JUDGMENT OF THE COURT
11 July 1985 *

In Joined Cases 60 and 61/84

REFERENCES to the Court under Article 177 of the EEC Treaty by the Tribunal de grande instance [Regional Court], Paris for a preliminary ruling in the actions pending before that court between

(1) **Cinéthèque SA,** Paris,

(2) **Glinwood Films Limited,** London,

(3) **Discophile Club de France,** Paris, and

(4) **Téléfrance SA,** Paris,

and

Fédération nationale des cinémas français, Paris (Case 60/84),

and between

(1) **Éditions René Chateau Sàrl,** Paris,

(2) **Hollywood Boulevard Diffusion — Michel Fabre,** Paris, and

(3) **DGD Sprl,** Charleroi (Belgium),

and

Fédération nationale des cinémas français, Paris (Case 61/84),

* Language of the Case: French.

on the interpretation of Articles 30, 34, 36 and 59 of that Treaty with a view to enabling the Tribunal de grande instance to determine the compatibility with those provisions of French legislation concerning the exploitation in the form of video-cassettes and video-discs of films distributed simultaneously in cinemas,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and O. Due (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louternann, Administrator

after considering the observations submitted on behalf of:

Téléfrance SA, the plaintiff in the main proceedings in Case 60/84, by J. P. Clement of the Paris Bar,

the other plaintiffs in the main proceedings, by J.-G. Bitoun and L.-E. Pettiti, both of the Paris Bar,

Fédération nationale des cinémas français, the defendant in the main proceedings, by L. Bousquet,

the Government of the Federal Republic of Germany, by E. Röder,

the French Government, by G. Guillaume,

the Commission of the European Communities, by J. Delmoly, C.-D. Ehlermann and D. Jacob, acting as Agents,

after hearing the opinion of the Advocate General delivered at the sitting on 20 March 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By two orders of 15 February 1984, which were received at the Court on 7 March 1984, the Tribunal de grande instance, Paris, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions, which were identical in both cases, concerning the interpretation of Articles 30, 34, 36 and 59 of the Treaty with a view to determining the compatibility with those provisions of French legislation on the distribution of cinematographic works.

2 Article 89 of French Law No 82-652 of 29 July 1982 on audio-visual communication (*Journal Officiel de la République Française* of 20 July 1982, p. 2431) provides that no cinematographic work shown in cinemas may simultaneously be exploited in the form of recordings intended for sale or hire for the private use of the public, in particular in the form of video-cassettes or video-discs, before the expiration of a period of between six and 18 months to be determined by decree. It is also provided that the period is to run from the grant of the performance certificate and that it may be waived on conditions to be determined by decree.

3 The interval thereby provided for was fixed at one year by a decree of 4 January 1983. According to the orders for reference it follows from that legislation in conjunction with the provisions which had previously been adopted in relation to the showing of films on television that the chronological order for the showing of films is as follows: first in cinemas, then on video-cassettes and video-discs and finally on television. The orders state that the strictness of that rule is mitigated by the power given to the Minister for Culture to waive the period of one year acting upon an opinion of a committee composed of eight members including two representing video-cassette and video-disc producers. According to the aforementioned decree a dispensation may be granted in the light of the results of the commercial exploitation of the cinematographic work in cinemas.

4 In Case 60/84 the main action concerns the distribution of the film 'Furyo' which was produced by Glinwood Films Limited, a company incorporated under English

law whose registered office is in London. That company granted the exclusive right to distribute and show the film in cinemas to a French undertaking, AAA, in March 1983; the film was granted a cinema performance certificate within the meaning of Article 89 of Law No 82-652 on 28 June 1983. One month later Glinwood granted to another French undertaking, Cinéthèque SA, an exclusive licence to produce and sell video-cassettes of the film from 1 October 1983, which licence related to Belgium, France and Switzerland. Cinéthèque undertook to pay royalties of FF 500 000 to Glinwood. After having also obtained the consent of AAA Cinéthèque began producing and selling cassettes of the film from the agreed date. In October 1983 those activities ceased due to the fact that the Fédération nationale des cinémas français [National Federation of French Cinemas] had sought and obtained an interim order for the seizure of all video recordings of the film 'Furyo' which had been produced by Cinéthèque and offered for sale to the public by retailers. Cinéthèque and Glinwood brought an action before the Tribunal de grande instance, Paris, to have the order lifted and for a declaration that the provisions of Article 89 of Law No 82-652 and of the Decree of 4 January 1983 were contrary to Articles 30 to 36 and 59 of the EEC Treaty.

5 In Case 61/84 the main action concerns the distribution of the film 'Le Marginal' which was produced by two French undertakings, Cérito films and Films Ariane. Those undertakings authorized the French undertaking Éditions René Chateau Sàrl to produce, issue and distribute video-cassettes of the film from 15 January 1984 at the latest for a consideration of FF 1 500 000 together with royalties of 20% on sales of video-cassettes over 20 000. That agreement covered Belgium, France, Luxembourg and Switzerland. On 27 October 1983 the film began a run of exclusive showings in three Paris cinemas belonging to the undertaking Hollywood Boulevard Diffusion — Michel Fabre. The film was granted a performance certificate on the same date. On 20 December 1983 Cérito films authorized Éditions René Chateau to distribute the video-cassette of the film as soon as possible in view of the existence in France of pirated cassette recordings of the film. René Chateau, in conjunction with Hollywood Boulevard, began issuing the cassette of the film immediately. Upon an application by the Fédération nationale des cinémas français an interim order was granted on 27 December 1983 prohibiting the two undertakings from distributing the film in the form of video-recordings intended for sale or hire for the private use of the public, upon penalty of a fine. Éditions René Chateau and Hollywood Boulevard brought an action

before the Tribunal de grande instance, Paris, to have the order lifted and for a declaration that the provisions of Article 89 of Law No 82-652 and of the Decree of 4 January 1983 were contrary to Articles 30 to 36 and 59 of the EEC Treaty.

6 In order to resolve those questions the Tribunal de grande instance, Paris, referred to the Court for a preliminary ruling in the two cases the following questions:

'(1) In establishing an interval between one mode of distributing cinematographical works and another by a prohibition of the simultaneous exploitation of such works in cinemas and in video-cassette form for a period of one year, save in the case of derogation, are the provisions of Article 89 of the French Law of 29 July 1982, as supplemented by the Decree of 4 January 1983, regulating the distribution of cinematographical works, compatible with the provisions of Article 30 and 34 of the EEC Treaty on the free movement of goods?

(2) Are those same provisions of domestic law compatible with Article 59 of the EEC Treaty on freedom to provide services?

(3) If the answer to either of those questions is in the negative, are the rules enacted by Article 89 of the Law of 29 July 1982 and the Decree of 4 January 1983 compatible with the provisions of Article 36 of the EEC Treaty laying down derogations from Articles 30 and 34 of that Treaty?'

7 By those questions the Tribunal de grande instance seeks to ascertain how Articles 30, 34, 36 and 59 of the Treaty are to be interpreted in order to determine the compatibility with those provisions of national legislation which regulates the distribution of cinematographic works by establishing an interval between one mode of distribution and another by a prohibition of the simultaneous exploitation of such works in cinemas and in video-cassette form for a period of one year.

8 It is necessary to consider first whether the Treaty provisions relating to the free movement of services, especially Article 59, are relevant in assessing the compatibility of such national legislation with Community law.

9 Cinematographic works belong to the class of artistic works which may be transmitted to the public either directly by showing the film on television or in cinemas, or indirectly by means of recordings such as video-cassettes. In the latter case the transmission to the public merges with the putting of the works on the market.

10 The provision of French law which gave rise to the main proceedings in the two cases prohibits the 'exploitation' of cinematographic works in the form of recordings, in particular in the form of video-cassettes. The question may therefore be asked whether that prohibition, whilst not applying to the mere grant of a licence which is not immediately followed by the production of the video-cassettes in question, nevertheless extends to an instruction to produce them. In that respect it must be emphasized that it is not possible to regard the process of production of video-cassettes as the provision of 'services' within the meaning of the Treaty since the services of a manufacturer of such products result directly in the manufacture of a material object which is, moreover, the subject of classification in the Common Customs Tariff (heading 37.07). According to Article 60 of the Treaty services are only to be considered as such if they are provided for remuneration 'in so far as they are not governed by provisions relating to freedom of movement for goods'.

11 It follows from the foregoing considerations that the questions raised by the Tribunal de grande instance fall to be considered solely with regard to Articles 30 to 36 of the Treaty.

12 The dispute between the parties centres on the effect of the national legislation in question on imports of video-cassettes and on the marketing of imported video-cassettes in the national territory. The French Government stated that the prohibition laid down by the French law did not extend to exports of video-cassettes since the specific purpose of the law was not frustrated if video-cassettes of films shown in cinemas in France were exported to other Member States. In so far as the Tribunal de grande instance had, in one of the main proceedings, authorized the seizure of video-cassettes intended for export, it had, in the opinion of the French Government, applied the law incorrectly; the French Government points out in that connection that the legislation was of recent date.

13 In those circumstances it is necessary to restrict the examination of the national legislation at issue to its possible effects on the importation of video-cassettes and on the marketing of imported video-cassettes.

14 In that respect the plaintiffs and the interveners in the main proceedings, namely Cinéthèque and Glinwood Films, Éditions René Chateau and Hollywood Boulevard, Téléfrance SA and Discophile Club de France, emphasize that legislation of the type applied in France has the effect of restricting intra-Community trade in view of the fact that its application prevents certain products from being made available for sale in the national territory even though they may circulate freely in the territory of other Member States. Such a restriction on intra-Community trade cannot be justified on the basis of Article 36 of the Treaty on the ground of the protection of industrial and commercial property and in particular of copyright since the holder of the copyright in cinematographic works is in fact prevented by that legislation from exercising the rights conferred by the copyright.

15 The Fédération nationale des cinémas français, the defendant in the main proceedings, contends that the legislation in question applies to imported and national products alike, that it was adopted in the absence of Community legislation in a field falling within the exclusive competence of the Member States, and that it was justified by the mandatory requirements of the general interest. What was at issue was the protection of the cinema as a means of cultural expression, which protection was necessary in view of the rapid development of other modes of film distribution.

16 The French Government, which adopts a similar point of view, observes that the legislation in question forms part of a body of rules intended to establish a chronological order between different methods of exploiting a cinematographic work in order to ensure priority for exploitation in cinemas. Exploitation through television was already regulated in France by means of the general conditions which the national television companies had to comply with, and the aim of Article 89 of Law No 82-652 was to apply the same system to exploitation by video, but subject to a shorter interval. Such an arrangement was necessary in order to ensure the continued creation of cinematographic works since their exploitation in cinemas produces the bulk of their revenue (80%) and income from other forms of exploitation is very small. Cinema showings were essential for the film industry to remain profitable, and thus for the continued production of films.

17 The French Government adds that it would have been possible to make the holders of film rights responsible for delaying exploitation of the film by video by laying a mandatory time-limit in their contracts. However, such a system of self-regulation would not have been able to meet the growing power of the video industry or the risk of the development of such an imbalance in contractual relations that the contract could no longer have a regulatory effect.

18 The Commission states that the national legislation in question, by prohibiting the marketing of video-cassettes of cinematographic works shown in cinemas, undeniably has the effect of hindering imports of video-recordings lawfully produced and marketed in another Member State and in free circulation there. The possibility of obtaining exemption on the basis of the aforementioned decree of 4 January 1983 is not capable of affecting that fact. The Commission maintains, however, that cultural aims may justify certain restrictions on the free movement of goods provided that those restrictions apply to national and imported products without distinction, that they are appropriate to the cultural aim which is being pursued and that they constitute the means of achieving them which affects intra-Community trade the least.

19 At the Court's request, the Commission produced information concerning the position in the other Member States. There is no legislation in the other Member States comparable to the French legislation in question. In most of those States the relevant trade interests have concluded agreements of varying scope with regard to the periods which are to elapse between the release of cinematographic works for showing in cinemas and the time when they may be distributed in the form of video-cassettes. Those periods vary from three to 12 months but in most cases a period of six months is fixed. In the Federal Republic of Germany and in Denmark films which benefit from certain subsidies may not, according to the rules adopted by the institutions responsible for granting the subsidies, be marketed in the form of video-cassettes until in the case of Germany six months and in the case of Denmark one year from the film's first cinema showing in that country.

20 It must be stated first that, in the light of that information, the national legislation at issue in the main proceedings of these cases forms part of a body of provisions applied in the majority of Member States, whether in the form of contractual,

administrative or legislative provisions and of variable scope, but the purpose of which, in all cases, is to delay the distribution of films by means of video-cassettes during the first months following their release in the cinema in order to protect their exploitation in the cinema, which protection is considered necessary in the interests of the profitability of cinematographic production, as against exploitation through video-cassettes. It must also be observed that, in principle, the Treaty leaves it to the Member States to determine the need for such a system, the form of such a system and any temporal restrictions which ought to be laid down.

21 In that connection it must be observed that such a system, if it applies without distinction to both video-cassettes manufactured in the national territory and to imported video-cassettes, does not have the purpose of regulating trade patterns; its effect is not to favour national production as against the production of other Member States, but to encourage cinematographic production as such.

22 Nevertheless, the application of such a system may create barriers to intra-Community trade in video-cassettes because of the disparities between the systems operated in the different Member States and between the conditions for the release of cinematographic works in the cinemas of those States. In those circumstances a prohibition of exploitation laid down by such a system is not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law.

23 It must be conceded that a national system which, in order to encourage the creation of cinematographic works irrespective of their origin, gives priority, for a limited initial period, to the distribution of such works through the cinema, is so justified.

24 The reply to the questions referred to the Court is therefore that Article 30 of the EEC Treaty must be interpreted as meaning that it does not apply to national legislation which regulates the distribution of cinematographic works by imposing an interval between one mode of distributing such works and another by prohibiting their simultaneous exploitation in cinemas and in video-cassette form

for a limited period, provided that the prohibition applies to domestically produced and imported cassettes alike and any barriers to intra-Community trade to which its implementation may give rise do not exceed what is necessary for ensuring that the exploitation in cinemas of cinematographic works of all origins retains priority over other means of distribution.

25 The plaintiffs and the interveners in the main action also raised the question whether Article 89 of the French law on audio-visual communication was in breach of the principle of freedom of expression recognized by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and was therefore incompatible with Community law.

26 Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.

Costs

27 The costs incurred by the Government of the Federal Republic of Germany, by the French Government and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal de grande instance, Paris, by orders of 15 February 1984, hereby rules:

Article 30 of the EEC Treaty does not apply to national legislation which regulates the distribution of cinematographic works by imposing an interval between one mode of distributing such works and another by prohibiting their simultaneous exploitation in cinemas and in video-cassette form for a limited period, provided that the prohibition applies to domestically produced and imported cassettes alike and any barriers to intra-Community trade to which its implementation may give rise do not exceed what is necessary for ensuring that the exploitation in cinemas of cinematographic works of all origins retains priority over other means of distribution.

Mackenzie Stuart Bosco Due Pescatore

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 11 July 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President