JUDGMENT OF THE COURT (Grand Chamber)

13 July 2004 *

In Case C-262/02,

Commission of the European Communities, represented by H. van Lier, acting as Agent, with an address for service in Luxembourg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, acting as Agent, and K. Beal, Barrister,

intervener,

v

French Republic, represented by G. de Bergues and R. Loosli-Surrans, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by making television broadcasting in France by French television channels of sporting events taking place in other Member States conditional on the prior removal of advertising for alcoholic beverages, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC),

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann (Rapporteur), A. Rosas, C. Gulmann, J.-P. Puissochet and J.N. Cunha-Rodrigues (Presidents of Chambers), R. Schintgen, S. von Bahr and R. Silva de Lapuerta, Judges,

Advocate General: A. Tizzano,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 November 2003, at which the Commission was represented by H. van Lier and W.Wils, acting as Agent, the French Republic by G. de Bergues and R. Loosli-Surrans, and the United Kingdom by K. Manji and P. Harris, Barrister,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2004,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 16 July 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by making television broadcasting in France by French television channels of sporting events taking place in other Member States conditional on the prior removal of advertising for alcoholic beverages, the French Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

Legal background

Substantive rules

2 Law No 91-32 of 10 January 1991 on the campaign against smoking and alcoholism ('Loi Evin') (JORF of 12 January 1991, p. 6615) amended, inter alia, Articles L.17 to L.21 of the Code des débits de boissons et des measures contre l'alcoolisme (Code of licensed premises and measures against alcoholism), which restrict advertising for certain alcoholic beverages, namely beverages whose alcoholic content exceeds 1.2°.

3 According to those provisions television advertising for alcoholic beverages, whether direct or indirect, is prohibited and that prohibition is repeated in Article 8 of Decree No 92-280 of 27 March 1992, which was adopted to implement Article 27 of the Law of 30 September 1986 on freedom of communication and laying down the general principles concerning the rules applicable to advertising and sponsorship (JORF of 28 March 1992, p. 4313).

4 Other forms of advertising are, however, permitted by French legislation. Thus it is permissible, for example, to advertise alcoholic beverages in the press, on the radio (except at certain times) or in the form of posters and signboards, including on advertising hoardings placed in sports stadia, etc.

5 An infringement of the Loi Evin is classified as a 'délit' (misdemeanour) by French criminal law.

Procedural rules

6 According to the first paragraph of Article 42 of Law No 86-1067 of 30 September 1986 on the freedom of communication, the 'Loi Léotard' (JORF of 1 October 1986, p. 11755), it is for the Conseil supérieur de l'audiovisuel (the Audiovisual Authority, 'CSA') to ensure the application of the Loi Evin. In that context, the CSA may call on the distributors of television services to comply with their obligations and, where they do not comply with the requirements imposed on them, it may order administrative penalties against them. Furthermore, the CSA may refer any infringements committed by distributors to the Procureur de la République (Public Prosecutor).

Implementing measures

7 In 1995 the French authorities, that is to say the CSA and the Ministry for Youth and Sports, and the French television channels drew up a Code of Conduct, published in the *Bulletin Official du Ministère de la Jeunesse et des Sports*, on the interpretation of the rules of the Loi Evin so far as concerns their application to television broadcasting of sporting events taking place abroad (that is, live broadcasts or retransmissions) in which advertising for alcoholic beverages is visible, for example on advertising hoardings or on sports shirts, and which are, accordingly, likely to contain indirect television advertising for alcoholic beverages within the meaning of that law.

8 Although it is not legally binding, the Code of Conduct states that in the case of bi-national events taking place abroad, which are described in the Code as 'other events', French broadcasters and any other party subject to French law (referred to collectively as 'French broadcasters'), who do not control filming conditions, must use all available means to prevent the appearance on their channels of brand names of alcoholic beverages. Thus, a French broadcaster must, at the time when it acquires the retransmission rights, inform its foreign partners of the requirements of French law and the rules laid down by the Code of Conduct. Likewise, it must make inquiries, so far as is materially possible and before the sporting event is broadcast, of the holder of the retransmission rights about the advertisements which will be displayed at the venue where that event is to take place. Finally, the French broadcaster must use all the technical means available to avoid showing hoardings advertising alcoholic beverages.

9 However, in the case of multinational events taking place abroad French broadcasters are not to be suspected of complicity with respect to advertising appearing on the screen where they have no control over the filming conditions of the pictures broadcast.

10 In the version applicable to the dispute in the main proceedings, the Code of Conduct defined multinational events as those 'in respect of which the images being retransmitted in a large number of countries cannot be regarded as being aimed principally at the French public'. Bi-national events were defined as 'events taking place abroad other than those mentioned in the previous category, where the transmission is specifically aimed at a French audience'.

11 Besides drawing up the Code of Conduct, the CSA approached French broadcasters to persuade them to insist on the removal of such hoardings advertising alcoholic beverages or not to retransmit the event at all. In at least one case the CSA referred a case to the State Prosecutor for proceedings to be brought against a French broadcaster. However, since the Code was adopted the CSA has taken action against such a broadcaster only once, in 1996.

Pre-litigation procedure

12 After inviting the French Republic to submit its observations the Commission sent it a reasoned opinion, on 21 November 1996, stating that the prohibition on television advertising for alcoholic beverages sold in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States, appeared to be incompatible with the freedom to provide services. Furthermore, the French Republic was called on to take the measures necessary to comply with that reasoned opinion within a period of two months from the date of notification thereof.

13 Contact between the Commission and the French authorities continued thereafter, leading to various modifications of the Code of Conduct.

14 However, since it found that there were still practical problems with the application of the Loi Evin and that the amendments proposed by the French authorities were not sufficient to remedy them, the Commission decided to bring the present infringement proceedings.

15 By order of the President of the Court of 3 December 2002 the United Kingdom of Great Britain and Northern Ireland was given leave, in accordance with the first paragraph of Article 37 of the EC Statute of the Court of Justice and Article 93(1) of the Rules of Procedure, to intervene in support of the forms of order sought by the Commission.

The action

16 In support of its action the Commission relies on a single plea in law, alleging that the French rules prohibiting television advertising for alcoholic beverages sold in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events held in other Member States ('the television advertising rules at issue'), is incompatible with Article 59 of the Treaty.

Arguments of the parties

17 The Commission and the United Kingdom Government argue that the French rules on television advertising are contrary to Article 59 of the Treaty.

18 They entail restrictions on the freedom to provide advertising services and television broadcasting services.

19 Furthermore, although they may in principle be justified for reasons relating to the protection of public health, as Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC) read in combination with Article 66 of the EC Treaty (now Article 55 EC) permits, such rules are disproportionate.

20 The French Government contends that the French rules on television advertising are not contrary to Article 59 of the Treaty.

21 Even if they entail a restriction within the meaning of Article 59 of the Treaty, they are in any event justified by reasons relating to the protection of public health and the need to prevent evasion of the applicable rules. Furthermore, the French Government submits that such rules are proportionate to the objectives pursued.

Findings of the Court

22 Article 59 of the Treaty requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see to that effect Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, freedom to provide services is enjoyed by both providers and recipients of services (see to that effect Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).

23 The freedom to provide services may, however, in the absence of Community harmonisation measures, be limited by national rules justified by the reasons mentioned in Article 56(1) of the EC Treaty, read together with Article 66, or for overriding requirements of the general interest (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031).

24 In that context, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality (see Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 16), which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, in particular, *Säger*, paragraph 15; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35; *Corsten*, paragraph 39; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 33).

25 In order to assess the merits of the Commission's plea in this case, since there are no Community harmonisation measures on the matter, three points must be examined in turn, namely, whether there is a restriction within the meaning of Article 59 of the Treaty, whether there may be justification for French rules on television advertising such as those at issue in the main proceedings under Article 56(1) of the Treaty, read together with Article 66, and whether those rules are proportionate.

26 In the first place, it must be observed that the French rules on television advertising constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty. They entail a restriction on freedom to provide advertising services in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede the provision of broadcasting services for television programmes. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages.

27 In that regard, the arguments relied on by the French Government against classing the rules as 'restrictive' within the meaning of Article 59 cannot be accepted.

28 Although it is true that it is technically possible to mask the images in order selectively to conceal the hoardings showing advertising for alcoholic beverages, the

use of such techniques involves substantial additional costs for the French broadcasters, as the French Government admitted at the hearing.

29 As regards the argument that the French rules on television advertising at issue concern, without discrimination, not only alcoholic beverages produced in France, but also alcoholic beverages regardless of their origin, so long as they are sold on French territory, it is sufficient to recall that in the context of the freedom to provide services it is only the origin of the service at issue which may be relevant to the case.

30 Second, the French rules on television advertising pursue an objective relating to the protection of public health within the meaning of Article 56(1) of the Treaty, as the Advocate General stated in paragraph 69 of his Opinion. Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns (see Case 152/78 *Commission* v *France* [1980] ECR 2299, paragraph 17; *Aragonesa de Publicidad Exterior and Publivía*, paragraph 15; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 27).

31 Third, the French rules on television advertising are appropriate to ensure their aim of protecting public health. Furthermore, they do not go beyond what is necessary to achieve such an objective. They limit the situations in which hoardings advertising

alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.

32 In that regard, the arguments set out by the Commission and the United Kingdom to establish the disproportionate nature of those rules cannot be accepted.

33 As far as concerns the argument that the French rules on television advertising are inconsistent, since they apply only to alcoholic beverages whose alcohol content exceeds 1.2°, concern only television advertising, and do not apply to advertising for tobacco, it is sufficient to reply that that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved (see *Aragonesa de Publicidad Exterior and Publivía*, paragraph 16).

34 As regards the argument that the rules mean in practice that whole events cannot be broadcast, although there are less restrictive measures to ensure the protection of public health, it must be observed that, for the reasons given by the Advocate General in paragraphs 103 and 104 of his Opinion, having regard, first, to the technical means currently available and, second, to their excessive cost, there is not currently any measure which is less restrictive which can exclude or conceal indirect television advertising for alcoholic beverages resulting from hoardings visible during the retransmission of sporting events. Since that advertising appears on screen only sporadically and only for a few seconds, it is not possible either to control its content or to insert warnings at the same time as the appearance of the advertisement on the screen on the dangers resulting from an excessive consumption of alcohol.

35 As regards the argument that the French rules on television advertising have the result that television advertising for alcoholic beverages is authorised where the French audience is overall very high (multinational events), but prohibited where the French audience is not so high (bi-national events), it is sufficient to observe that by limiting the prohibition to indirect advertising broadcast during the retransmission of sporting events which specifically target a French audience and when the advertising is therefore capable of specifically targeting that audience alone, the rules can only make the measure less prejudicial to the freedom to provide services and, therefore, more proportionate to the objective pursued.

36 The same is true as regards the argument that the French rules on television advertising at issue are, in practice, only applied to advertising for alcoholic beverages marketed in France. Limiting the prohibition at issue to advertising for products which are marketed in France, and thus restricting the scope of that prohibition, reduces the impediment to the freedom to provide services and makes it therefore more proportionate to the objective pursued.

37 As regards the argument that advertising for alcoholic beverages is permitted in certain Member States, it must be observed that, as the Advocate General stated in paragraph 106 of his Opinion, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51).

38 As regards the argument that the application of the French rules on advertising might duplicate controls already carried out in the context of the procedures in force in another Member State, it must be observed that, as the Advocate General states in

paragraph 105 of his Opinion, if the Member State in which the sporting event is taking place prohibits the transmission of the images of hoardings displaying advertising for alcoholic beverages, that event can be broadcast in France without the need for controls. If, on the other hand, such a ban does not exist in the Member State in which the sporting event is taking place, the control imposed by the French authorities will be the only one.

39 Finally, as far as concerns the argument that some of the rules are ambiguous, it is sufficient to state that for the reasons stated by the Advocate General in paragraph 91 of his Opinion, the provisions in question are sufficiently clear and precise. The rules on television advertising at issue define with sufficient precision, for the broadcasters concerned, the cases in which the retransmission of sporting events is prohibited.

40 It is clear from all the foregoing considerations that in those circumstances the single plea relied on by the Commission in support of its action cannot be accepted and, therefore, it must be rejected.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4), the United Kingdom is to pay its own costs.

On those grounds,

THE COURT (Grand Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

Skouris	Jann	Rosas
Gulmann	Puissochet	Cunha Rodrigues
Schintgen	von Bahr	Silva de Lapuerta

Delivered in open court in Luxembourg on 13 July 2004.

R. Grass — Registrar

V. Skouris — President