OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 26 September 2002 [1]

1. By order of 28 July 2000, the High Court of Justice of England and Wales, Queen's Bench Division (United Kingdom) (hereinafter 'the High Court') referred to the Court of Justice for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 49 EC. In summary, the High Court queries the compatibility with Article 49 EC of legislative provisions of a Member State which prohibit, within that State, the television broadcasting of sporting events taking place in another Member State, in so far as those broadcasts include pictures of advertising billboards at the venue of the sporting event which advertise products (in this case alcoholic drinks) which may not be advertised on television in the first Member State.

Relevant law

2. As far as Community law is concerned, relevant to the present case is Article 49 EC which, as we know, guarantees the freedom to provide services within the Community.

3. As regards national legislation, first mention must be given to the French provisions relating to the televised advertising of alcoholic drinks, beginning with Law No 91-32 of 10 January 1991 on combating smoking and alcoholism [2] (hereinafter referred to as 'the Loi Evin'), which amended Article L.17 of the *Code des débits de boissons* (hereinafter 'the CDB'). [3]

4. The Loi Evin is based on the principle that all forms of advertising of alcoholic beverages (that is, drinks with an alcohol content greater than 1.2°) which are not expressly authorised are prohibited. In accordance with that principle, the televised advertising of alcoholic drinks, which is not expressly authorised by Article 17 of the CDB, is thus prohibited.

5. That prohibition is expressly confirmed by Article 8 of Decree No 92-280 of

1 — Original language: Italian.

2 — *Journal Officiel de la République Française* of 12 January 1991, p. 615.

3 — This later became Article L. 3323-2 of the Code de la santé publique.

27 March 1992 on television advertising and sponsorship, [4] which provides:

'The advertising of products which, by law, must not be advertised on television and the advertising of the following goods and economic sectors:

drinks having an alcohol content greater than 1.2°...

shall be prohibited.'

6. Infringement of the Loi Evin is a criminal offence (*délit*) under the French penal system. Article L.21 of the CDB in fact provides that:

'Infringement of Articles L.17, L.18, L.19 and L.20 is punishable by a fine of up to FRF 500 000. The upper limit of that fine may be increased by an amount equal to 50% of the unlawful advertising expenditure.

In the case of repeat offences, the court may prohibit the sale of the alcoholic beverage which is the subject of the unlawful advertising for between one and five years.'

4 — JORF of 28 March 1992, p. 4313.

7. Moreover, an important supervisory role was conferred on the 'Conseil supérieur de l'audiovisuel' (hereinafter 'the CSA'), which can impose administrative penalties on French broadcasters for failing to comply with the Loi Evin. In the exercise of that role, the CSA drew up, in 1995, a 'Code of Good Conduct' explaining its intended interpretation of the Loi Evin in so far as concerns broadcasts of sporting events at which advertisements for alcoholic beverages are shown (for example, on athletes' shirts or on billboards around the playing field).

8. Whilst discrimination between French and foreign alcoholic drinks is not permitted, the Code of Good Conduct calls for great vigilance on the part of advertisers, intermediaries, sporting federations and television broadcasters where advertisements are shown in the course of sporting events that take place outside France. In such cases, broadcasters transmitting pictures of events in France must not adopt a complacent approach towards advertisements shown in the place where the event takes place, must not be involved in the placing of the advertisements and, as far as possible, must not allow such advertisements to enter the shot.

9. That general rule is further defined by a distinction drawn between 'multinational events' and 'other events taking place

abroad'.[5] In the case of 'multinational events' broadcast to a number of nations and thus not regarded as being intended mainly for French viewing audiences, broadcasters cannot be accused of complicity even if advertisements appear on screen, provided that the pictures transmitted are not within their control. 'Other events', however, regarded as being intended for the French viewing public, are treated differently. In the case of such 'other events', where the law of the host country allows the advertising of alcoholic drinks at the venue, the parties who negotiate with the owners of the broadcasting rights must use every possible means to ensure that such advertisements do not appear in France and must inform their foreign counterparts of the rules prevailing in France.

10. Finally, mention should be made of the relevant English law, which, according to the order for reference, does not prohibit the televised advertising of alcoholic drinks.[6] Generally speaking, however, English law provides that advertisements must not suggest that alcoholic drinks are capable of enhancing mental or physical capacity (and, in particular, sexual ability), popularity, attractiveness, masculinity or femininity, personal relationships, or social or sporting achievement.

Facts and procedure

11. The facts which gave rise to the main action concern a series of contractual relationships, all of them interconnected to some degree, involving the companies Bacardi-Martini S.A.S., Cellier des Dauphins, Newcastle United Football Company Ltd, Dorna Marketing (UK) Ltd and CSI Ltd (hereinafter referred to respectively as 'Bacardi', 'Cellier', 'Newcastle', 'Dorna' and 'CSI'). Bacardi and Cellier are French companies engaged in the production and marketing of alcoholic beverages. Newcastle is an English company which owns and manages a football club and a stadium. Dorna is a company incorporated in England and Wales that concerns itself with the sale and management of advertising space on electronic billboards located around the perimeter of football grounds. Lastly, CSI is an English law company whose business consists in selling television rights to sporting events.

5 — The CSA does not provide official lists of the events which it considers 'multinational events' or 'other events'. However, it seems to regard as 'multinational events' all rounds of the UEFA Champions League (football), all international matches, including friendlies, played by the French national football team, all matches of the Five (now Six) Nations Rugby Championship and the Rugby World Cup finals and all Grand Prix in the FIA Formula One World Championship. 'Other events' include the early rounds (prior to the quarter-finals) of the UEFA Cup (football) and the (now defunct) UEFA Cup Winners' Cup (football) and all matches in the Inter-Toto Cup (football).

6 — The High Court refers, in particular, to the British Code of Advertising.

12. The contractual relations between the parties may be summarised as follows:

(i) under an agreement concluded in 1994 between the Football Association Premier League Limited and the clubs affiliated to it (including Newcastle) on one side and Dorna on the other, Dorna was appointed to sell and manage advertising space located around the perimeter of the pitch for all home matches played by Premier League clubs;

(ii) under two agreements concluded by Dorna in November 1996 with Bacardi and Cellier, Dorna undertook to make advertising space available to the two French companies during a match between Newcastle and the French team Metz, which was to be played in England on 3 December 1996 in the third round of the UEFA Cup;

(iii) under a separate agreement Newcastle then granted to CSI the broadcasting rights for the match. In particular, in so far as is relevant here, Newcastle undertook to permit and/or procure the live broadcast of the match on French television. The rights to broadcast the match in France were subsequently sold by CSI to CANAL+.

13. On the day of the match, shortly before it was to begin, Newcastle became aware that Bacardi and Cellier had purchased advertising space from Dorna in order to promote their alcoholic drinks. Newcastle informed Dorna that the match was to be broadcast in France, where the televised advertising of alcoholic drinks is not allowed, and asked Dorna to remove the advertisements for the two French companies from its billboards.

14. The advertisements could not be removed before the beginning of the match and so the electronic display system was programmed so that they should not appear during the match for periods of more than a second or two.

15. Bacardi and Cellier took the view that they had suffered damage as a result of the substantial suppression of their advertisements and on 23 July 1998 commenced proceedings in the High Court against Dorna and Newcastle, seeking, *inter alia*, 'damages, declarations and injunctive relief'. The action against Dorna was subsequently withdrawn, having been settled by agreement between the parties.

16. Bacardi and Cellier argued before the High Court that Dorna had failed to fulfil

its contractual obligations as a result of Newcastle's interference and that Newcastle's actions could not be justified 'by reference to the Loi Evin' because that law was inconsistent with Article 49 EC. They argued that the Loi Evin restricted the advertising of alcoholic drinks at sporting events taking place in Member States other than France when the events are to be televised in France and prohibited or restricted the televising in France of sporting events taking place in Member States other than France where advertising for alcoholic drinks is displayed at the venue. Consequently, the claimant companies take the view that Newcastle is liable to them for having induced Dorna to breach its contractual obligations. For its part, Newcastle pleaded in its defence, *inter alia*, that it was justified in instructing Dorna to remove the Bacardi and Cellier advertisements 'on the basis of the Loi Evin provisions', because those provisions were compatible with Article 49 EC.

17. In its order for reference, the High Court was careful to note that, according to an experts' report, in its application of the Code of Good Conduct, the CSA gave the impression that it was only in relation to the advertising of French alcoholic beverages that it wished to curb infringement of the Loi Evin. Owners of television rights for sporting events taking place outside France thus allegedly refrain from selling advertising space for such drinks, for fear of losing the very high fees derived from the sale of television rights in France. The order for reference reports a statement from the finance director of Newcastle to that effect:

'The French law is a real problem for football clubs competing against French clubs in UEFA Cup matches. It restricts the clubs' freedom to sell advertising space at their grounds. Indeed [the] C.S.I. tends to advise English clubs not to accept advertisements from alcohol manufacturers for those games in order to ensure they maximise their television income. Newcastle United's current stance is that we are unlikely to take advertisements from Bacardi, Cellier or any other alcohol advertising for any future matches against French opposition until the position of the Loi Evin is clarified. We really do not see any other alternative.'

18. Thus, taking the view that the issue of the compatibility of the Loi Evin with Article 49 EC is central to the resolution of the dispute and regarding it as inappropriate for it to give a ruling thereon without allowing the French Government an opportunity to state its position, the High Court decided to stay the proceedings and refer to

the Court the following questions for a preliminary ruling:

'1. Are Articles L.17 to L.21 of the *Code des débits de boissons* (the so-called "Loi Evin" provisions), Article 8 of Decree No 92-280 of 27 March 1992 and the provisions of the *Code de Bonne Conduite* of 28 March 1995 contrary to Article 59 of the EC Treaty (now Article 49 EC) in so far as they prevent or restrict:

(a) the advertising of alcoholic drinks at sporting events taking place in Member States other than France when the events are to be televised in France, and

(b) the broadcasting in France of sporting events taking place in other Member States at which there is advertising of alcoholic beverages?

2. If not, is the manner in which these provisions are interpreted and applied in practice by the *Conseil Supérieur de l'Audiovisuel* contrary to Article 59 of the EC Treaty (now Article 49 EC) in so far as they prevent or restrict:

(a) the advertising of alcoholic drinks at sporting events taking place in Member States other than France when the events are to be televised in France, and

(b) the broadcasting in France of sporting events taking place in other Member States at which there is advertising of alcoholic beverages?'

19. In addition to the claimants in the main proceedings, the French Government, the United Kingdom Government and the Commission have all intervened in the proceedings before the Court of Justice. As part of its organisation of the proceedings, the Court of Justice has requested clarification from the High Court concerning the relevance of the questions referred to the resolution of the main dispute and has also put questions to the two governments which have intervened seeking further information concerning the factual and legal background.

Legal analysis

20. The case under consideration is highly distinctive. It concerns a court in the United Kingdom which, called upon to decide whether a company (Newcastle) has incurred civil liability under English law for having induced another company

(Dorna) to disregard certain contractual obligations it had assumed for the benefit of certain other companies (Bacardi and Cellier), regards as decisive for the resolution of the matter the question of the compatibility with Community law of a French law (the Loi Evin), which, whilst not directly applicable to the facts of the case, has nevertheless been relied upon by the first company as justification for its conduct. The case is peculiar also for the fact that, according to indications in the order for reference,[7] as a quite separate matter from the proceedings in question, all the parties to the dispute seem to have a broader interest in obtaining a declaration that the French law in question is inconsistent with Community law.

21. Given those special features, it seems appropriate, before assessing the compatibility with Community law of a piece of national legislation such as the Loi Evin, to consider whether the Court of Justice has jurisdiction to give a ruling on the questions referred. Indeed, the admissibility of this reference for a preliminary ruling has been expressly disputed by both the French Government and the Commission, the latter going so far as to restrict its own written observations to that particular aspect, saying nothing whatsoever on the substantive merits of the questions. Whilst it draws the opposite conclusion, the United Kingdom Government itself is also mindful of the issue and has devoted part of its observations to the question of the admissibility of the reference. It is therefore appropriate to address this aspect of the case as preliminary point.

7 — In this connection one might cite in particular the statement made by Newcastle's finance director, reported by the High Court and cited in paragraph 17 of the present Opinion.

The jurisdiction of the Court of Justice

Arguments of the parties

22. As I have mentioned, the French Government maintains that the reference for a preliminary ruling is inadmissible. It emphasises in particular that the French law in question has no extraterritorial application and argues that, consequently, only the French broadcaster which purchased the broadcasting rights (namely CANAL+) could potentially be liable for breach of the Loi Evin and certainly not Newcastle, which in reality took action only out of fear of losing the income from the sale of the television rights.

23. Similarly, the Commission takes the view that the questions referred are inadmissible because Newcastle was under no obligation to comply with the Loi Evin anyway. Thus, the Commission too argues that Newcastle's conduct was dictated solely by its fear of losing the agreed fee for the television rights relating to the match in question or, more generally, by its concern not to compromise its ability to sell in the future broadcasting rights relating to its own matches to French television channels. Moreover, in the Commission's opinion, the national court has not given sufficient reasons for its decision to refer the questions. That is for two reasons: first, it failed to clarify the basis on which Newcastle might rely on the French law

in order to justify its conduct and thus failed to give any indication as to the incidence of the questions referred upon the resolution of the main dispute; secondly, it failed to state whether, and if so on what legal basis, the fear of financial loss might excuse interference in a contract between third parties.

24. The United Kingdom, on the other hand, takes the view that the questions referred are relevant to the resolution of the main dispute. However, its reasons for doing so are not the same as those expressly set out by the national court. According to the United Kingdom, the broadcasting on French television of the match between Newcastle and Metz was the subject of a clause of the contract between Newcastle and CSI. Therefore, Newcastle intervened in the contract between Bacardi and Cellier and Dorna not because it was directly required to do so by the provisions of the Loi Evin, but in order to avoid a breach of a contractual obligation which implicitly or explicitly called for compliance with the French law governing the broadcasting of the match. To that degree, and on that condition, the United Kingdom considers the questions regarding the validity of the French law as indeed being relevant to the main proceedings.

25. Bacardi and Cellier, which expressed no view on the point during the written procedure, pointed out at the hearing that, before the High Court, Newcastle had sought to justify giving its instructions to Dorna on the ground that, had it not done so, performance of the contract with the French television broadcaster might have been unlawful under French law. They also stated that they did not dispute that Newcastle's actions were motivated 'by the very fact of, and the effects of, the French law', but took the view that that could not justify its interference in Dorna's contract because the French law was inconsistent with Community law.

Assessment

26. Coming now to the assessment of this issue, I think it appropriate first of all to point out that, according to settled case-law and as a general principle, 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court'. [8]

27. As is well-known, however, the Court of Justice nevertheless retains a margin of discretion as regards the views of the national court and may, where appropriate,

8 — Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20. See, to the same effect, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-421/97 *Tarantik* [1999] ECR I-3633, paragraph 33, *inter alia*.

find that a reference for a preliminary ruling is inadmissible. On a number of occasions, the Court has 'held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical'. [9] In accordance with that precedent, therefore, '[i]f it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment'. [10] In this connection it has also been made plain that, 'in order that the Court of Justice may perform its task in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment'. [11]

28. For the purposes of the present opinion, it is also of interest to note that, according to case-law, in assessing the admissibility of a reference for a preliminary ruling, 'the Court of Justice for its part must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law'. [12]

29. That being so, I must observe that, in the order for reference, the relevance of the questions referred is asserted essentially by reiteration of the points made by the parties, which, moreover, as the Commission has emphasised, as a quite separate matter from the current proceedings, seem to have a common interest in obtaining a declaration that the Loi Evin is inconsistent with Community law. [13] More specifically, the order states that, according to Bacardi and Cellier, Newcastle's interference in Bacardi's and Cellier's agreements with Dorna 'could not be justified by reference to the Loi Evin provisions because those provisions are unlawful under Article 59 of the EC Treaty (now Article 49 EC)' and that, in its defence, Newcastle pleads, *inter alia*, that 'it was justified in instructing Dorna to remove the Bacardi and Cellier advertisements on the basis of the Loi Evin provisions because the Loi Evin provisions are compatible with Article 59 of the EC Treaty'. For its part, in explaining the reasons which led it to refer the questions for a preliminary ruling, the High Court limited itself to asserting that the 'issue of the legality of the Loi Evin provisions is central to resolution of the proceedings before the national court'.

9 — *Idéal Tourisme*, cited above, paragraph 20. See also Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 17 and 18, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25, *Bosman*, cited above, paragraph 61, and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52.

10 — *Lorenço Dias*, cited above, paragraph 20.

11 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 17.

12 — *Ibidem*, paragraph 30.

13 — See paragraph 17 above.

30. In accordance with Article 104(5) of the Rules of Procedure, the Court of Justice called upon the High Court to explain why it needed an answer to the questions it had referred in order to resolve the dispute before it. The High Court replied that, in the United Kingdom, where a breach of contract is induced, no liability in damages arises if there is justification for inducing the breach. It went on to say that the question of what can constitute such justification is fundamentally a question for the good sense of the court, which must take account of all the relevant circumstances. Having made that general point, the High Court then stated that, in the main proceedings, Newcastle had argued in its defence that it was justified in giving instructions to remove the advertisements since, *inter alia*, 'such instructions were given in the reasonable anticipation that a failure to give them would result in a breach of French law'. The claimant companies, for their part, replied that that defence, under domestic law, was unacceptable as a matter of Community law because the Loi Evin was, in any event, contrary to Article 59 of the EC Treaty (now Article 49 EC), which has direct effect. On that basis, the High Court considered it appropriate, in order to ensure the efficient conduct of the proceedings, to seek a preliminary ruling from the Court of Justice on the issue of Community law raised by the parties.

31. It seems to me that it can be inferred from that reply that the reference for a preliminary ruling is based on arguments of the parties according to which

(i) it was reasonable for Newcastle to think that, had it not taken action with regard to Dorna, its omission would have resulted in an infringement of the Loi Evin, and

(ii) that desire to avoid infringement of the Loi Evin 'justified' Newcastle's intervention and thus protected it from incurring liability, but only if the Loi Evin is compatible with Community law. That was the basis on which the High Court regarded it as appropriate to ask the Court of Justice about the compatibility of the Loi Evin with Article 49 EC.

32. In so doing, however, the High Court appears to ascribe relevance to the questions which it refers solely on the basis of arguments raised by the parties: in the order for reference, there is no sign of any appraisal, not even a prima facie appraisal, of the merits of those arguments and, in particular, of the legal assumptions on the basis of which the parties allege that the resolution of the main dispute depends on the French law's compatibility or otherwise with Community law.

33. In particular, the High Court has not made clear whether, in its opinion, in the event that the Loi Evin is declared compatible with Community law, interference with Dorna would have to be regarded as 'justified' inasmuch as Newcastle was, as it alleges in its pleadings, 'reasonably' entitled to think that, had it failed to take action, the omission on its part would have resulted in a breach of French law. Because the English court does not express a view on the point, the relevance to the main proceedings of the questions referred remains dependent solely on the court's acceptance or rejection of Newcastle's argument, which, moreover, is a highly debatable one in that it is apparently based on an erroneous interpretation of French law. Indeed, it does not seem 'reasonable' to take the view that failure to act on Newcastle's part would have resulted in a breach of the Loi Evin, for, as the French Government and the Commission have emphasised, the Loi Evin clearly imposed no obligation upon the English company and only the French broadcaster which purchased the broadcasting rights could potentially be liable for its breach. That is not to mention the fact that, as the French Government and the Commission have also observed, there is in point of fact some doubt surrounding Newcastle's argument, for there are indications in the order for reference that the real reason behind Newcastle's intervention was its fear of losing television income should the French broadcaster be prohibited from broadcasting the match. [14]

34. Yet, even granting Newcastle's submission that its desire to avoid some inchoate infringement of the Loi Evin ought to justify its interference in Dorna's affairs, the fact remains that the High Court has not made plain whether, in its view, such justification would fall away, as Bacardi and Cellier maintain, should the Court of Justice declare that a law such as the Loi Evin is in fact inconsistent with Community law. Indeed, supposing that an intention to avoid infringement of the Loi Evin did constitute valid justification for Newcastle's conduct (and thus protected it from incurring liability), it is not at all clear why that justification should automatically be undone if the law with which Newcastle was trying to ensure compliance is declared to be inconsistent with Community law. In light of the principles of legal certainty and the protection of legitimate expectations and given the presumption that national laws are consistent with Community law, I incline to the contrary view. It seems to me that it is at least open to question whether an individual who has acted in accordance with the law of a Member State (the breach of which, moreover, is punishable by criminal sanctions) can be penalised if that law is subsequently shown to be inconsistent with Community law.

35. By not expressing its position on these preliminaries, the High Court has thus failed to make plain why, for the resolution of the dispute in the main proceedings, it is

14 — See, in this connection, the statement of the Newcastle's finance director, reported at paragraph 17 of the present Opinion.

necessary, *in its opinion*, for the Court of Justice to decide whether a law such as the Loi Evin is compatible with Article 49 EC. Given the particular features of the case under consideration, I therefore consider that, in the absence of any evaluation of the legal arguments on the basis of which the reference for a preliminary ruling is regarded as necessary, the questions posed remain merely hypothetical inasmuch as it remains doubtful, to say the least, whether a decision of the Court of Justice will be of use in resolving the main dispute, rather than simply representing a useful precedent of which the parties might avail themselves in other circumstances.

36. Furthermore, I do not think that the questions referred for a preliminary ruling can become relevant, as the United Kingdom Government (whose arguments were partially adopted by Bacardi and Cellier at the hearing) suggests, because of the fact that Newcastle intervened in Dorna's affairs not because it was directly required to do so by the provisions of the Loi Evin, but so as not to find itself in breach of obligations arising under its contract with CSI. Indeed, that is not the reason for which the High Court regards the questions referred as relevant. In its reply to the Court of Justice's request for clarification, the High Court did not even mention the contract between Newcastle and CSI. Even if it were so, it nevertheless remains unclear why the justification afforded by Newcastle's desire to comply with the terms of its contract with CSI should fall away if the Court declares laws such as the Loi Evin to be incompatible with Article 49 EC.

37. In light of the foregoing considerations and taking into account the particular features of the case under consideration, I therefore take the view that the Court of Justice has no jurisdiction to give a ruling on the questions referred by the High Court.

Conclusion

38. On the basis of the foregoing considerations, I suggest that the Court has no jurisdiction to rule on the questions referred for a preliminary ruling by the High Court.