OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 2 October 1990 *

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling the Tribunal de grande instance (Regional Court), Paris, asks the Court whether Article 10(1) of Law No 88-14 of 5 January 1988 and the Order of 11 March 1988 are compatible with Article 30 of the EEC Treaty inasmuch as they prohibit any statement alluding to the physical, chemical or nutritional properties of sugar or to the word 'sugar' in the labelling or advertising of artificial sweeteners.

I refer to the Report for the Hearing for an account of the relevant legal provisions and the facts of the dispute in the main proceedings.

2. Before dealing with the substance of the question referred to the Court, I consider it necessary to make several brief comments.

Firstly, it is clear that the question referred by the national court must be reformulated.

The Court of Justice has consistently held that in the context of a reference for a preliminary ruling it has no jurisdiction to decide whether provisions of national law are compatible with Community law. However, if a reference for a preliminary ruling is imprecisely formulated, it may identify the question of Community law in terms which enable it to give a ruling.

Moreover, as the Commission has rightly pointed out, in order to give satisfactory guidance to the national court, it is necessary in particular to refer to the rules laid down in Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs,[1] in compliance with the case-law of the Court of Justice according to which, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question.[2]

3. Directive 79/112/EEC, which enacts Community rules of a general nature applicable horizontally to foodstuffs, was conceived with the intention of improving the functioning of the common market and the free movement of goods while at the same time ensuring that consumers received correct information and adequate protection.[3]

* Original language: Italian.

1 — OJ 1979 L 33, p. 1.

2 — Judgment in Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207, paragraph 9.

3 — See the second, third, fourth and seventh recitals in the preamble.

The scope of the directive, as defined in Article 1(1), appears to coincide with the scope of the French provisions at issue, which also apply to products intended for the ultimate consumer.[4]

The title itself of Law No 88-14 makes it clear that the law concerns legal actions brought by recognized associations of consumers and information supplied to consumers themselves.

Moreover, the directive appears to cover both cases in which artificial sweeteners are intended for sale as such and cases in which they are an ingredient of another food product intended for sale to the ultimate consumer (Articles 1(1) and 3(1)).

4. There may in fact be some doubt as to whether the directive and the French law correspond exactly in extending the prohibition to advertising since that is a matter which the Community directive touches upon only in passing.

However, it must be accepted that the French law does not set out to regulate the forms and methods of promoting sales but merely extends to advertising the prohibition imposed with regard to the labelling of the products in question, and that the directive deals with some aspects of advertising, in particular the requirement that information supplied to the consumer should not be misleading (Article 2).

In my view, therefore, the French law in question, taken as a whole, falls within the scope of the directive.

5. The rules laid down in the Community directive provide in particular, in Article 2, that the labelling and the methods used (paragraph 1(a)) and the presentation and advertising of foodstuffs (paragraph 3) must not be such as could mislead the purchaser to a material degree, particularly as to the characteristics of the foodstuff or by attributing to it effects or properties which it does not possess, or, finally, by suggesting that it possesses special characteristics when in fact all similar foodstuffs possess such characteristics.

Article 3 lists the only particulars which are compulsory on the labelling of foodstuffs, subject to a number of conditions and derogations provided for in the articles which follow.

Finally, Article 15 provides that the Member States may not prohibit trade in foodstuffs which comply with the directive by the application of non-harmonized national provisions governing the labelling and presentation of foodstuffs unless such provisions are justified on grounds of, in particular and for our purposes here, protection of public health or prevention of unfair competition.

6. That having been said, with regard to the legislation at issue, let me say straight away that a prohibition of the use of the word

4 — It should be noted that Directive 79/112/EEC was amended by Directive 89/395/EEC of 14 June 1989 (OJ 1989 L 186, p. 17), which extended the scope of the directive to foodstuffs intended for supply to restaurants, hospitals, canteens and other similar mass caterers.

'sugar' which is as general as that imposed by the French legislature, and which even prohibits the use of the expression 'sucré avec' [sweetened with] and brand names which contain the radical 'suc' (for example Maxi-suc, Pouss-suc, Sucredulcor), goes, in my opinion, far beyond what is required by Directive 79/112 and in particular Article 2 thereof.

Far from ensuring that the information supplied to consumers is accurate, a prohibition which is so comprehensive and indiscriminate is likely to achieve the opposite effect, forming an obstacle to the satisfactory and full provision of information.

There is thus no way, for example, of indicating that a product does not contain sugar, which is precisely what the purchaser wishes to know.

Similarly, if the use of the words 'sucré avec' or 'pouvoir sucrant' is prohibited, understanding the function of the artificial sweetener is certainly made more difficult, since in French there are no corresponding expressions which are easily understood by the great majority of people. That is confirmed by the fact that the French law itself, with reference to artificial sweeteners (Article 10(a)), refers to 'pouvoir sucrant'.

Moreover, the derogation provided for in the French law, which allows sweeteners marketed in the medical and pharmaceutical sectors before 1 December 1987 to retain their former brand names and trade marks, is potentially discriminatory because, given the situation on the market, it would seem to favour French products, and it removes all credibility and force from the argument that consumers must be protected (and, in fact, all the other arguments relied on) because if there is in fact a possibility of confusion, it is not clear why some products should be allowed to retain their previous names.

7. If therefore, in the light of what has already been said, it is found to be the case that the French law goes beyond what is allowed by Article 2 of the directive for the protection of consumers, the only possible justification could be the derogation provided for in Article 15(2).

With regard in particular to the prevention of unfair competition, the argument put forward in the observations submitted by the Chambre syndicale des raffineurs and conditionneurs de sucre is, in substance, that since campaigns have been repeatedly mounted against sugar, merely using that word in the labelling of a product which is in some way a competitor constitutes unfair competition.

Clearly, that is not the strongest and most convincing of arguments. It is frankly difficult to accept the argument that the information 'without sugar' is in itself a derogatory remark about sugar since a consumer would associate a product referred to in that context with harmful effects on his own health.

If that line of reasoning were followed, we would also have to regard a reference to a decaffeinated or alcohol-free beverage not as information supplied to the purchaser but as a derogatory remark about caffeine and alcohol.

Let me add that that argument appears to be motivated by a rather low opinion of the ability of consumers to understand and to form judgments.

Nor is it reasonable to argue, as the French Government does, that the law in question is justified by the need to 'prevent abusive practices' (p. 11 of the observations of the French Government), since a prohibition of that kind is, in any event, manifestly disproportionate to that objective.

If abusive practices exist, they can be suppressed by means of the general legal provisions which seek to protect consumers or prevent unfair competition.

It is clear that Community law does not preclude the prevention of unfair competition which consists in disparaging a rival product by stating or implying that it is harmful to health. However, in my opinion, that is not the point at issue in the present case.

8. With regard next to any grounds concerning the requirement to protect public health (raised to some extent by the national court itself), in my opinion they are not seriously tenable since, as I have already said, mention of or reference to the word 'sugar' in the labelling of a product does not in itself mislead the consumer; on the contrary, it may enable the consumer to make a more informed choice.

In fact, the provisions of the French law at issue in this case are not those intended to ensure the protection of public health but rather other specific provisions concerning, for example, the obligation to indicate the presence of phenylalanine or to warn pregnant women not to use large amounts of the product.

9. Before concluding, I would like to emphasize that the same conclusion would be reached even if the Court were to consider the aspects of the law at issue which relate to advertising in the light of Article 30 of the Treaty.

In that regard, it should first be pointed out that, as the Court has consistently held, [5] the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

In particular, a law which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. 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

5 — See primarily the judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

applies, as in this case, to domestic products and imported products without distinction.[6]

It should then be pointed out that, as the Court has emphasized on a number of occasions, citing the judgment in *Rewe*,[7] in the absence of common rules relating to the marketing of the products at issue, obstacles to movement within the Community resulting from disparities between the national laws must be accepted if they apply to national and imported products alike and are necessary for reasons of public interest such as those laid down in Article 36 of the Treaty, for example the protection of public health or mandatory requirements relating, *inter alia*, to consumer protection and fair trading. As I have just shown, such reasons do not arise in the present case.

10. In the light of the foregoing considerations, I propose that the Court of Justice should give the following reply to the national court:

'The provisions of Directive 79/112/EEC, in particular Articles 2 and 15 thereof, are to be interpreted as precluding the application of national legislation which prohibits use of the word 'sugar' or any reference to the physical, chemical or nutritional properties of sugar in the labelling of artificial sweeteners and in their advertising if the artificial sweeteners also possess those properties.'

6 — Judgment in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15.

7 — Judgment in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8.