JUDGMENT OF THE COURT (Grand Chamber)

13 July 2004 *

In Case C-429/02,

REFERENCE to the Court under Article 234 EC by the Cour de Cassation (France) for a preliminary ruling in the proceedings pending before that court between

Bacardi France SAS, formerly Bacardi-Martini SAS,

and

Télévision française 1 SA (TF1),

Groupe Jean-Claude Darmon SA,

Girosport SARL,

* Language of the case: French.

on the interpretation of Council Directive 89/552/CEE of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) and 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 written observations submitted on behalf of:

— Bacardi France SAS, by C. Niedzielski and J.-M. Cot, avocats,

— Télévision française 1 SA (TF1), by L. Bousquet and O. Sprung, avocats,

— the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,

— the United Kingdom Government, by K. Manji, acting as Agent, and K. Beal, Barrister,

— the Commission of the European Communities, by H. van Lier, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Bacardi France SAS, represented by J.-M. Cot, of the French Government, represented by G. de Bergues and R. Loosli-Surrans, of the United Kingdom Government, represented by K. Manji, and of the Commission, represented by H. van Lier and W. Wils, acting as Agent, at the hearing on 25 November 2003,

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

gives the following

Judgment

1 By decision of 19 November 2002, received at the Court on 27 November 2002, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain

provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) and Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

2 Those questions were raised in proceedings between Bacardi France SAS, formerly Bacardi-Martini SAS ('Bacardi'), and Télévision française 1 SA ('TF1'), Groupe Jean-Claude Darmon SA ('Darmon') and Girosport SARL ('Girosport'), seeking an order that the latter three undertakings cease to put pressure on foreign clubs to refuse advertising for alcoholic beverages produced by Bacardi on advertising hoardings placed in venues hosting bi-national sporting events taking place in other Member States.

Legal background

Community legislation

3 Directive 89/552 aims to abolish restrictions on the free movement of services in the broadcasting of television programmes. To that end, it lays down the principle of freedom to receive and transmit programmes across borders and coordinates the laws applicable thereto in the different Member States in fields such as television advertising. According to the system put in place by that directive, it is for the originating Member State to regulate and monitor broadcasts transmitted across borders while observing the minimum rules laid down by the directive. By contrast, in the fields coordinated by the directive the receiving Member States are, generally, no longer competent.

Definitions

4 'Television advertising' is defined in Article 1(b) of Directive 89/552 as 'any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment'.

Substantive rules

5 The first sentence of Article 2(2) of Directive 89/552 provides:

'Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this directive.'

6 Article 10(1) of the directive states:

'Television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.'

7 The first sentence of Article 11(1) of the directive provides that 'advertisements shall be inserted between programmes'.

8 According to Article 11(2) of Directive 89/552:

'In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals.'

National legislation

Substantive rules

9 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°.

10 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).

11 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.

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

Procedural rules

13 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 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

14 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 Officiel 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.

15 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.

16 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.

17 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'.

18 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.

The main proceedings and the questions referred

19 Bacardi is a French company belonging to the international group Bacardi-Martini, which produces and markets numerous alcoholic beverages in most countries of the world, including Bacardi rum, Martini and Duval pastis.

20 Darmon and Girosport are companies which negotiate on behalf of TF1 for television retransmission rights for football matches.

21 Relying on the alleged fact that Darmon and Girosport put pressure on foreign clubs to refuse to allow Bacardi's brand names to appear on advertising hoardings around sports stadia, Bacardi sought an order that Darmon, Girosport and TF1 should cease that conduct as being incompatible with Article 59 of the Treaty.

22 After that application was rejected both at first instance and on appeal, Bacardi appealed on a point of law.

23 As it was in doubt as to the compatibility with Community law of the French rules prohibiting television advertising for alcoholic beverages marketed 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 ('the television advertising rules at issue in the main proceedings'), the Court of Cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. [Does] Directive 89/552/EEC of 3 October 1989 ("Television without frontiers"), in the version prior to that of Directive 97/36/EC of 30 June 1997, [preclude] national legislation, such as Articles L.17 to L.21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992, which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive [?]

2. [Are] Article 49 EC and the principle of the free movement of television broadcasts within the Union to be interpreted as precluding a national provision such as that in Articles L.17 to L.21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992 which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive, from having the effect that operators responsible for the broadcasting and distribution of television programmes:

(a) refrain from broadcasting television programmes, such as in particular retransmissions of sporting events, whether held in France or in other countries of the Union, where they show prohibited advertisements within the meaning of the French Code des débits de boissons, or

(b) broadcast them on condition that prohibited advertisements within the meaning of the French Code des débits de boissons do not appear, thereby preventing the conclusion of advertising contracts concerning alcoholic drinks whether of national origin or from other Member States of the Union [?]'

The questions referred

The first question: the obligation to ensure freedom of reception and retransmission

24 By its first question the national court asks, essentially, whether the first sentence of Article 2(2) of Directive 89/552 precludes a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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.

In that context, the national court wishes to know whether such indirect television advertising must be classified as 'television advertising' within the meaning of Articles 1(b), 10 and 11 of the directive.

25 The first sentence of Article 2(2) of Directive 89/552 requires Member States to ensure freedom of reception and not to restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the directive. Articles 10 to 21 harmonise the rules on television advertising.

26 By the definition given in Article 1(b) of Directive 89/552, 'television advertising' comprises 'any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment.' Under Article 10(1) 'television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.' The first sentence of Article 11(1) provides that 'advertisements shall be inserted between programmes' and Article 11(2) states that 'in programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals'.

27 In this case, for the reasons set out by the Advocate General in paragraphs 48 to 52 of his Opinion, the indirect television advertising for alcoholic beverages resulting from hoardings visible on screen during the retransmission of sporting events does not constitute a separate announcement broadcast in order to promote goods or services. For obvious reasons, it is impossible to show such advertising only during the intervals between the different parts of the television broadcast concerned. The images on the advertising hoardings which appear in the background of the pictures broadcast, in a random and unpredictable fashion according to the requirements of the retransmission, do not have any distinct character in that context.

28 Such indirect television advertising cannot, therefore, be regarded as 'television advertising' within the meaning of Directive 89/552, and accordingly the directive is not applicable to it.

29 Consequently, the answer to the first question must be that the first sentence of Article 2(2) of Directive 89/552 does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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.

That kind of indirect television advertising is not to be classed as 'television advertising' within the meaning of Articles 1(b), 10 and 11 of the directive.

Second question: freedom to provide services

30 By its second question, the national court asks, essentially, whether Article 59 of the Treaty (now, after amendment, Article 49 EC) precludes a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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.

31 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).

32 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 (now, after amendment Article 46(1) EC) read together with Article 66 of the EC Treaty (now Article 55 EC), or for overriding requirements of the general interest (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031).

33 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).

34 In the main proceedings, 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 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.

35 In the first place, it must be observed that rules on television advertising such as those at issue in the main proceedings 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.

36 In that context, as is clear from paragraphs 28 and 29 of today's judgment in Case C-262/02 *Commission* v *France* [2004] ECR I-6569, the arguments of the French Government concerning, first, the technical possibility of masking images in order selectively to conceal the hoardings showing advertising for alcoholic beverages and, second, the non-discriminatory application of the rules on television advertising to all alcoholic beverages, whether they are produced in France or abroad, cannot be accepted. Although it is true that such technical means exist, they involve substantial additional costs for the French broadcasters. Furthermore, in the context of the freedom to provide services, it is only the origin of the service at issue which may be relevant in the case in these proceedings.

37 Second, rules on television advertising such as those at issue in the main proceedings 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).

38 Third, rules on television advertising such as those at issue in the main proceedings 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.

39 In that regard, as is clear from paragraphs 33 to 39 of today's judgment in *Commission* v *France*, the arguments set out by the Commission and the United Kingdom Government to establish the disproportionate nature of that regime must be rejected.

40 As far as concerns the one argument raised by Bacardi which was not considered in today's judgment in *Commission* v *France*, namely the argument that the rules on television advertising at issue in the main proceedings are not consistent because they do not cover advertising for alcoholic beverages visible in the background on film sets, 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 in which that protection is to be achieved (see *Aragonesa de Publicidad Exterior and Publivía*, paragraph 16).

41 Accordingly, the answer to the second question is that Article 59 of the Treaty does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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.

Costs

42 The costs incurred by the French and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Grand Chamber),

in answer to the questions referred to it by the Cour de cassation by judgment of 19 November 2002, hereby rules:

1. **The first sentence of Article 2(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law,**

regulation or administrative action in Member States concerning the pursuit of television broadcasting activities does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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 the territory of other Member States.

That kind of indirect television advertising is not to be classed as 'television advertising' within the meaning of Articles 1(b), 10 and 11 of the directive.

2. **Article 59 of the EC Treaty (now, after amendment, Article 49 EC) does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, 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.**

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