JUDGMENT OF THE COURT (Sixth Chamber)
9 February 1995 *

In Case C-412/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Commerce de Paris for a preliminary ruling in the proceedings pending before that court between

Société d'Importation Édouard Leclerc-Siplec

and

1) TF1 Publicité SA,

2) M6 Publicité SA,

on the interpretation of Articles 30, 85, 86, 5 and 3(f) of the EEC Treaty and 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),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn (Rapporteur), G. F. Mancini, C. N. Kakouris and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Leclerc-Siplec, by Bruno Cavalié, of the Paris Bar,

— TF1 Publicité, by Louis Bosquet, of the Paris Bar,

— M6 Publicité, by Pierre Deprez and Philippe Dian, of the Paris Bar,

— the French Government, by Jean-Louis Falconi, Foreign Affairs Secretary in the Legal Affairs Directorate in the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in the same Directorate, acting as Agents,

— the Commission of the European Communities, by Richard Wainwright, Principal Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Leclerc-Siplec, represented by Bruno Cavalié, TF1 Publicité, represented by Olivier Sprung, of the Paris Bar, M6 Publicité, represented by Didier Théophile, of the Paris Bar, the French Government, represented by Jean-Louis Falconi, and the Commission, represented by Richard Wainwright, assisted by Hervé Lehman, at the hearing on 7 July 1994,

after hearing the Opinion of the Advocate General at the sitting on 24 November 1994,

gives the following

Judgment

1 By judgment of 27 September 1993, received at the Court on 4 October 1993, the Tribunal de Commerce de Paris (Commercial Court, Paris) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30, 85, 86, 5 and 3(f) of the EEC Treaty and 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; hereinafter 'the Directive').

2 That question was raised in proceedings brought by the import company Édouard Leclerc-Siplec (hereinafter 'Leclerc-Siplec') against TF1 Publicité (hereinafter 'TF1') and M6 Publicité (hereinafter 'M6') concerning the latter companies' refusal to broadcast an advertisement concerning the distribution of fuel in Leclerc supermarkets on the ground that Article 8 of Decree No 92-280 of 27 March 1992,

implementing Article 27(1) of the Law of 30 September 1986 on freedom of communication and setting general principles for advertising and sponsorship (JORF of 28 March 1992, p. 4313, hereinafter 'the Decree'), excludes the distribution sector from televised advertising.

3 Leclerc-Siplec, after bringing proceedings against TF1 and M6 before the Commercial Court of Paris and being of the view that Article 8 of the Decree was contrary to several provisions of the Treaty and the Directive, proposed that the court refer that question to the Court of Justice. TF1 and M6, although defendants, were in complete agreement with Leclerc-Siplec. In addition, TF1 stated that the ruling by the Court of Justice should be couched in general terms and relate not only to distribution but to all the sectors excluded from airtime by the Decree.

4 The national court, noting that TF1's and M6's understanding that the advertisement in question was caught by the prohibition in Article 8 of the Decree was confirmed by various bodies which had been consulted, including the State Secretariat for Communication, the Conseil Supérieur de l'Audiovisuel (Higher Council for the Audio-visual Sector; hereinafter 'CSA') and the Bureau de Vérification de la Publicité (Office for the Control of Advertising), stayed the proceedings and requested the Court of Justice to give a preliminary ruling

'on the question whether Articles 30, 85, 86, 5 and 3(f) of the Treaty and Directive 89/552/EEC of 3 October 1989 are to be interpreted as prohibiting Member States from banning, by statute or by regulation, televised advertising in respect of certain sectors of economic activity, in particular the distribution sector, and more generally whether Article 8 of the Decree of 27 March 1992 may be considered compatible with the aforesaid provisions.'

5 Article 8 of the Decree prohibits 'the advertising of, first, goods the televised advertising of which is prohibited by statute and, second, the following goods and economic sectors:

— drinks with an alcohol content of more than 1.2°;

— literary publications;

— the cinema;

— the press;

— distribution, except in the overseas departments and territories and the territorial collectivities of Mayotte and Saint-Pierre-et-Miquelon.'

6 Article 21 of the Decree provides that the CSA is to monitor compliance with those provisions.

7 There are decisions of the CSA to the effect that advertising by 'manufacturers/distributors', who are not subject to the prohibition on televised advertising for the distribution sector, may not refer to the outlets where goods are distributed.

The Court's jurisdiction

8 The Commission observes as a preliminary point that the request for a ruling is inadmissible. It considers that the judgment of the national court shows that there is no dispute before that court, since Leclerc-Siplec's claim simply seeks to obtain a preliminary ruling. In any event, when that court at TF1's suggestion broadened Leclerc-Siplec's question to include economic sectors other than its initial subject-matter, the distribution sector, the national court referred a question concerning a dispute which does not exist, even latently, between the parties.

9 Pursuant to Article 177 of the Treaty, where a question on the interpretation of the Treaty or of subordinate acts of the institutions of the Community is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

10 In the context of that procedure for making a reference, the national court, which alone has direct knowledge of the facts of the case, is in the best position to appreciate, with full knowledge of the matter before it, the necessity for a preliminary ruling to enable it to give judgment (see the judgments in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, Case C-186/90 *Durighello* v *Istituto Nazionale Della Previdenza Sociale* [1991] ECR I-5773 and Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraph 23).

11 Consequently, where the questions put by national courts concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling (see the judgment in Case C-231/89 *Gmurzynska-Bscher* v *Oberfinanzdirektion Köln* [1990] ECR I-4003, paragraph 20).

12 The Court has nonetheless considered that, in order to determine whether it has jurisdiction, it is necessary to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (judgments in Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171 and *Meilicke*, cited above, paragraph 25).

13 It is in the light of that function that the Court has considered that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings.

14 In this case it seems plain that, as the French Government has pointed out, the purpose of the main proceedings is, for Leclerc-Siplec, to obtain a declaration by the national court that TF1's and M6's refusal, on the basis of Article 8 of the Decree, to broadcast an advertisement for fuel distribution is incompatible with Community law. The fact that the parties to the main proceedings are in agreement as to the result to be obtained makes the dispute no less real.

15 It follows that the question referred, to the extent that it relates to that purpose, is objectively necessary to the outcome of the main proceedings. That is not, however, true in so far as it concerns the prohibition on broadcasting televised advertising for other goods or economic sectors.

16 It follows from the foregoing that the question referred must be answered in so far as it concerns the exclusion of the distribution sector from televised advertising.

The interpretation of the provisions referred to in the question

17 The question referred, thus circumscribed, is restricted to the issue whether on a proper construction Article 30 of the Treaty, Articles 85 and 86 in conjunction with Articles 5 and 3(f) of the Treaty and the Directive preclude a Member State from prohibiting, by statute or by regulation, the broadcasting of advertisements for the distribution sector by broadcasters established in its territory.

Article 30 of the Treaty

18 It has been consistently held that all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5).

19 A law or regulation such as that at issue in the main proceedings, which prohibits televised advertising in the distribution sector, is not designed to regulate trade in goods between Member States. Moreover, such a prohibition does not prevent distributors from using other forms of advertising.

20 Such a prohibition may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives distributors of a particular form of advertising their goods. But the question remains

whether such a possibility is sufficient to characterize the prohibition in question as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

21 The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, cited above, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see the judgments in Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraphs 16 and 17, and Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 21).

22 A provision such as that at issue in the main proceedings concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution).

23 Furthermore, those provisions, which apply regardless of the type of product to all traders in the distribution sector, even if they are both producers and distributors, affect the marketing of products from other Member States and that of domestic products in the same manner.

24 The reply should accordingly be that on a proper construction Article 30 of the Treaty does not apply where a Member State, by statute or by regulation, prohibits the broadcasting of televised advertisements for the distribution sector.

Articles 85 and 86 in conjunction with Articles 3(f) and 5 of the Treaty

25 Articles 85 and 86 of the Treaty *per se* are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that Articles 85 and 86 of the Treaty, in conjunction with Article 5, require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere (see the judgment in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, paragraph 16, and, most recently, the judgment in Joined Cases C-401/92 and 402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paragraph 16).

26 In this case, there is nothing in the documents before the Court to suggest that the national provisions at issue require or favour anti-competitive conduct or reinforce the effects of a pre-existing agreement.

27 The reply should accordingly be that Articles 85 and 86 in conjunction with Articles 3(f) and 5 of the Treaty are not applicable to such national provisions.

Directive 89/552

28 The main purpose of the Directive, which was adopted on the basis of Articles 57(2) and 66 of the Treaty, is to ensure freedom to provide television broadcasting services.

