromentin was instructed by the German company Nado ('Nado'), whose registered office is in Hamburg, to sell by public auction on 6 November 1988 a number of second-hand vehicles some of which, according to the findings of the court before which an application for interim relief was initially brought, were collectors' items and some were high-priced vehicles of recent manufacture and low mileage. SA British Motors Wright and three other companies made an application to the Tribunal de Grande Instance (Regional Court), Paris, for an interim order prohibiting the sale pursuant to Article 1 of the Law of 25 June 1841. On the basis of that provision, on 4 November 1988 the court ordered the auctioneers not to proceed with the sale until it was proved that the owner or person in possession of the vehicles was entered in the trade register or the business tax roll pursuant to Article 1 of the Law of 25 June 1841. SCP Boscher, Studer et Fromentin appealed against that order, but it was confirmed the following day by a judgment of the Cour d'Appel (Court of Appeal), Paris. SCP Boscher, Studer et Fromentin brought a further appeal against that judgment before the Cour de Cassation.

5 It was in those circumstances that the national court referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 59 of the EEC Treaty, properly construed, applicable to occasional sales by public auction in a Member State, by a trader established in another Member State, of second-hand goods belonging to him?

2. If so, do conditions such as those laid down by the Law of 25 June 1841 constitute restrictions?

3. Is Article 30 of the EEC Treaty, properly construed, applicable to the sale by public auction of second-hand goods coming from another Member State subject to conditions such as those laid down by the Law of 25 June 1841?

4. If so, would it be possible to rely on the exception relating to public policy provided for in Article 36 of the EEC Treaty?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question (freedom to provide services)

7 The national court's first question seeks to determine whether or not legislation of a Member State which lays down the conditions governing the sale by a trader established in another Member State of goods belonging to him falls within the scope of Article 59 of the Treaty.

8 Such legislation, which concerns the conditions laid down for the marketing of goods traded between Member States, is subject to the provisions of the Treaty concerning the free movement of goods.

9 Pursuant to Article 60 of the Treaty, services provided for remuneration are considered to be 'services' within the meaning of the Treaty, in so far as they are not governed by the provisions relating *inter alia* to the free movement of goods.

10 Accordingly, it must be stated in reply to the first question that legislation of a Member State laying down the conditions governing the sale by a trader established in another Member State of goods belonging to him does not fall within the scope of Article 59 of the Treaty.

The second question

11 In view of the answer given to the first question, there is no need to give a ruling on the second question.

The third and fourth questions (free movement of goods)

12 These questions seek to determine whether or not national legislation which makes the sale by public auction of second-hand goods from another Member State conditional upon the prior entry of the undertaking which owns the goods offered for sale in the trade register at the place of sale is compatible with Articles 30 and 36 of the Treaty.

13 According to the principle laid down in the judgment in Case 8/74 *Dassonville* [1974] ECR 837, the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules that are capable of hindering intra-Community trade directly or indirectly, actually or potentially.

14 The Court has consistently held (judgments in Case 286/81 *Oosthoek* [1982] ECR 4575 and Case C-362/88 *GB-INNO* [1990] ECR I-667) that the possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction. In its judgment in Case 382/87 *Buet* [1989] ECR 1235, the Court stated that that finding applies, *a fortiori*, when the rules in question deprive the trader concerned of the possibility of using not a means of advertising but a method of marketing.

15 Moreover, the Court has held that legislation which causes undertakings established in another Member State to incur the additional expenditure involved in complying with the obligation to have a representative in the importing Member State must be regarded as a measure having an effect equivalent to a quantitative

restriction (judgments in Case 155/82 *Commission* v *Belgium* [1983] ECR 531 and Case 247/81 *Commission* v *Germany* [1984] ECR 1111).

16 National legislation that imposes on a seller the requirement of prior entry in the trade register at the place where the auction sale takes place is liable to impede the free movement of goods, since its effect is to require the owner of the goods either to use the services of a trader operating at the place of the sale or to refrain from selling goods by public auction.

17 Since the rules at issue apply without distinction to the sale of domestic and imported products, it is necessary to determine whether they may be justified by imperative requirements relating to the protection of consumers.

18 It has been contended that the requirement of prior entry of the seller in the trade register at the place of sale is necessary since otherwise the system of public auctions might not provide adequate safeguards for the consumer as to the origin and condition of an article which he purchases without the benefit of any period of reflection.

19 As the Court has made clear on several occasions, rules intended to satisfy a mandatory requirement must be proportionate to the goals pursued, and if a Member State has at its disposal less restrictive means of attaining the same goals it is under an obligation to use them.

20 The system of public auctions, as described in the documents before the Court, usually involves buyers who are specially informed; furthermore, there are sufficient safeguards for the consumer. In any event, it is possible to impose conditions which are capable of protecting consumers and have a less restrictive effect on the free movement of goods than the requirement of prior entry of the owner of the goods offered for sale in the trade register at the place of sale.

21 It follows that legislation of the kind referred to by the national court cannot be justified by mandatory requirements relating to the protection of consumers and, consequently, that it is incompatible with Article 30 of the Treaty.

22 Nor can such legislation be justified on grounds of public policy under Article 36 of the Treaty.

23 The goal purportedly pursued, namely prevention of the sale of stolen cars, may be attained by appropriate control measures, such as checking of the chassis number.

24 It must therefore be stated in reply to the questions submitted by the national court that national legislation which makes the sale by public auction of second-hand goods from another Member State conditional upon the prior entry of the undertaking which owns the goods offered for sale in the trade register at the place of the sale is incompatible with Articles 30 and 36 of the Treaty.

Costs

25 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the French Cour de Cassation (Commercial, Financial and Economic Chamber) by judgment of 3 July 1990, hereby rules:

(1) Legislation of a Member State laying down the conditions governing the sale by a trader established in another Member State of goods belonging to him does not fall within the scope of Article 59 of the Treaty.

(2) National legislation which makes the sale by public auction of second-hand goods from another Member State conditional upon the prior entry of the undertaking which owns the goods offered for sale in the trade register at the place of the sale is incompatible with Articles 30 and 36 of the Treaty.

Moitinho de Almeida Rodríguez Iglesias

Slynn Grévisse Zuleeg

Delivered in open court in Luxembourg on 30 April 1991.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber