JUDGMENT OF THE COURT (Sixth Chamber)
7 March 1990 *

In Case C-362/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de cassation of the Grand Duchy of Luxembourg for a preliminary ruling in the proceedings pending before that court between

GB-INNO-BM, a company incorporated under Belgian law, Brussels,

and

Confédération du commerce luxembourgeois, a non-profit-making association established in Luxembourg,

on the interpretation of Articles 30 and 36 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, T. Koopmans, G. F. Mancini, T. F. O'Higgins and M. Díez de Velasco, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

GB-INNO-BM, a company incorporated under Belgian law, the appellant, by Nicolas Decker, of the Luxembourg Bar, Antoine de Bruyn, avocat with the right to appear before the Belgian Cour de cassation, and Louis van Bunnen and Michel Mahieu, of the Brussels Bar,

* Language of the case: French.

Confédération du commerce luxembourgeois ASBL, the respondent, by Yvette Hamilius, of the Luxembourg Bar,

the Government of the Grand Duchy of Luxembourg by Alain Gross, of the Luxembourg Bar,

the Government of the Federal Republic of Germany by Horst Teske, Martin Seidel and A. von Mühlendahl, acting as Agents,

the Government of the French Republic by G. de Bergues, acting as Agent,

the Commission of the European Communities by Christine Berardis-Kayser, in the written procedure, and E. White and H. Lehman, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 23 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 January 1990,

gives the following

Judgment

1 By judgment of 8 December 1988, which was received at the Court on 14 December 1988, the Cour de cassation of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty in order to enable it to assess the compatibility with those provisions of national legislation on advertising.

2 The question was raised in proceedings between the Confédération du commerce luxembourgeois (hereinafter referred to as 'CCL'), a non-profit-making association which claims to represent the interests of Luxembourg traders, and GB-INNO-BM, which operates supermarkets in Belgian territory, *inter alia* in Arlon, near the Belgian-Luxembourg border. The Belgian company had distributed advertising leaflets on Luxembourg territory as well as on Belgian territory and CCL applied to the Luxembourg courts for an injunction against the company to stop the distribution of those advertising leaflets. CCL claimed that the advertising contained in the leaflets was contrary to the Grand-Ducal Regulation of 23 December 1974 on unfair competition (*Mémorial* A 1974, p. 2392), according to which sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices.

3 The presiding judge of the tribunal d'arrondissement (District Court), Luxembourg, competent for commercial matters granted the injunction, taking the view that the distribution of the leaflets in question constituted a sales offer prohibited by the Grand-Ducal Regulation of 1974 and an unfair practice prohibited by the same regulation. The cour d'appel upheld the injunction, whereupon GB-INNO-BM appealed to the Cour de cassation. It argued that the advertising contained in the leaflets complied with the Belgian provisions on unfair competition and that it would thus be contrary to Article 30 of the EEC Treaty to apply to it the prohibitions laid down in the Luxembourg legislation.

4 The Cour de cassation stayed proceedings and submitted the following question to the Court of Justice for a preliminary ruling:

'Is a legislative provision of a Member State whereby the offering of goods for retail sale at a temporarily reduced price, other than in special sales or clearance sales, is permitted only on condition that the offers may not state their duration and that there may be no reference to previous prices contrary to Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty, properly construed?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 As a preliminary point, an argument that was raised by CCL and the German and Luxembourg Governments calls for examination. That argument is to the effect that the provisions of Articles 30, 31 and 36 of the Treaty have no relevance to the subject-matter of the main proceedings, which solely concern advertising, not the movement of goods between Member States. Moreover, it is said, GB-INNO-BM sells its wares only on Belgian territory.

7 That argument cannot be accepted. The Court has already held, in its judgment of 15 December 1982 in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, that legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities.

8 Free movement of goods concerns not only traders but also individuals. It requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the Treaty.

9 It is therefore clear that the question referred to the Court for a preliminary ruling concerns the compatibility with Article 30 of the Treaty of an obstacle to the free movement of goods resulting from disparities between the applicable national legislation. It is apparent from the documents before the Court that the advertising of sales offers involving a price reduction and stating the duration of the offer and the prices previously charged is prohibited by the Luxembourg legislation but permitted by the provisions in force in Belgium.