29 To that end, it lays down, according to the thirteenth and fourteenth recitals in the preamble, minimum rules to govern broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State.

30 To attain that objective, Chapter II of the Directive, devoted to general provisions, requires Member States from which broadcasts are made to ensure that television broadcasters under their jurisdiction comply with the provisions of the Directive (Article 3(2)) and Member States receiving broadcasts 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, although they may provisionally suspend broadcasts in certain specified cases (Article 2(2)).

31 Article 3(1), which is in the same chapter, provides that Member States are to remain free, as regards television broadcasters under their jurisdiction, to lay down more detailed or stricter rules in the areas covered by the Directive.

32 The fields coordinated by the Directive include the minimum provisions governing the Member States from which broadcasts are made relating to televised advertising, which are contained in Chapter IV.

33 Two articles in Chapter IV permit Member States from which broadcasts are made to derogate from some of its provisions concerning the conditions in which advertisements may be broadcast.

34 First, Article 19 permits them to lay down stricter rules than those in Article 18 for programming time and the procedures for television broadcasting for television broadcasters under their jurisdiction.

35 Second, Article 20, without prejudice to Article 3, permits them, with due regard for Community law, to lay down conditions other than those laid down in Article 11(2) to (5) and Article 18 in respect of broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more other Member States.

36 It is common ground that neither Article 19 nor Article 20 can be the basis for a prohibition by a Member State of televised advertising in the distribution sector.

37 The question is therefore whether such a prohibition may be founded on Article 3(1) of the Directive.

38 In order to determine the scope of Article 3(1) of the Directive, it must first be considered whether Member States may, by virtue of that provision, impose on television broadcasters under their jurisdiction stricter rules than those laid down in Chapter IV where the circumstances are not covered by Article 19 or 20.

39 While Article 20 states expressly that it applies without prejudice to Article 3, there is no such statement in Article 19.

40 However, it cannot be inferred from that that Member States' freedom to impose stricter rules for televised advertising and sponsorship is limited to the circumstances set out in Article 19.

41 Such an interpretation would deprive the general provision in Article 3(1) of the Directive of its purpose in an essential area covered by the Directive.

42 Neither the recitals in the preamble nor the objective of the Directive requires Article 19 to be interpreted as divesting Member States of the freedom conferred on them by Article 3(1).

43 The twenty-seventh recital in the Directive refers in general terms, and without restriction to the circumstances set out in Article 19, to the right of Member States to set rules which are more detailed or stricter than the minimum rules and standards which the Directive imposes on television advertising.

44 Furthermore, the attainment of the Directive's objective of ensuring freedom to provide broadcasting services complying with the minimum rules it lays down is in no way affected where Member States impose stricter rules on the television broadcasters under their jurisdiction in circumstances other than those set out in Article 19.

45 As for the purpose of Article 3(1) of the Directive, TF1 and M6 have argued that the twenty-seventh recital in the preamble means that the interests of consumers alone can justify stricter rules and that, in excluding distribution from televised advertising because of certain economic interests, the Decree goes beyond the Directive.

46 That argument cannot be accepted.

47 Although it appears to follow from that recital, such an interpretation is not supported by the wording of Article 3(1), which contains no restriction whatever as to the interests which the Member States may take into consideration. In any event, that recital does not preclude the justification of such restrictions by the protection of interests other than those of consumers.

48 In the light of all those considerations, the reply to the question referred should be that on a proper construction Articles 30, 85, 86, 5 and 3(f) of the Treaty and Directive 89/552 do not preclude Member States from prohibiting, by statute or by regulation, the broadcasting of advertisements for the distribution sector by television broadcasters established on their territory.

Costs

49 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Sixth Chamber),

in answer to the question referred to it by the Tribunal de Commerce de Paris by judgment of 27 September 1993, hereby rules:

On a proper construction Articles 30, 85, 86, 5 and 3(f) of the Treaty and 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 do not preclude Member States from prohibiting, by statute or by regulation, the broadcasting of advertisements for the distribution sector by television broadcasters established on their territory.

Schockweiler Kapteyn Mancini

Kakouris Murray

Delivered in open court in Luxembourg on 9 February 1995.

R. Grass

Registrar

F. A. Schockweiler

President of the Sixth Chamber