OPINION OF MR ADVOCATE GENERAL DA CRUZ VILACA
delivered on 27 October 1987 *

Mr President,
Members of the Court,

1. I — André Gauchard, a supermarket manager, was charged by the French authorities with infringing the law on planning rules applicable to commercial premises by extending without authorization the area of 1 660 m² which he had been authorized to operate since 1976.

2. Before the tribunal de police, Falaise, the accused argued that the French legislation in question was contrary to Community law, and the national court therefore referred to the Court of Justice under Article 177 of the Treaty the following question:

'Is the French town-planning legislation relating to commercial premises, in particular Articles 28 to 36 of the Law of 27 December 1973, compatible with the provisions of the Treaty of Rome and the directives of the European Economic Community?'

3. The Court has stated on a number of occasions [1] that, in giving a ruling under Article 177, it 'has no power to apply a rule of Community law to a particular case or to judge a provision of national law by reference to that rule. In pursuance of the judicial cooperation provided for by that article it may, however, on the basis of the material presented to it, provide a national court with information on the interpretation of Community law which may be useful to it in assessing the effects of the provision'.

4. The question put to the Court in this case by the national court does not make it clear which rules of Community law it considers applicable and requests the Court to interpret.

5. However, the Court has already acknowledged that, 'in the event of questions having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 177, the Court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation . . . having regard to the subject-matter of the dispute'. [2]

6. On that basis, I shall therefore endeavour to identify the provisions of Community law whose interpretation may be useful for the determination of the dispute in the main proceedings.

7. From the order for reference it is clear that the national court considers that 'the rule requiring French traders to obtain prior authorization in order to operate a retail outlet of an area exceeding 1 000 m² in a commune with a population of under 40 000 and exceeding 1 500 m² in other communes undoubtedly constitutes a restriction on freedom of establishment'; and it is against

* Translated from the Portuguese.

1 — See, for example, judgment of 11 July 1985 in Case 137/84 *Ministère public* v *Mutsch* [1985] ECR 2681, paragraph 6.

2 — See, *inter alia*, judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, at p. 2368.

that background that the national court, in order to justify its question, raises the issue 'whether the Treaty of Rome, which lays down the principle of freedom of trade and of competition, precludes the imposition of any restrictions on the freedom of establishment'.

8. It is therefore clear from the proceedings that the tribunal de police, Falaise, wishes to know whether the principle of free movement of goods, the right of establishment and the rules on competition, as laid down in particular in Articles 30, 52, 85 and 86 of the Treaty respectively, prevent legislation on planning rules applicable to commercial premises, such as the French Law of 27 December 1973 (the 'loi Royer') and, in particular, Articles 28 to 36 thereof, from requiring prior authorization to be obtained for the operation of a retail outlet exceeding a specified size.

9. II — First of all, I shall examine the situation regarding the right of establishment, since that is referred to most directly in the order for reference.

10. The first response that comes to mind is that the provisions of the Treaty on freedom of establishment do not apply to purely internal situations 'in which there is no factor connecting them to any of the situations envisaged by Community law' (as the Court ruled, with regard to the free movement of workers, in its judgment of 23 January 1986 in Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, paragraph 14).

11. In the present case, the undertaking concerned is French and is established in France, and the manager in question is French.

12. It is, however, worth considering the question a little further in order to clarify the answer and to dispel any doubts as to the interpretation of Community law referred to.

13. The Court has stressed [3] that 'Article 52 (of the Treaty) is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as a self-employed person receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality'. In those conditions, 'freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down by the legislation of the country of establishment for its own nationals'. From the second paragraph of Article 52 and its context the Court inferred (in the field of activity considered in that judgment but in terms which lend themselves to general application) that 'provided that such equality of treatment is respected, each Member State is, in the absence of Community rules in this area, free to lay down rules for its own territory' governing the activities covered by freedom of establishment.

14. As regards the legislation referred to in the main proceedings, the present case does not seem to involve any discrimination against nationals of other Member States, since the legislation in question, regardless of its merits, is applicable without distinction to French nationals and to nationals of other Member States and does not impose any restriction which would be particularly burdensome for the latter. The

3 — See judgment of 12 February 1987 in Case 221/85 *Commission* v *Belgium* [1987] ECR 675, paragraphs 9 and 10.

criteria on which it is based are objective and are set out in Article 28 of the law: the state of development of commercial and craft industry structures and of trading systems in the *département* and surrounding areas, medium-term and long-term trends in urban and rural activities and the desirable balance between the various forms of commercial activity.

15. Similarly, no evidence has been adduced to show that in practice the legislation in question discriminates against nationals of other Member States who wish to set up in France.

16. It is true that it is not impossible that the law might result in discrimination if it were incorrectly applied; however, that is not the case at present, it does not appear ever to have been the case in the past, and it does not seem that there are any legitimate grounds for expecting that it will be the case in the future.

17. Consequently, a national of another Member State may not rely upon Article 52 of the Treaty to oppose the application of the French legislation at issue, provided that it is applied without any intention of discriminating against foreign traders.

18. *A fortiori*, Article 52 cannot enable a French national, established in France, to secure exemption from the requirements of domestic legislation regulating the exercise of commercial activities and laying down the conditions for setting up and extending trading establishments.

19. At the same time, in this field no importance may be attributed to the provisions of Community law such as Council Directives 68/363/EEC and 68/364/EEC of 15 October 1968, respectively concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in retail trade and laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in retail trade.

20. Both directives were adopted in order to promote the attainment of freedom of establishment and freedom to provide services during the transitional period and in accordance with the 'General programmes' concerned; they do not affect or restrict the direct effect which must be attributed [4] to Article 52 of the Treaty after the end of the transitional period, nor do they contain any rules applicable to the situation concerned here.

21. III — I shall now consider the issue in the light of the principle of free movement of goods (laid down, in particular, in Article 30 of the Treaty). This was, moreover, the aspect insisted upon at the hearing by Counsel for the accused in the main proceedings.

22. Legislation such as that referred to by the national court cannot affect the attainment of the objectives of Article 30 unless it constitutes a measure having an effect equivalent to a quantitative restriction likely to affect trade between Member States.

4 — As a result, so far as the right of establishment is concerned, of the judgment of 21 June 1974 in Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631.

23. Since its judgment of 11 July 1974 in *Dassonville*,[5] the Court has consistently held that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' are measures having an effect equivalent to quantitative restrictions.

24. Similarly, in Commission Directive 70/50/EEC of 22 December 1969[6] there are considered as measures which have an effect equivalent to quantitative restrictions 'measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production', and also 'measures governing the marketing of products . . . which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules'.

25. That is why the Court ruled in its judgment of 31 March 1982 in *Blesgen*[7] that

'the concept in Article 30 of the Treaty of measures having an effect equivalent to quantitative restrictions on imports is to be understood as meaning that the prohibition laid down by that provision does not cover a national measure applicable without distinction to domestic and imported products which prohibits the consumption, sale or offering even without charge of spirituous beverages of a certain alcoholic strength for consumption on the premises in all places open to the public . . . '.

5 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

6 — Official Journal, English Special Edition, 1970 (I), p. 17.

7 — Case 75/81 *Blesgen* v *Belgian State* [1982] ECR 1211.

26. The Court stated (at paragraph 9) that 'such a legislative measure has (. . .) in fact no connection with the importation of the products and for that reason is not of such a nature as to impede trade between Member States'.

27. In the same way, it must be stated that it does not appear that legislation which provides that authorization must be obtained for setting up or extending commercial units exceeding a specified size, such as the French legislation at issue, is capable of directly or indirectly affecting, in a discriminatory manner, the free movement of goods within the Community.

28. Such legislation has no effect on the flow of imported goods; it affects only the organization of distribution within the country on the basis of objectives of economic policy defined by the public authorities, in particular in order to promote smaller commercial undertakings and to adjust distribution infrastructures by reference to urban planning requirements.

29. It is inappropriate to comment here on the merits or inadequacies of that legislation from a political and economic point of view.

30. It is, however, important to bear in mind that an authorization system of that kind affects the distribution on the domestic market of imported and domestic goods without distinction.

31. It is the traders — both domestic and foreign — who have to adjust to this legal framework, in particular by using various

authorized centres for the storage or distribution of goods — regardless of whether they are manufactured in France or come from other Member States of the Community.

32. IV — Lastly, the problem must be considered from the point of view of the application of the competition rules laid down in Articles 85 and 86 of the Treaty.

33. As the Court has stated,[8] those rules are of course concerned with undertakings and not with the legislation of the Member States. The Court has also stressed[9] that 'Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings'.

34. It must therefore be considered whether or not, in the light of the evidence available, the French legislation at issue is capable of having such an effect on the application of the competition rules of the Treaty, in particular by promoting or actually creating conditions enabling undertakings to adopt practices likely to infringe those rules.

8 — See in particular judgments of 10 January 1985 in Case 229/83 *Leclerc* v *Au blé Vert* [1985] ECR 1, at p. 31, and of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1425.

9 — Judgment in *Leclerc*, paragraph 14; also, judgment in *Asjes*, paragraphs 71 and 72.

35. For that purpose, the scope of those rules must first be determined.

36. By virtue of Article 85 (1) of the Treaty, and having regard to the objective laid down in Article 3 (f) thereof, 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which *may affect trade between Member States* and which have as their object or effect the *prevention, restriction or distortion of competition within the common market*' are incompatible with the common market. I wish to stress the two essential conditions which must be satisfied before certain conduct is covered by Article 85:

(i) It must be capable of affecting trade between Member States;

(ii) It must affect competition within the common market.

37. I would add that the practices listed by way of example in Article 85 (1) (b) include those which: 'limit or control production, markets, technical development, or investments' and in Article 85 (1) (c) those which: 'share markets or sources of supply'.

38. Furthermore, Article 86 of the Treaty provides that 'Any abuse by one or more undertakings of a *dominant position within the common market or in a substantial part of it* shall be prohibited as incompatible with the common market in so far as it may *affect trade between Member States*' (emphasis added). Such abuse may, in particular, consist in:

'...

(b) Limiting production, markets or technical development to the prejudice of consumers'.

39. It will now be seen that the answer to the question at issue here may be predicted from the answer given to the previous question: since the French legislation is not capable of affecting trade between Member States, it is very difficult to see how one of the requirements for the application of the competition rules of the Treaty can be satisfied.

40. Moreover, there are no grounds for concluding that the legislation in question is likely to encourage action on the part of undertakings which might produce that effect and affect competition within the common market or a substantial part of it.

41. Even the fact — to which attention was drawn by the accused in the main proceedings and which was examined by the Commission at the hearing — that the composition of the Commissions départementales d'urbanisme commercial (Departmental Commissions for commercial planning) may confer disproportionate power on a certain type of undertaking as compared with others — even if it is relevant — is in itself not necessarily, or even probably, likely to produce such effects, or even to encourage the creation of situations in which such effects occur.

42. In view of the fact that the Departmental Commissions operate in each *département* and regulate the activity of the retail trade, it is clear that the effects of their intervention (and, in general, of the legislation at issue) apply only to distribution within the country and, in particular, within regional and local markets.

43. The Departmental Commissions — which are presided over by the *Préfet*, who has no vote — are composed of three types of members: nine members elected locally, including the mayor of the commune concerned, nine representatives of commercial undertakings and craft industries (who, according to the French Government, represent different categories of business) and two representatives of consumer associations, with the mayors of the adjoining communes also taking part in the proceedings on a consultative basis (Article 30 of the loi Royer).

44. The intention is clearly to achieve a balance in the representation of the various interests, which the composition described above appears to ensure.

45. The Departmental Commissions must adopt their decisions in accordance with the principles laid down in Articles 1, 3 and 4 of the loi Royer and take into account the criteria laid down in Article 28, to which I have already referred; furthermore, they decide on the basis of detailed reports drawn up by the Direction départementale du commerce intérieur et des prix (Departmental Directorate for domestic trade and prices), the Chamber of Commerce and local trade organizations (Article 31).

46. In those circumstances, there is no reason to suppose that any category of trader (in particular the 'competitors' of the party applying for authorization) could

obtain the support of the majority or affect the decision to be taken.

47. The Departmental Commissions' decisions must be adopted within two months, after which period authorization is deemed to be granted; they must contain a statement of the reasons on which they are based and there is a right of appeal to the competent minister, who will adopt his decision after consulting the Commission nationale d'urbanisme commerciale (National Commission on planning regulations applicable to commercial premises) which is also made up of three types of members (Articles 32 and 33). The Minister's decision is itself subject to appeal; in my opinion, it has not been established that, under the present French legislation, these rights of appeal are ineffective and, in any event, it does not seem that, in the context of the present case and having regard to the evidence before the Court at present, that question is relevant from the point of view of Community law.

48. It should also be stressed that there are no rules in the loi Royer governing the setting up of retail outlets with a sales area not exceeding 1 000 m² or 1 500 m², as the case may be; authorization is required only for the remaining cases.

49. As the French Government points out in its observations, it is clear from Article 1 (1) of the loi Royer that it is designed to promote 'open and fair competition', by preventing 'the haphazard growth of new forms of distribution from causing the disappearance of small undertakings and under-utilization of the facilities available for the conduct of trade' (Article 1 (3)).

50. It may therefore be concluded that the national legislation in question is intended to regulate competition in commerce and craft industries; its stated objective and likely effect are to restrict or control the growth of retail units and not to strengthen their power in the market.

51. As the Court of Justice stated in its judgment in *Giry and Guerlain*,[10] 'Community law and national law on competition consider restrictive practices from different points of view. Whereas Articles 85 and 86 regard them in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context'.

52. The conclusion which may be drawn from that statement as regards the present case is confirmed by the principles defined by the Court in its judgment in *Hugin*[11] to the effect that 'the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to

10 — Judgment of 10 July 1980 in Joined Cases 253/78 and 1 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraph 15.

11 — Judgment of 31 May 1979 in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17, at p. 1899.

freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand, conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order'.

53. In my view, the situations governed by the loi Royer fall clearly within the latter category and not the former.

54. V — For the foregoing reasons, I propose that the Court should answer the question referred to it by the tribunal de police, Falaise, as follows:

55. 'The principle of free movement of goods, the right of establishment and the rules on competition, in particular those laid down in Articles 30, 52, 85 and 86 of the Treaty do not prevent legislation laying down planning rules applicable to commercial premises such as the French Law of 27 December 1973, and in particular Articles 28 to 36 thereof, from requiring prior authorization to be obtained by any retailers, for the operation of retail outlets exceeding a specified area, provided that it applies without distinction to nationals of the Member State in question and nationals of other Member States and that its content and objectives do not permit the conclusion that it was adopted for discriminatory purposes or produces discriminatory effects.'