10 The Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating

inter alia to consumer protection or the fairness of commercial transactions (see, in particular, the judgments of 20 February 1979 in Case 120/78 *Rewe* [1979] ECR 649, and of 26 June 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071).

11 According to CCL and the Luxembourg Government, the two prohibitions in question — against stating the duration of a special offer and against specifying the previous price — are justified on the grounds of consumer protection. The purpose of the prohibition concerning the duration of the special offer is to avoid the risk of confusion between special sales and half-yearly clearance sales the timing and duration of which is restricted under Luxembourg legislation. The prohibition against allowing the previous price to appear in the offer is justified, they say, by the fact that the consumer is not normally in a position to check that a previous reference price is genuine. In addition, the marking of a previous price might exert excessive psychological pressure on the consumer. In substance the German Government shares that point of view.

12 That view is contested by GB-INNO-BM and the Commission, who point out that any normally aware consumer knows that annual sales take place only twice a year. As regards comparison of prices, the Commission has submitted an overview of the relevant legislation in various Member States and concludes that, with the exception of the Luxembourg and German provisions, they all allow both prices to be indicated if the reference price is genuine.

13 The question thus arises whether national legislation which prevents the consumer from having access to certain information may be justified in the interest of consumer protection.

14 It should be observed first of all that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information. Thus the 'preliminary programme' adopted by the Council in 1975 (Official Journal 1975, C 92, p. 1) provides for the implementation of a 'consumer protection and information policy'. By a Resolution of 19 May 1981 (Official Journal 1981, C 133, p. 1), the Council approved a 'second programme

of the European Economic Community for a consumer protection and information policy' the objectives of which were confirmed by the Council Resolution of 23 June 1986 concerning the future orientation of the policy of the Community for the protection and promotion of consumer interests (Official Journal 1986, C 167, p. 1).

15 The existence of a link between protection and information for consumers is explained in the introduction to the second programme. There it is stressed that measures taken or scheduled in accordance with the preliminary programme contribute towards improving the consumer's situation by protecting his health, his safety and his economic interest, by providing him with appropriate information and education, and by giving him a voice in decisions which involve him. It is stated that often those same measures have also resulted in harmonizing the rules of competition by which manufacturers and retailers must abide.

16 The introduction goes on to specify that the purpose of the second programme is to continue and intensify the measures in this field and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other. To that end the programme sets out five basic rights to be enjoyed by the consumer, amongst which appears the right to information and education. One of the measures proposed in the programme is the improvement of consumer education and information (paragraph 9D). The part of the programme which lays down the principles which must govern the protection of the economic interests of consumers includes passages which aim to ensure the accuracy of information provided to the consumer, but without refusing him access to certain information. Thus, according to one of the principles (Paragraph 28(4)), no form of advertising should mislead the buyer; an advertiser must be able to 'justify, by appropriate means, the validity of any claims he makes'.

17 As the Court has held, a prohibition against importing certain products into a Member State is contrary to Article 30 where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts (judgments of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019, and of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227).

18 It follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.

19 In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection. They thus fall under the prohibition laid down in Article 30 of the Treaty. The exceptions to the application of that provision contained in Article 36 are not applicable; indeed, no reliance was placed on them during the proceedings before the Court.

20 Since Article 30 is applicable, there is no need to interpret Article 31 of the Treaty, which was also mentioned in the reference for a preliminary ruling.

21 The reply to the question posed must therefore be that under Articles 30 and 36 of the EEC Treaty, properly interpreted, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

Costs

22 The costs incurred by the Government of the Grand Duchy of Luxembourg, the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 submitted to it by the Cour de cassation of the Grand Duchy of Luxembourg, by order of 8 December 1988, hereby rules:

Under Articles 30 and 36 of the EEC Treaty, properly interpreted, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

Kakouris Koopmans

Mancini O'Higgins Díez de Velasco

Delivered in open court in Luxembourg on 7 March 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber