RGSL
RIGA GRADUATE SCHOOL OF LAW

15 September 2005

Consumer Protection in the EU

Judicial Cases

Riga 2005

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Session no. 5

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- Associated guarantees (directive 99/44)

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- Case C-96/00
- Case C-167/00

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Written exam

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**Judgment of the Court
of 20 February 1979
Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
Reference for a preliminary ruling: Hessisches Finanzgericht - Germany.
Measures heaving an effect equivalent to quantitative restrictions.
Case 120/78.**

1 . STATE MONOPOLIES OF A COMMERCIAL CHARACTER - SPECIFIC PROVISION OF THE TREATY - SCOPE

(EEC TREATY , ART. 37)

2 . QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - MARKETING OF A PRODUCT - DISPARITIES BETWEEN NATIONAL LAWS - OBSTACLES TO INTRA-COMMUNITY TRADE - PERMISSIBLE - CONDITIONS AND LIMITS

(EEC TREATY , ART. 30 AND 36)

3 . QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - CONCEPT - MARKETING OF ALCOHOLIC BEVERAGES - FIXING OF A MINIMUM ALCOHOL CONTENT

(EEC TREATY , ART. 30)

1 . SINCE IT IS A PROVISION RELATING SPECIFICALLY TO STATE MONOPOLIES OF A COMMERCIAL CHARACTER , ARTICLE 37 OF THE EEC TREATY IS IRRELEVANT WITH REGARD TO NATIONAL PROVISIONS WHICH DO NOT CONCERN THE EXERCISE BY A PUBLIC MONOPOLY OF ITS SPECIFIC FUNCTION - NAMELY , ITS EXCLUSIVE RIGHT - BUT APPLY IN A GENERAL MANNER TO THE PRODUCTION AND MARKETING OF GIVEN PRODUCTS , WHETHER OR NOT THE LATTER ARE COVERED BY THE MONOPOLY IN QUESTION.

2 . IN THE ABSENCE OF COMMON RULES , OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF A PRODUCT MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION , THE PROTECTION OF PUBLIC HEALTH , THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER .

3 . THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' , CONTAINED IN ARTICLE 30 OF THE EEC TREATY , IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED.

IN CASE 120/78

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE HESSISCHES FINANZGERICHT FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

REWE-ZENTRAL AG , HAVING ITS REGISTERED OFFICE IN COLOGNE ,

AND

BUNDESMONOPOLVERWALTUNG FUR BRANNTWEIN (FEDERAL MONOPOLY ADMINISTRATION

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FOR SPIRITS),

ON THE INTERPRETATION OF ARTICLES 30 AND 37 OF THE EEC TREATY IN RELATION TO ARTICLE 100 (3) OF THE GERMAN LAW ON THE MONOPOLY IN SPIRITS ,

1BY ORDER OF 28 APRIL 1978 , WHICH WAS RECEIVED AT THE COURT ON 22 MAY , THE HESSISCHES FINANZGERICHT REFERRED TWO QUESTIONS TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY FOR A PRELIMINARY RULING ON THE INTERPRETATION OF ARTICLES 30 AND 37 OF THE EEC TREATY , FOR THE PURPOSE OF ASSESSING THE COMPATIBILITY WITH COMMUNITY LAW OF A PROVISION OF THE GERMAN RULES RELATING TO THE MARKETING OF ALCOHOLIC BEVERAGES FIXING A MINIMUM ALCOHOLIC STRENGTH FOR VARIOUS CATEGORIES OF ALCOHOLIC PRODUCTS.

2IT APPEARS FROM THE ORDER MAKING THE REFERENCE THAT THE PLAINTIFF IN THE MAIN ACTION INTENDS TO IMPORT A CONSIGNMENT OF ' ' CASSIS DE DIJON ' ' ORIGINATING IN FRANCE FOR THE PURPOSE OF MARKETING IT IN THE FEDERAL REPUBLIC OF GERMANY.

THE PLAINTIFF APPLIED TO THE BUNDESMONOPOLVERWALTUNG (FEDERAL MONOPOLY ADMINISTRATION FOR SPIRITS) FOR AUTHORIZATION TO IMPORT THE PRODUCT IN QUESTION AND THE MONOPOLY ADMINISTRATION INFORMED IT THAT BECAUSE OF ITS INSUFFICIENT ALCOHOLIC STRENGTH THE SAID PRODUCT DOES NOT HAVE THE CHARACTERISTICS REQUIRED IN ORDER TO BE MARKETED WITHIN THE FEDERAL REPUBLIC OF GERMANY.

3THE MONOPOLY ADMINISTRATION ' S ATTITUDE IS BASED ON ARTICLE 100 OF THE BRANNTWEINMONOPOLGESETZ AND ON THE RULES DRAWN UP BY THE MONOPOLY ADMINISTRATION PURSUANT TO THAT PROVISION , THE EFFECT OF WHICH IS TO FIX THE MINIMUM ALCOHOL CONTENT OF SPECIFIED CATEGORIES OF LIQUEURS AND OTHER POTABLE SPIRITS (VERORDNUNG UBER DEN MINDESTWEINGEISTGEHALT VON TRINKBRANNTWEINEN OF 28 FEBRUARY 1958 , BUNDESANZEIGER NO 48 OF 11 MARCH 1958).

THOSE PROVISIONS LAY DOWN THAT THE MARKETING OF FRUIT LIQUEURS , SUCH AS ' ' CASSIS DE DIJON ' ' , IS CONDITIONAL UPON A MINIMUM ALCOHOL CONTENT OF 25% , WHEREAS THE ALCOHOL CONTENT OF THE PRODUCT IN QUESTION , WHICH IS FREELY MARKETED AS SUCH IN FRANCE , IS BETWEEN 15 AND 20% .

4THE PLAINTIFF TAKES THE VIEW THAT THE FIXING BY THE GERMAN RULES OF A MINIMUM ALCOHOL CONTENT LEADS TO THE RESULT THAT WELL-KNOWN SPIRITS PRODUCTS FROM OTHER MEMBER STATES OF THE COMMUNITY CANNOT BE SOLD IN THE FEDERAL REPUBLIC OF GERMANY AND THAT THE SAID PROVISION THEREFORE CONSTITUTES A RESTRICTION ON THE FREE MOVEMENT OF GOODS BETWEEN MEMBER STATES WHICH EXCEEDS THE BOUNDS OF THE TRADE RULES RESERVED TO THE LATTER .

IN ITS VIEW IT IS A MEASURE HAVING AN EFFECT EQUIVALENT TO A QUANTITATIVE RESTRICTION ON IMPORTS CONTRARY TO ARTICLE 30 OF THE EEC TREATY .

SINCE , FURTHERMORE , IT IS A MEASURE ADOPTED WITHIN THE CONTEXT OF THE MANAGEMENT OF THE SPIRITS MONOPOLY , THE PLAINTIFF CONSIDERS THAT THERE IS ALSO AN INFRINGEMENT OF ARTICLE 37 , ACCORDING TO WHICH THE MEMBER STATES SHALL PROGRESSIVELY ADJUST ANY STATE MONOPOLIES OF A COMMERCIAL CHARACTER SO AS TO ENSURE THAT WHEN THE TRANSITIONAL PERIOD HAS ENDED NO DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED OR MARKETED EXISTS BETWEEN NATIONALS OF MEMBER STATES.

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5IN ORDER TO REACH A DECISION ON THIS DISPUTE THE HESSISCHES FINANZGERICHT HAS REFERRED TWO QUESTIONS TO THE COURT , WORDED AS FOLLOWS :

1 . MUST THE CONCEPT OF MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS CONTAINED IN ARTICLE 30 OF THE EEC TREATY BE UNDERSTOOD AS MEANING THAT THE FIXING OF A MINIMUM WINE-SPIRIT CONTENT FOR POTABLE SPIRITS LAID DOWN IN THE GERMAN BRANNTWEINMONOPOLGESETZ , THE RESULT OF WHICH IS THAT TRADITIONAL PRODUCTS OF OTHER MEMBER STATES WHOSE WINE-SPIRIT CONTENT IS BELOW THE FIXED LIMIT CANNOT BE PUT INTO CIRCULATION IN THE FEDERAL REPUBLIC OF GERMANY , ALSO COMES WITHIN THIS CONCEPT?

2 . MAY THE FIXING OF SUCH A MINIMUM WINE-SPIRIT CONTENT COME WITHIN THE CONCEPT OF ' ' DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED... BETWEEN NATIONALS OF MEMBER STATES ' ' CONTAINED IN ARTICLE 37 OF THE EEC TREATY?

6THE NATIONAL COURT IS THEREBY ASKING FOR ASSISTANCE IN THE MATTER OF INTERPRETATION IN ORDER TO ENABLE IT TO ASSESS WHETHER THE REQUIREMENT OF A MINIMUM ALCOHOL CONTENT MAY BE COVERED EITHER BY THE PROHIBITION ON ALL MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS IN TRADE BETWEEN MEMBER STATES CONTAINED IN ARTICLE 30 OF THE TREATY OR BY THE PROHIBITION ON ALL DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED BETWEEN NATIONALS OF MEMBER STATES WITHIN THE MEANING OF ARTICLE 37.

7IT SHOULD BE NOTED IN THIS CONNEXION THAT ARTICLE 37 RELATES SPECIFICALLY TO STATE MONOPOLIES OF A COMMERCIAL CHARACTER.

THAT PROVISION IS THEREFORE IRRELEVANT WITH REGARD TO NATIONAL PROVISIONS WHICH DO NOT CONCERN THE EXERCISE BY A PUBLIC MONOPOLY OF ITS SPECIFIC FUNCTION - NAMELY , ITS EXCLUSIVE RIGHT - BUT APPLY IN A GENERAL MANNER TO THE PRODUCTION AND MARKETING OF ALCOHOLIC BEVERAGES , WHETHER OR NOT THE LATTER ARE COVERED BY THE MONOPOLY IN QUESTION.

THAT BEING THE CASE , THE EFFECT ON INTRA-COMMUNITY TRADE OF THE MEASURE REFERRED TO BY THE NATIONAL COURT MUST BE EXAMINED SOLELY IN RELATION TO THE REQUIREMENTS UNDER ARTICLE 30 , AS REFERRED TO BY THE FIRST QUESTION.

8IN THE ABSENCE OF COMMON RULES RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL - A PROPOSAL FOR A REGULATION SUBMITTED TO THE COUNCIL BY THE COMMISSION ON 7 DECEMBER 1976 (OFFICIAL JOURNAL C 309 , P . 2) NOT YET HAVING RECEIVED THE COUNCIL ' S APPROVAL - IT IS FOR THE MEMBER STATES TO REGULATE ALL MATTERS RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL AND ALCOHOLIC BEVERAGES ON THEIR OWN TERRITORY .

OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF THE PRODUCTS IN QUESTION MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION , THE PROTECTION OF PUBLIC HEALTH , THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER.

9THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , INTERVENING IN THE

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PROCEEDINGS , PUT FORWARD VARIOUS ARGUMENTS WHICH , IN ITS VIEW , JUSTIFY THE APPLICATION OF PROVISIONS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES , ADDUCING CONSIDERATIONS RELATING ON THE ONE HAND TO THE PROTECTION OF PUBLIC HEALTH AND ON THE OTHER TO THE PROTECTION OF THE CONSUMER AGAINST UNFAIR COMMERCIAL PRACTICES.

10AS REGARDS THE PROTECTION OF PUBLIC HEALTH THE GERMAN GOVERNMENT STATES THAT THE PURPOSE OF THE FIXING OF MINIMUM ALCOHOL CONTENTS BY NATIONAL LEGISLATION IS TO AVOID THE PROLIFERATION OF ALCOHOLIC BEVERAGES ON THE NATIONAL MARKET , IN PARTICULAR ALCOHOLIC BEVERAGES WITH A LOW ALCOHOL CONTENT , SINCE , IN ITS VIEW , SUCH PRODUCTS MAY MORE EASILY INDUCE A TOLERANCE TOWARDS ALCOHOL THAN MORE HIGHLY ALCOHOLIC BEVERAGES.

11SUCH CONSIDERATIONS ARE NOT DECISIVE SINCE THE CONSUMER CAN OBTAIN ON THE MARKET AN EXTREMELY WIDE RANGE OF WEAKLY OR MODERATELY ALCOHOLIC PRODUCTS AND FURTHERMORE A LARGE PROPORTION OF ALCOHOLIC BEVERAGES WITH A HIGH ALCOHOL CONTENT FREELY SOLD ON THE GERMAN MARKET IS GENERALLY CONSUMED IN A DILUTED FORM.

12THE GERMAN GOVERNMENT ALSO CLAIMS THAT THE FIXING OF A LOWER LIMIT FOR THE ALCOHOL CONTENT OF CERTAIN LIQUEURS IS DESIGNED TO PROTECT THE CONSUMER AGAINST UNFAIR PRACTICES ON THE PART OF PRODUCERS AND DISTRIBUTORS OF ALCOHOLIC BEVERAGES.

THIS ARGUMENT IS BASED ON THE CONSIDERATION THAT THE LOWERING OF THE ALCOHOL CONTENT SECURES A COMPETITIVE ADVANTAGE IN RELATION TO BEVERAGES WITH A HIGHER ALCOHOL CONTENT , SINCE ALCOHOL CONSTITUTES BY FAR THE MOST EXPENSIVE CONSTITUENT OF BEVERAGES BY REASON OF THE HIGH RATE OF TAX TO WHICH IT IS SUBJECT.

FURTHERMORE , ACCORDING TO THE GERMAN GOVERNMENT , TO ALLOW ALCOHOLIC PRODUCTS INTO FREE CIRCULATION WHEREVER , AS REGARDS THEIR ALCOHOL CONTENT , THEY COMPLY WITH THE RULES LAID DOWN IN THE COUNTRY OF PRODUCTION WOULD HAVE THE EFFECT OF IMPOSING AS A COMMON STANDARD WITHIN THE COMMUNITY THE LOWEST ALCOHOL CONTENT PERMITTED IN ANY OF THE MEMBER STATES , AND EVEN OF RENDERING ANY REQUIREMENTS IN THIS FIELD INOPERATIVE SINCE A LOWER LIMIT OF THIS NATURE IS FOREIGN TO THE RULES OF SEVERAL MEMBER STATES.

13AS THE COMMISSION RIGHTLY OBSERVED , THE FIXING OF LIMITS IN RELATION TO THE ALCOHOL CONTENT OF BEVERAGES MAY LEAD TO THE STANDARDIZATION OF PRODUCTS PLACED ON THE MARKET AND OF THEIR DESIGNATIONS , IN THE INTERESTS OF A GREATER TRANSPARENCY OF COMMERCIAL TRANSACTIONS AND OFFERS FOR SALE TO THE PUBLIC.

HOWEVER , THIS LINE OF ARGUMENT CANNOT BE TAKEN SO FAR AS TO REGARD THE MANDATORY FIXING OF MINIMUM ALCOHOL CONTENTS AS BEING AN ESSENTIAL GUARANTEE OF THE FAIRNESS OF COMMERCIAL TRANSACTIONS , SINCE IT IS A SIMPLE MATTER TO ENSURE THAT SUITABLE INFORMATION IS CONVEYED TO THE PURCHASER BY REQUIRING THE DISPLAY OF AN INDICATION OF ORIGIN AND OF THE ALCOHOL CONTENT ON THE PACKAGING OF PRODUCTS.

14IT IS CLEAR FROM THE FOREGOING THAT THE REQUIREMENTS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES DO NOT SERVE A PURPOSE WHICH IS IN THE GENERAL INTEREST AND SUCH AS TO TAKE PRECEDENCE OVER THE

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REQUIREMENTS OF THE FREE MOVEMENT OF GOODS , WHICH CONSTITUTES ONE OF THE FUNDAMENTAL RULES OF THE COMMUNITY.

IN PRACTICE , THE PRINCIPLE EFFECT OF REQUIREMENTS OF THIS NATURE IS TO PROMOTE ALCOHOLIC BEVERAGES HAVING A HIGH ALCOHOL CONTENT BY EXCLUDING FROM THE NATIONAL MARKET PRODUCTS OF OTHER MEMBER STATES WHICH DO NOT ANSWER THAT DESCRIPTION.

IT THEREFORE APPEARS THAT THE UNILATERAL REQUIREMENT IMPOSED BY THE RULES OF A MEMBER STATE OF A MINIMUM ALCOHOL CONTENT FOR THE PURPOSES OF THE SALE OF ALCOHOLIC BEVERAGES CONSTITUTES AN OBSTACLE TO TRADE WHICH IS INCOMPATIBLE WITH THE PROVISIONS OF ARTICLE 30 OF THE TREATY

THERE IS THEREFORE NO VALID REASON WHY , PROVIDED THAT THEY HAVE BEEN LAWFULLY PRODUCED AND MARKETED IN ONE OF THE MEMBER STATES , ALCOHOLIC BEVERAGES SHOULD NOT BE INTRODUCED INTO ANY OTHER MEMBER STATE ; THE SALE OF SUCH PRODUCTS MAY NOT BE SUBJECT TO A LEGAL PROHIBITION ON THE MARKETING OF BEVERAGES WITH AN ALCOHOL CONTENT LOWER THAN THE LIMIT SET BY THE NATIONAL RULES.

15CONSEQUENTLY , THE FIRST QUESTION SHOULD BE ANSWERED TO THE EFFECT THAT THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' CONTAINED IN ARTICLE 30 OF THE TREATY IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED .

COSTS

16THE COSTS INCURRED BY THE GOVERNMENT OF THE KINGDOM OF DENMARK , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION BEFORE THE HESSISCHES FINANZGERICHT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HESSISCHES FINANZGERICHT BY ORDER OF 28 APRIL 1978 , HEREBY RULES :

THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' CONTAINED IN ARTICLE 30 OF THE EEC TREATY IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED.

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DOCNUM	61978J0120
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1978 ; J ; judgment
PUBREF	European Court reports 1979 Page 00649 Greek special edition 1979:I Page 00321 Portuguese special edition 1979:I Page 00327 Swedish special edition IV Page 00377 Finnish special edition IV Page 00403 Spanish special edition 1979 Page 00351
DOC	1979/02/20
LODGED	1978/05/22
JURCIT	11957E030 : N 7 14 15 11957E036 : N 8 11957E037 : N 7 51976PC0274 : N 8
CONCERNS	Interprets 11957E030
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; State monopolies of a commercial character ; Agriculture ; Alcohol
AUTLANG	German
OBSERV	Commission ; Federal Republic of Germany ; Denmark ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Finanzgericht Hessen, Vorlagebeschluß vom 28/04/1978 (VII 67/77 (Cassis de Dijon)) - Recht der internationalen Wirtschaft 1978 p.682-683 *P1* Finanzgericht Hessen, Beschluß vom 08/08/1979 (VII 67/77 (Cassis de Dijon)) - Recht der internationalen Wirtschaft 1979 p.699-700
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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Pescatore

DATES of document: 20/02/1979
of application: 22/05/1978

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Judgment of the Court
of 25 July 1991
Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña.
References for a preliminary ruling: Tribunal Superior de Justicia de Cataluña - Spain.
Free movement of goods - National legislation on the advertising of alcoholic beverages.
Joined cases C-1/90 and C-176/90.

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1. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Justification - Protection of public health - Legal context of assessment - Article 36 of the Treaty

(EEC Treaty, Arts 30 and 36)

2. Free movement of goods - Derogations - Prohibition of discriminatory or protective measures - Scope - Measures limited to a part of the national territory - Whether included

(EEC Treaty, Art. 36)

3. Free movement of goods - Derogations - Protection of public health - Legislation of an autonomous community of a Member State prohibiting in its territory certain forms of advertising of beverages having a high alcohol content - Whether proportionate and non-discriminatory - Permissibility

(EEC Treaty, Arts 30 and 36)

1. Where it has to be assessed whether a measure having equivalent effect to a quantitative restriction on imports may be justified by the fact that it is pursuing an objective relating to the protection of public health, it is not necessary to consider whether that objective may be equated with an imperative requirement which must be taken into account in the interpretation of Article 30 of the Treaty, since the protection of public health is expressly mentioned amongst the grounds of public interest which are set out in Article 36 and enable a restriction on imports to escape the prohibition laid down in Article 30. It is only in the light of Article 36 that that assessment is to be carried out since that article applies even where the measure in question specifically restricts imports, whereas imperative requirements fall for consideration only in the case of measures which apply without distinction to national and imported products.

2. When a national measure has limited territorial scope because it applies only to a part of the national territory, it cannot escape being characterized as discriminatory or protective for the purposes of the rules on the free movement of goods on the ground that it affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States. For such a measure to be characterized as discriminatory or protective, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products.

3. Articles 30 and 36 of the Treaty, viewed together, do not preclude legislation adopted by an autonomous community of a Member State from prohibiting, in the territory to which it applies, the advertising of beverages having an alcoholic strength of more than 23 degrees in the media, on streets and highways (with the exception of signs indicating centres of production and sale), in cinemas and on public transport.

Such legislation, even if it constitutes a measure having equivalent effect within the meaning of Article 30, can be justified under Article 36. On the one hand, it is not disproportionate to the public-health objective, namely the campaign against alcoholism which it is pursuing. On the other hand, it does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, since it does not distinguish between products according to their

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origin and the restrictions which it imposes do not apply to beverages having an alcoholic strength of less than 23 degrees and therefore do not restrict imports of such beverages from other Member States since, in regard to beverages having an alcoholic strength of more than 23 degrees, those restrictions affect both products, in not inconsiderable quantities, originating in the part of the territory to which they apply and products imported from other Member States. The fact that that part of the national territory produces more beverages having an alcoholic strength of less than 23 degrees than beverages with a higher alcohol content is not in itself sufficient to cause legislation to be regarded as not satisfying the requirements of Article 36.

In Joined Cases C-1/90 and C-176/90,

REFERENCES to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia de Cataluña for a preliminary ruling in the proceedings pending before that court between

Aragonesa de Publicidad Exterior SA

and

Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña

and between

Publivía SAE

and

Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña,

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

THE COURT,

composed of: O. Due, President, G.F. Mancini, T.F. O' Higgins and G.C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, R. Joliet, F.A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,

Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted

- In Case C-1/90 on behalf of:

- the applicant in the main proceedings, by Juan Pascual Planas and Joaquín Masramon Fontanals, of the Barcelona Bar, and by Jaime Gasso i Espina, Avoué, Barcelona;

- the defendant in the main proceedings, by Marta Moix i Puig, Abogado in the Litigation Department of the Central Legal Office of the Autonomous Community of Catalonia, acting as Agent;

- the Belgian Government, by R. van Havere, Chief Inspector, Director at the Ministry for Foreign Affairs, External Trade and Development Cooperation, acting as Agent;

- the Commission of the European Communities, by Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agent;

- in Case C-176/90 on behalf of:

- the applicant in the main proceedings, by Eduardo Vivancos Comes and Enrique Vendrell Santiveri, of the Barcelona Bar, and by Araceli García Gomez, Avoué, Barcelona;

- the defendant in the main proceedings, by Mercè Corretja i Torrens, Abogado in the Litigation

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Department of the Central Legal Office of the Autonomous Community of Catalonia, acting as Agent;

- for the United Kingdom, by Hussein A. Kaya, of the Treasury Solicitor' s Department, acting as Agent;

- for the Commission of the European Communities, by Blanca Rodríguez Galindo, a member of its Legal Service, acting as Agent;

having regard to the Report for the Hearing,

after hearing the oral observations of the applicants in the main proceedings, represented by Juan Pascual Planas, Joaquin Masramon Fontanals, Enrique Vendrell Santiveri and Josep Molto Darner, of the Barcelona Bar, and the Commission of the European Communities, at the hearing on 24 April 1991,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1991,

gives the following

Judgment

1 By order of 7 November 1989, which was received at the Court on 2 January 1990 and rectified by order of 8 January 1990, received at the Court on 5 February 1990, and by order of 29 November 1989, which was received at the Court on 7 June 1990 and rectified by order of 28 June 1990, received at the Court on 12 July 1990, the Tribunal Superior de Justicia de Cataluña (High Court of Catalonia) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 30 and 36 of the EEC Treaty.

2 Those questions were raised in the course of proceedings between, on the one hand, Aragonesa de Publicidad Exterior and Publivía, which operate advertising hoardings, and the Departamento de Sanidad y Seguridad Social (Department of Health and Social Security) of the Autonomous Community of Catalonia.

3 It is apparent from the documents before the Court that administrative fines were imposed on those companies for infringing the provisions of Law No 20/85 enacted on 25 July 1985 by the Parliament of the Autonomous Community of Catalonia on prevention and assistance with regard to substances likely to lead to dependency (DOG No 572, of 7 August 1985, p. 465), which prohibit the advertising of beverages having an alcoholic strength of more than 23 degrees in the media, on streets and highways (except to indicate centres of production and sale) and in cinemas and on public transport.

4 Aragonesa de Publicidad Exterior and Publivía appealed against those fines to the Tribunal Superior de Justicia de Cataluña. Before that court they contended in particular that the Catalan law on which the decision was based was contrary to Article 30 of the Treaty, inasmuch as by virtue of the advertising restrictions which it imposed, it affected marketing opportunities for beverages originating in other Member States.

5 Those were the circumstances in which the Tribunal Superior de Justicia decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

> "(1) Does a law of a Member State (or, in this case, of the parliament of an autonomous community of a Member State with powers, under domestic legislation, to legislate on particular matters) which prohibits, within the territory under its jurisdiction, the advertising of beverages having an alcoholic strength of more than 23 degrees in (a) the mass media (b) streets and highways, with the exception of signs indicating centres of production and sale (c) cinemas (d) public transport, constitute a measure having an effect equivalent to a quantitative restriction on exports within the meaning of Article 30 of the EEC Treaty?

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(2) If the answer is in the affirmative, must the first sentence of Article 36 of the EEC Treaty be interpreted as meaning that a Member State may lawfully impose a partial prohibition on the advertising of beverages having an alcoholic strength of more than 23 degrees for the protection of the health of humans in accordance with domestic law?

(3) May a prohibition on grounds of public health as described above constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States?"

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

7 With these three questions, which must be examined together, the national court is seeking to ascertain whether Articles 30 and 36 of the EEC Treaty preclude rules, such as those contained in the law at issue in the main proceedings, which in the cases therein specified prohibit the advertising of beverages having an alcoholic strength of more than 23 degrees.

8 It should first be pointed out that Article 30 of the Treaty may apply to measures adopted by all the authorities of the Member States, be they the central authorities, the authorities of a federal State, or other territorial authorities.

9 Under Article 30 of the Treaty "quantitative restrictions on imports and all measures having equivalent effect shall... be prohibited between Member States". In accordance with the settled case-law of the Court, any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be deemed to be a measure having equivalent effect.

10 As the Court held, inter alia, in its judgment in Case C-362/88 GB-INNO-BM v Conféderation du Commerce Luxembourgoise [1990] ECR 667, paragraph 7, 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.

11 Accordingly, national legislation such as that at issue in the main proceedings, which prohibits the advertising in certain places of beverages having an alcoholic strength of more than 23 degrees may constitute a hindrance to imports from other Member States and, therefore must in principle be regarded as a measure having equivalent effect within the meaning of Article 30.

12 However, in its observations to the Court, the Commission argues that such legislation, which applies without distinction to domestic and imported products, must be upheld by reference to Article 30 alone without its being necessary to have recourse, as the national court does, to Article 36, because that legislation is justified by an imperative requirement, namely the protection of public health.

13 That form of reasoning cannot be accepted. The protection of public health is expressly mentioned amongst the grounds of public interest which are set out in Article 36 and enable a restriction on imports to escape the prohibition laid down in Article 30. In those circumstances, since Article 36 also applies where the contested measure restricts only imports, whereas according to the Court' s case-law the question of imperative requirement for the purposes of the interpretation of Article 30 cannot arise unless the measure in question applies without distinction to both national and imported products, it is not necessary to consider whether the protection of public health might also be in the nature of an imperative requirement for the purposes of the application of Article 30.

14 In those circumstances it is first of all necessary to ascertain whether the legislation at issue is of such a nature as to protect public health and, secondly, is proportionate to the objective to be attained.

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15 On the first point it is sufficient to observe, as the Court pointed out in its judgment in Case 152/78 Commission v France [1980] ECR 2299, paragraph 17, that advertising acts as an encouragement to consumption and the existence of rules restricting the advertising of alcoholic beverages in order to combat alcoholism reflects public health concerns.

16 On the second point it must be stated that in the present state of Community law, in which there are no common or harmonized rules governing in a general manner the advertising of alcoholic beverages, 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 on which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, comply with the principle of proportionality.

17 A national measure such as that at issue restricts freedom of trade only to a limited extent since it concerns only beverages having an alcoholic strength of more than 23 degrees. In principle, the latter criterion does not appear to be manifestly unreasonable as part of a campaign against alcoholism.

18 On the other hand, the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which, such as public highways and cinemas, are particularly frequented by motorists and young persons, two categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticized for being disproportionate to its stated objective.

19 Secondly, in order to benefit from the derogation provided for in Article 36, a national provision must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, to use the precise terms of the second sentence of that article.

20 As the Court held in Case 34/79 Regina v Henn and Darby [1979] ECR 3795, paragraph 21, the function of the second sentence of Article 36 is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products.

21 In that connection, Aragonesa de Publicidad Exterior and Publivía argue that, in assessing the discriminatory and protective nature of the measure, it is necessary to take more into account than the fact that the Catalan law makes no formal distinction between the domestic or foreign origin of the beverages in question. It should be borne in mind that that law applies only within the territorial jurisdiction of the parliament of Catalonia.

22 According to the applicants in the main proceedings, what should be compared, therefore, is not the situation of imported products with that of products from Spain as a whole but the situation of imported products with that of Catalan products. Since the majority of Catalan- produced alcoholic beverages have an alcohol content of less than 23 degrees, the measure at issue should be regarded as discriminatory and protective in nature, inasmuch as it seeks to discourage the consumption of beverages with a high alcohol content and thus places at a disadvantage beverages originating outside Catalonia, and inasmuch, on the other hand, as it does not restrict the advertising of beverages with a lower alcohol content, thus protecting locally-produced beverages.

23 Those arguments cannot be upheld.

24 It is true that, when a national measure has limited territorial scope because it applies only to a part of the national territory, it cannot escape being characterized as discriminatory or protective for the purposes of the rules on the free movement of goods on the ground that it affects both the sale of products from other parts of the national territory and the sale of products imported from

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other Member States. For such a measure to be characterized as discriminatory or protective, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products.

25 However, national legislation such as that in question in the main proceedings does not constitute arbitrary discrimination or a disguised restriction on intra-Community trade. On the one hand, it is clear from the documents before the Court that such legislation does not distinguish between products according to their origin. The restrictions which it imposes do not apply to beverages having an alcoholic strength of less than 23 degrees and therefore do not restrict imports of such beverages from other Member States. In regard to beverages having an alcoholic strength of more than 23 degrees, those restrictions affect both products, in not inconsiderable quantities, originating in the part of the national territory to which they apply and products imported from other Member States. On the other hand, the fact that that part of the national territory produces more beverages having an alcoholic strength of less than 23 degrees than beverages with a higher alcohol content is not in itself sufficient to cause such legislation to be regarded as liable to give rise to arbitrary discrimination or a disguised restriction on intra-Community trade.

26 Accordingly, the reply to be given to the questions submitted for a preliminary ruling should be that Articles 30 and 36 of the EEC Treaty, viewed together, do not preclude legislation such as the law at issue in the main proceedings which, in part of the territory of a Member State, prohibits the advertising of beverages having an alcoholic strength of more than 23 degrees, in the media, on streets and highways (with the exception of signs indicating centres of production and of sale) in cinemas and on public transport, where that legislation, even if it constitutes a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, can be justified under Article 36 of that Treaty on grounds of the protection of public health, and where, in view of its characteristics and the circumstances set out in the documents before the Court, it does not appear to be a means, even an indirect means, of protecting certain local products.

Costs

27 The costs incurred by the Belgian Government, the United Kingdom 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 proceedings pending 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 Superior de Justicia de Cataluña, by orders of 7 November 1989 and 29 November 1989, rectified respectively by orders of 8 January 1990 and 28 June 1990, hereby rules:

Articles 30 and 36 of the EEC Treaty, viewed together, do not preclude legislation such as the law at issue in the main proceedings which, in part of the territory of a Member State, prohibits the advertising of beverages having an alcoholic strength of more than 23 degrees in the media, on streets and highways (with the exception of signs indicating centres of production and sale) in cinemas and on public transport, where that legislation, even if it constitutes a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, can be justified under Article 36 of that Treaty on grounds of the protection of public health, and where, in view of its characteristics and the circumstances set out in the documents before the Court, it does not appear to be a means, even an indirect means, of protecting certain local products.

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DOCNUM	61990J0001
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1990 ; J ; judgment
PUBREF	European Court reports 1991 Page I-04151 Swedish special edition XI Page I-00373 Finnish special edition XI Page I-00387
DOC	1991/07/25
LODGED	1990/01/02
JURCIT	11957E030 : N 5 7 - 26 11957E036 : N 5 7 12 - 26 61978J0152 : N 15 61979J0034 : N 20 61988J0362 : N 10
CONCERNS	Interprets 11957E030 Interprets 11957E036
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect
AUTLANG	Spanish
MISCINF	Joined case : 690J0176
OBSERV	Belgium ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Spain
NATCOUR	** AFFAIRE 176/1990 ** *A9* Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, auto de 29/11/1989 *P1* Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, sentencia de 06/04/1995 (7) - Revista Jurídica de Catalunya - Jurisprudencia 1995 p.823-827 - Revista española de Derecho Internacional 1996 p.251-252 (résumé) - Fernandez Pérez, Bernardo: Revista española de Derecho Internacional 1996 p.252 *A9* Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, auto de 07/11/1989 *P1* Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, sentencia de 04/10/1991 - Noticias CEE 1992 no 85 p.81-85 - Revista General de Derecho 1992 p.5911-5916 - Crucelegui, Juan Luis: Cuadernos Europeos de Deusto 1994 no 11 p.168-174

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NOTES	Leupold, Andreas ; Nachbaur, Andreas: Juristenzeitung 1991 p.1110-1116 X: Revue du marché unique européen 1991 no 4 p.206-208 Lange, Gisela: European Food Law Review 1992 p.59-63 Berr, Claude J.: Journal du droit international 1992 p.435-437 Pellisé, Cristina: Revista Jurídica de Catalunya 1992 p.583-586 Pisuisse, C.J.: S.E.W. ; Sociaal-economische wetgeving 1993 p.486-491 Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1993 p.214
PROCEDU	Reference for a preliminary ruling
ADVGEN	Van Gerven
JUDGRAP	Grévisse
DATES	of document: 25/07/1991 of application: 02/01/1990

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Judgment of the Court (Fifth Chamber)
of 6 July 1995
Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH.
Reference for a preliminary ruling: Landgericht Köln - Germany.
Free movement of goods - Measures having an effect equivalent to quantitative restrictions - Presentation of a product likely to restrict freedom to fix retail prices and mislead the consumer.
Case C-470/93.

++++

Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Prohibition of importing and marketing a product whose packaged units were increased in quantity during a publicity campaign with the increase being indicated on the packaging ° Not permissible ° Justification ° Protection of consumers ° None

(EC Treaty, Art. 30)

Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, whose packaged units were increased in quantity during a short publicity campaign and the wrapping marked "+ 10%",

° on the ground that that presentation may induce the consumer into thinking that the price of the goods offered for sale is the same as that at which the goods had previously been sold in their old presentation, a circumstance which would have the consequence that, in the event that the trader increased the price, the consumer could be the victim of deception within the meaning of the national law applicable, or, in the event that the price was not increased, the offer would meet the consumer' s expectation but might then entail a breach of the prohibition of imposing prices on retailers enacted by the same national law,

° on the ground that the new presentation, owing to the fact that the band marked "+ 10%" occupies more than 10% of the total surface area of the wrapping, would give the impression to the consumer that the volume and the weight of the product had been increased to an extent greater than indicated.

Although it applies to all products without distinction, such a prohibition is by nature such as to hinder intra-Community trade, since it may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and it cannot be justified as being necessary in order to satisfy overriding requirements relating to the protection of consumers where it does not appear that the prices of those products have been increased, where, on the contrary, the constraint imposed on retailers not to increase their prices, which is in fact favourable to consumers, does not arise from any contractual stipulation and applies only during the short duration of the publicity campaign in question and, finally, where the "+ 10%" marking is not such as to mislead a reasonably circumspect consumer.

In Case C-470/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht Koeln for a preliminary ruling in the proceedings pending before that court between

Verein gegen Unwesen in Handel und Gewerbe Koeln eV

and

Mars GmbH

on the interpretation of Article 30 of the EC Treaty,

THE COURT (Fifth Chamber),

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composed of: C. Gulmann (Rapporteur), President of the Chamber, P. Jann, J.C. Moitinho de Almeida, D.A.O. Edward and L. Sevon, Judges,

Advocate General: P. Léger,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Mars GmbH, by J. Sedemund, Rechtsanwalt, Cologne,

° the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and A. Bardenhewer, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mars GmbH and the Commission, at the hearing on 16 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1995,

gives the following

Judgment

1 By order of 11 November 1993, received at the Court on 17 December 1993, the Landgericht Koeln (Regional Court, Cologne) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question relating to the interpretation of Article 30 of that treaty.

2 The question was raised in proceedings between an association for combatting unfair competition, the Verein gegen Unwesen in Handel und Gewerbe Koeln eV, and Mars GmbH (hereafter "Mars") concerning the use of a certain presentation for the marketing of ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands.

3 Mars imports those goods from France where they are lawfully produced and packaged by an undertaking belonging to the American group, Mars Inc., Mc Lean, in a uniform presentation for distribution throughout Europe.

4 At the material time, the ice-cream bars were presented in wrappers marked "+ 10%". That presentation had been chosen as part of a short publicity campaign covering the whole of Europe during which the quantity of each product was increased by 10%.

5 Under Paragraph 1 of the Gesetz gegen unlauteren Wettbewerb (Law on Unfair Competition, hereafter "the UWG") proceedings may be brought in order to restrain improper competitive practices while under Paragraph 3 of that Law proceedings may be brought in order to restrain the use of misleading information. Furthermore, under Paragraph 15 of the Gesetz gegen Wettbewerbs-beschraenkungen (Law on Restraints of Competition, hereafter "the GWB"), agreements between undertakings restricting the freedom of one of the parties to fix prices in contracts concluded with third parties for the supply of goods are void.

6 The plaintiff association brought proceedings under those provisions before the Landgericht Koeln in order to prevent the "+ 10%" marking from being used in Germany.

7 It contends first of all that the consumer is bound to assume that the advantage indicated by the "+ 10%" marking is granted without any price increase, since a product whose composition is only slightly changed and which is sold at a higher price offers no advantage. So, in order not to mislead the consumer, the retailer should maintain the final price previously charged. Since the marking in question was binding on the retail trade as regards the fixing of the price for sale

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to the ultimate consumer, it constituted a breach of Paragraph 15 of the GWB which had to be brought to an end in accordance with Paragraph 1 of the UWG.

8 Secondly, the plaintiff in the main proceedings contends that the way in which the "+ 10%" marking was incorporated in the presentation gave the consumer the impression that the product had been increased by a quantity corresponding to the coloured part of the new wrapping. The coloured part occupied considerably more than 10% of the total surface area of the wrapping and this, in the plaintiff' s view, was misleading and therefore contrary to Paragraph 3 of the UWG.

9 In interlocutory proceedings the Landgericht Koeln had, by order of 10 December 1992, granted an interim restraining order against the defendant. The Landgericht took the view that the presentations in question, conveying the idea that more of the product, negligible in quantitative terms, was being offered without any increase in price, restricted freedom of retail trade in the matter of the fixing of prices.

10 When it came to rule on the substance of the case, the Landgericht Koeln decided to refer the following question to the Court:

"Is it compatible with the principles of the free movement of goods to prohibit the marketing in a Member State of ice-cream snacks in a particular presentation which are produced in another Member State and lawfully marketed there in that same presentation, which is described in the application,

(1) on the ground that the (new) presentation is liable to give consumers the impression that the goods are offered for the same price as under the old presentation,

(2) on the ground that the visual presentation of the new feature '+ 10% ice-cream' gives consumers the impression that either the volume or the weight of the product has been considerably increased?"

Applicability of Article 30 of the Treaty

11 The first question to be examined is whether a prohibition of the marketing of goods bearing on their packaging a publicity marking such as that in question in the main proceedings constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

12 According to the case-law of the Court, Article 30 is designed to prohibit any trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see the judgment in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5). The Court has held that, in the absence of harmonization of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by Article 30, even if those rules apply without distinction to national products and to imported products (judgment in Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15).

13 Although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such to hinder intra-Community trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs.

14 Such a prohibition therefore falls within the scope of Article 30 of the Treaty.

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The grounds of justification relied on

15 It is settled law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions may be justified as being necessary in order to satisfy overriding requirements relating, inter alia, to consumer protection and fair trading. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-Community trade (see the judgments in Case 120/78 Rewe -Zentral [1979] ECR 649; Case C-238/89 Pall [1990] ECR I-4827, paragraph 12; and Case C-126/91 Yves Rocher [1993] ECR I-2361, paragraph 12).

16 It is contended in the main proceedings that the prohibition is justified on two legal grounds, which are indicated in the first and second parts of the preliminary question.

The consumer' s expectation that the price previously charged is being maintained

17 It is argued that the "+ 10%" marking may lead the consumer to think that the "new" product is being offered at a price identical to that at which the "old" product was sold.

18 As the Advocate General points out in Paragraphs 39 to 42 of his Opinion, on the assumption that the consumer expects the price to remain the same, the referring court considers that the consumer could be the victim of deception within the meaning of Paragraph 3 of the UWG and that if the price did not increase the offer would meet the consumer' s expectation but then a question would arise concerning the application of Paragraph 15 of the GWB, which prohibits manufacturers from imposing prices on retailers.

19 As regards the first possibility, it must be observed first of all that Mars has not actually profited from the promotional campaign in order to increase its sale prices and that there is no evidence that retailers have themselves increased their prices. In any case, the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers may be deceived is not sufficient to justify a general prohibition which may hinder intra-Community trade. That fact does not prevent the Member States from taking action, by appropriate measures, against duly proved actions which have the effect of misleading consumers.

20 As regards the second possibility, the principle of freedom of retail trade in the matter of the fixing of prices, provided for by a system of national law, and intended in particular to guarantee the consumer genuine price competition, may not justify an obstacle to intra-Community trade such as that in question in the main proceedings. The constraint imposed on the retailer not to increase his prices is in fact favourable to the consumer. It does not arise from any contractual stipulation and has the effect of protecting the consumer from being misled in any way. It does not prevent retailers from continuing to charge different prices and applies only during the short duration of the publicity campaign in question.

The visual presentation of the "+ 10%" marking and its alleged misleading effect

21 It is accepted by all the parties that the "+ 10%" marking is accurate in itself.

22 However, it is contended that the measure in question is justified because a not insignificant number of consumers will be induced into believing, by the band bearing the "+ 10%" marking, which occupies more than 10% of the total surface area of the wrapping, that the increase is larger than that represented.

23 Such a justification cannot be accepted.

24 Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product' s quantity and the

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size of that increase.

25 The reply to the preliminary question must therefore be that Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+ 10%",

a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,

b) on the ground that the new presentation gives the impression to the consumer that the volume and weight of the product have been considerably increased.

Costs

26 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Landgericht Koeln, by order of 11 November 1993, hereby rules:

Article 30 of the EC Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+ 10%",

(a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,

(b) on the ground that the new presentation gives the impression to the consumer that the volume and the weight of the product have been considerably increased.

DOCNUM	61993J0470
AUTHOR	COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
FORM	JUDGMENT
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; CASES ; 1993 ; J ; JUDGMENT
PUBREF	European Court Reports 1995 page I-1923
DOC	1995/07/06

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LODGED	1993/12/17
JURCIT	11992E030 : N 11 - 25 61974J0008-N5 : N 12 61991J0267-N15 : N 12 61978J0120 : N 15 61989J0238-N12 : N 15 61991J0126-N12 : N 15 61993C0470 : N 18
CONCERNS	I 11992E030
SUB	FREE MOVEMENT OF GOODS ; QUANTITATIVE RESTRICTIONS ; MEASURES HAVING EQUIVALENT EFFECT
AUTLANG	GERMAN
OBSERV	Commission
NATIONA	FEDERAL REPUBLIC OF GERMANY
NATCOUR	*A9* Landgericht Köln, Vorlagebeschluß vom 28/09/93 (81 O 88/93) - Wettbewerb in Recht und Praxis 1994 p.907-908 ºNOTESº - Leible, Stefan: Wettbewerb in Recht und Praxis 1994 p.908-911
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ADVGEN	Léger
JUDGRAP	Gulmann

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DATES OF DOCUMENT.....: 06/07/1995
OF APPLICATION....: 17/12/1993

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Judgment of the Court of 9 August 1994

Federal Republic of Germany v Council of the European Union.

Action for annulment of measures - Directive 92/59/EEC on general product safety - Legal basis - Article 100a and third indent of Artiacle 145 of the EEC Treaty.

Case C-359/92.

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Approximation of laws ° Measures for the attainment of the single market ° Concept ° Measures, if necessary individual, relating to a specific product ° Inclusion ° Directive 92/59 on general product safety ° Commission empowered to adopt a decision requiring Member States to take specific measures with respect to a particular product ° Power justified by the need to secure the free movement of goods whilst ensuring a high level of protection ° Breach of the principle of proportionality ° None

(EEC Treaty, Art. 100a(1); Council Directive 92/59/EEC, Art. 9)

The measures which the Council is empowered to take under Article 100a(1) of the Treaty are aimed at "the establishment and functioning of the internal market". Since in certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market, the concept of "measures for the approximation" of legislation must be interpreted as encompassing the Council' s power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products.

Thus Article 100a(1) is the legal basis of the power, conferred upon the Commission by Article 9 of Council Directive 92/59 on general product safety, to adopt a decision requiring Member States to take measures whereby the placing of a specific consumer product on the market is restricted or that product is withdrawn from the market.

Under the directive, the responsibility for adopting the necessary provisions to ensure the health and safety of consumers lies in the first place with the Member State concerned. However, it is likely that differences will exist between the various measures adopted at national level, which may entail unacceptable disparities in consumer protection and constitute a barrier to intra-Community trade, whilst making it impossible to cope with emergency situations in which serious product-safety problems may affect the whole or a large part of the Community. Therein lies the justification for the Commission' s power ° on the basis of the information received, and to the extent that effective protection can be ensured only by action at Community level and no other procedure specifically applicable to the product can be used ° to act by adopting a decision in cases where a product placed on the market puts in serious and immediate jeopardy the health and safety of consumers in a number of Member States and those States differ with respect to the measures adopted or planned with regard to that product, that is to say, where such measures do not provide the same level of protection and thereby prevent the product from moving freely within the Community.

The conferral of those powers on the Commission is not in breach of the principle of proportionality. Those powers are appropriate for the purpose of attaining the objectives pursued by the directive, notwithstanding the difficulties which may arise if the appropriate measures are determined on a case-by-case basis, and they are not excessive in relation to the objectives pursued, since the infringement procedure under Article 169 of the Treaty does not permit the results set out in Article 9 of the directive to be achieved.

In Case C-359/92,

Federal Republic of Germany, represented by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry for Economic Affairs, 76 Villemombler Strasse, Bonn, acting as Agent, assisted

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by Jochim Sedemund, Rechtsanwalt, Cologne,

applicant,

v

Council of the European Union, represented by Ruediger Bandilla, Director in the Legal Service, and Bjarne Hoff-Nielsen, Adviser in the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Rolf Waegenbaur, Principal Legal Adviser, assisted by Xavier Lewis, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for a declaration that Article 9 of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24) is void in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive,

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida, M. Diez de Velasco and D.A.O. Edward (Presidents of Chambers), C.N. Kakouris, R. Joliet, F.A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse (Rapporteur), M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. v. Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 May 1994, at which the Federal Republic of Germany was represented by Gerhard Rambow, Ministerialdirektor at the Federal Ministry for Economic Affairs, acting as Agent, and by Jochim Sedemund, Rechtsanwalt, Cologne,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1994,

gives the following

Judgment

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs. The Commission, which has intervened in the proceedings, must, in accordance with the first paragraph of Article 69(4) of the Rules of Procedure, bear its own costs.

On those grounds,

THE COURT

hereby:

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1. Dismisses the application.

2. Orders the Federal Republic of Germany to pay the costs and the Commission, as intervener, to bear its own costs.

1 By application lodged at the Court Registry on 14 September 1992, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Article 9 of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24) is void in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive.

2 Directive 92/59 was adopted under Article 100a of the Treaty for the purpose of ensuring that consumer products placed on the internal market of the Community do not in general present a risk to the consumer under normal conditions of use or, at least, involve only a very low level of risk. Its provisions apply only in so far as more specific Community provisions have not been adopted (Article 1(2) of the directive). It requires both producers and distributors of products to comply with a general safety requirement. Producers are obliged to place only safe products on the market. They must moreover warn the consumer of the risks attaching to the use of the product and take the necessary measures to identify and avoid such risks. Distributors are required to help to ensure compliance with the general safety requirement (Article 3 of the directive).

3 Member States are obliged to adopt the necessary laws, regulations and administrative provisions to ensure compliance with the general safety requirement. In particular, they must establish authorities to check that products placed on the market are safe and confer upon those authorities the necessary powers to take the measures incumbent upon them under the directive (Article 5). Under Article 6 of the directive, Member States must adopt provisions enabling them to take, in compliance with the provisions of the Treaty and in particular Articles 30 and 36 thereof, appropriate measures for the purpose of attaining, inter alia, the objectives set out in paragraph 1 of that article.

4 Such measures include those with a view to:

"...

d) subjecting product marketing to prior conditions designed to ensure product safety and requiring that suitable warnings be affixed regarding the risks which the product may present;

e) making arrangements to ensure that persons who might be exposed to a risk from a product are informed in good time and in a suitable manner of the said risk by, inter alia, the publication of special warnings;

f) temporarily prohibiting, for the period required to carry out the various checks, anyone from supplying, offering to supply or exhibiting a product or product batch, whenever there are precise and consistent indications that they are dangerous;

g) prohibiting the placing on the market of a product or product batch which has proved dangerous and establishing the accompanying measures needed to ensure that the ban is complied with;

h) organizing the effective and immediate withdrawal of a dangerous product or product batch already on the market and, if necessary, its destruction under appropriate conditions".

5 The directive lays down procedures for notification and exchanges of information. Under Article 7, where a Member State takes measures which restrict the placing of a product on the market or require its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h), it must inform the Commission which, after consultations with the parties concerned, is to establish whether or not the measure is justified and inform, as appropriate, the other Member States or

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the Member State concerned.

6 Lastly, the directive contains provisions relating to emergency situations and action at Community level.

7 Article 8 of the directive provides that, where a Member State adopts emergency measures to prevent, restrict or impose specific conditions on the possible marketing or use of a product presenting serious and immediate risks to the health and safety of consumers, it must immediately inform the Commission, which must ascertain whether that information complies with the provisions of the directive and forward it to the other Member States. Those States must inform the Commission of any measures adopted.

8 Article 9 provides as follows:

"If the Commission becomes aware, through notification given by the Member States or through information provided by them, in particular under Article 7 or Article 8, of the existence of a serious and immediate risk from a product to the health and safety of consumers in various Member States and if:

(a) one or more Member States have adopted measures entailing restrictions on the marketing of the product or requiring its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h);

(b) Member States differ on the adoption of measures to deal with the risk in question;

(c) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product and in a manner compatible with the urgency of the case, under the other procedures laid down by the specific Community legislation applicable to the product or category of products concerned; and

(d) the risk can be eliminated effectively only by adopting appropriate measures applicable at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the common market,

the Commission, after consulting the Member States and at the request of at least one of them, may adopt a decision, in accordance with the procedure laid down in Article 11, requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h)."

9 The procedure provided for in Article 11 of the directive is variant (b) of Procedure III, as described in Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33). During that procedure, the Commission is assisted by the Committee on Product Safety Emergencies, composed of the representatives of the Member States and chaired by a representative of the Commission. It is the duty of that committee to deliver an opinion on the measures proposed by the Commission. The Commission adopts the measures which are in accordance with the Committee' s opinion. If the measures proposed are not in accordance with the Committee' s opinion, or in the absence of an opinion from the Committee, the Council adopts measures by a qualified majority, on a proposal by the Commission. If the Council does not act within 15 days of the date on which the proposal was submitted to it, the Commission may adopt the measures proposed, unless the Council has decided against them by a simple majority. Decisions thus adopted are valid for no more than three months, but that period may be prolonged in accordance with the same procedure. Member States must take all necessary measures to implement those decisions within 10 days.

10 Member States were required to comply with the directive by 29 June 1994 at the latest.

11 Although the application by the Federal Republic of Germany expressly seeks a declaration that

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Article 9 of the directive is void only in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive, its true purpose, given the structure of Article 9, is to obtain the annulment of the article in its entirety.

12 The Federal Republic of Germany bases its application for annulment on two pleas in law. First, it claims that Article 9 of the directive has no legal base. Second, it claims that the article is contrary to the principle of proportionality. The Council and the Commission contend, for their part, that neither of those two pleas in law is well founded.

The plea in law alleging lack of a legal base

13 According to the German Government, Article 9 empowers the Commission to apply the directive to individual cases. It enables the Commission to take decisions replacing those which the national authorities have taken in order to ensure compliance with national legislation transposing the directive.

14 In its application, the German Government considers that since the directive was adopted on the basis of Article 100a of the Treaty, it can only derive from Article 100a(5), which empowers the Commission to supervise provisional measures taken by the Member States in accordance with the safeguard clauses which are included in a harmonization measure. The German Government claims that the article does not, however, constitute an adequate legal base, since it allows the Commission only to check whether provisional national measures comply with Community law, but not to adopt measures intended to implement the conclusions which must be drawn, at national level, from that finding.

15 In reply, the Council and the Commission submit that Article 100a(5) of the Treaty does not constitute the legal base for Article 9 of the directive. In their view, the directive does not contain any "safeguard clause" within the meaning of Article 100a(5) of the Treaty, that is to say, any clause authorizing the Member States to adopt provisional measures on one of the non-economic grounds referred to in Article 36 of the Treaty. Consequently, Article 9 does not lay down a "Community control procedure" for the provisional measures adopted on the basis of such a clause.

16 The Council and the Commission contend that the legal base of Article 9 of the directive is Article 100a(1) of the Treaty, in conjunction with the third indent of Article 145 thereof. They submit that Article 9 empowers the Commission to adopt "ad hoc" harmonization measures in the form of decisions which are addressed to Member States, but do not have direct effect with respect to individuals, where emergency measures can be adopted only at Community level and certain conditions are fulfilled.

17 The German Government objects to that argument essentially on the ground that the sole aim of Article 100 et seq. of the Treaty, and of Article 100a(1) in particular, is the approximation of laws and that those articles do not therefore confer power to apply the law to individual cases in the place of the national authorities, as permitted by Article 9 of the directive. The German Government further observes that the powers conferred upon the Commission by Article 9 thus exceed those which, in a federal state such as the Federal Republic of Germany, are enjoyed by the Bund in relation to the Laender, since, under the German Basic Law, the implementation of federal laws rests with the Laender. Lastly, the German Government submits that Article 9 cannot be regarded as constituting an implementing power, within the meaning of the third indent of Article 145 of the Treaty, since that article does not embody a substantive power of its own, but merely authorizes the Council to confer implementing powers on the Commission where a legal base exists in primary Community law for the act to be implemented and its implementing measures.

18 It is important to note, in the first place, that Article 100a(5) of the Treaty cannot constitute the legal base for Article 9 of the directive as, moreover, the parties themselves have recognized.

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19 Article 100a(5) of the Treaty provides: "The harmonization measures ... shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure."

20 That article only concerns supervision, by the Community authorities, of measures taken by the Member States. The purpose of Article 9 of the directive, however, is not to introduce a control procedure of that kind. It sets out a Community procedure for the coordination of national measures with respect to a product, in order to ensure that it may circulate freely throughout the Community without danger to the consumer.

21 Secondly, the question arises whether Article 100a(1) of the Treaty, supplemented by the third indent of Article 145, constitutes an appropriate legal base for Article 9 of the directive, as the Council and the Commission contend.

22 As the Court stated in Case C-41/93 (France v Commission [1994] ECR I-0000, paragraph 22), for the purposes of implementing the objectives set out in Article 8a of the EEC Treaty (now Article 7a of the EC Treaty), Article 100a(1) of the Treaty empowers the Council to adopt, in accordance with the procedure laid down therein, measures which have as their object the abolition of barriers to trade arising from differences between the provisions laid down by law, regulation or administrative action in Member States.

23 However, the harmonization effected by the directive is of a particular type, which the Council, by reference to the terms used in the third recital in the preamble to the directive, describes as "horizontal" harmonization.

24 According to the fourth recital in the preamble, the directive establishes at Community level "a general safety requirement for any product placed on the market that is intended for consumers or likely to be used by consumers". In accordance with that "general safety requirement" (see Title II), producers are obliged, first, to place only safe products on the market; second, to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks; and third, to adopt measures commensurate with the characteristics of the products which they supply, to enable them to be informed of risks which those products might present and to take appropriate action including, if necessary, withdrawing the product in question from the market to avoid those risks. Distributors are required to act with due care in order to help to ensure compliance with the general safety requirement (Article 3 of the directive).

25 The directive requires Member States to adopt the necessary laws, regulations and administrative provisions to make producers and distributors comply with their obligations under it in such a way that products placed on the market are safe. In particular, Member States must establish or nominate authorities to monitor the compliance of products with the obligation to place only safe products on the market and arrange for such authorities to have the necessary powers to take the appropriate measures incumbent upon them under the directive, including the possibility of imposing suitable penalties in the event of failure to comply with the obligations deriving from it (Article 5 of the directive).

26 Under Article 6 of the directive, Member States must, for the purposes of Article 5, have the necessary powers, acting in accordance with the degree of risk and in conformity with the Treaty, and in particular with Articles 30 and 36 thereof, to adopt appropriate measures to attain, inter alia, the objectives laid down in Article 6(1)(a) to (h).

27 However, Articles 7 and 8 of the directive entrust the Commission with the task of supervising

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measures taken by Member States which are likely to hinder trade.

28 Under Article 7, Member States must inform the Commission of measures which restrict the placing of a product or product batch on the market or require its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h), specifying their reasons for adopting them.

29 Under Article 8, Member States must as a matter of urgency inform the Commission of emergency measures which they have adopted or decided to adopt in order to prevent, restrict or impose specific conditions on the possible marketing or use, within their territory, of a product or product batch by reason of a serious and immediate risk presented by the said product or product batch to the health and safety of consumers. Member States may also pass on to the Commission any information in their possession regarding the existence of a serious and immediate risk before deciding to adopt the measures in question.

30 Under the scheme established by the directive, it is possible, even likely, that differences may exist between the measures taken by Member States. As the eighteenth recital in the preamble states, such differences may "entail unacceptable disparities in consumer protection and constitute a barrier to intra-Community trade".

31 Under that scheme, the nineteenth recital in the preamble to the directive indicates, it may also be necessary to cope with serious product-safety problems which affect or could affect, in the immediate future, all or a large part of the Community and which, in view of the nature of the safety problem posed by the product and of its urgency, cannot be dealt with effectively under the procedures laid down in the specific rules of Community law applicable to the products or category of products in question.

32 The Community legislature therefore considered it necessary, in order to cope with a serious and immediate risk to the health and safety of consumers, to provide for an adequate mechanism allowing, in the last resort, for the adoption of measures applicable throughout the Community, in the form of decisions addressed to the Member States (see the twentieth recital in the preamble to the directive).

33 For that purpose, Article 9 of the directive empowers the Commission, on the basis of the information received, to act in cases where a product placed on the market puts in serious and immediate jeopardy the health and safety of consumers in a number of Member States and those States differ with respect to the measures adopted or planned with regard to that product, that is to say, where such measures do not provide the same level of protection and thereby prevent the product from moving freely within the Community. Article 9 provides that, to the extent that effective protection can be ensured only by action at Community level and no other procedure specifically applicable to the product can be used, the Commission may adopt a decision requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h).

34 As is apparent from the eighteenth, nineteenth and twentieth recitals of the preamble to the directive and from the structure of Article 9, the purpose of that provision is to enable the Commission to adopt, as promptly as possible, temporary measures applicable throughout the Community with respect to a product which presents a serious and immediate risk to the health and safety of consumers, so as to ensure compliance with the objectives of the directive. The free movement of goods can be secured only if product safety requirements do not differ significantly from one Member State to another. A high level of protection can be achieved only if dangerous products are subject to appropriate measures in all the Member States.

35 Such action must be taken by the Commission in close cooperation with the Member States. For one thing, decisions taken at Community level may be adopted by the Commission only after consulting the Member States and at the request of a Member State. For another, such measures may be adopted by the Commission only if they are in accordance with the opinion of a committee composed of the

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Member States' representatives and a Commission representative. Otherwise the measure must be adopted by the Council within a specified period. Lastly, those decisions are addressed only to Member States. The twentieth recital in the preamble to the directive states that such decisions are not of direct application to traders in the Community and must be incorporated in a national measure.

36 Thus, in the circumstances set out in Article 9, action by the Community authorities is justified by the fact that, in the terms used in Article 9(d), "the risk can be eliminated effectively only by adopting appropriate measures at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the Common Market".

37 Such action is not contrary to Article 100a(1) of the Treaty. The measures which the Council is empowered to take under that provision are aimed at "the establishment and functioning of the internal market". In certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market. Consequently, the concept of "measures for the approximation" of legislation must be interpreted as encompassing the Council' s power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products.

38 So far as concerns the argument that the power thus conferred on the Commission goes beyond that which, in a federal state such as the Federal Republic of Germany, is enjoyed by the Bund in relation to the Laender, it must be borne in mind that the rules governing the relationship between the Community and its Member States are not the same as those which link the Bund with the Laender. Furthermore, the measures taken for the implementation of Article 100a of the Treaty are addressed to Member States and not to their constituent entities. Nor do the powers conferred on the Commission by Article 9 of the directive have any bearing upon the division of powers within the Federal Republic of Germany.

39 Accordingly the legal base of the powers delegated to the Commission by Article 9 of the directive is Article 100a(1) of the Treaty.

40 Since the German Government does not dispute that such power may accrue to the Commission if its legal base is Article 100a of the Treaty, there is no need to address the question whether the third indent of Article 145 of the Treaty is applicable in this case.

41 It follows from the foregoing that the first plea in law put forward by the Federal Republic of Germany must be rejected.

Breach of the principle of proportionality

42 The German Government claims that Article 9 of the directive fails to comply with the principle of proportionality in two essential respects. First, the powers given to the Commission are not appropriate for the purpose of ensuring a high level of protection with respect to public health since the adoption of a decision at Community level is no guarantee that the measures taken will be the most suitable. Second, those powers encroach unnecessarily upon the Member States' own powers since the Commission can attain the same objectives by recourse to the infringement procedure under Article 169 of the Treaty and, where appropriate, by making an application to the Court for the adoption of interim measures.

43 The Council and the Commission contend, for their part, that Article 9 of the directive is not in breach of the principle of proportionality. They submit that action by the Commission, in the situations envisaged by the article, is not only appropriate but also necessary in order to attain the objectives set out in the directive and, in particular, in order to ensure a high level of protection for consumers whilst maintaining the proper functioning of the internal market. In their view, those objectives cannot be attained by means of the infringement procedure, especially

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in emergency situations.

44 As the Court has consistently held (see, in particular, Case C-174/89 Hoche [1990] ECR I-2681, paragraph 19), the principle of proportionality requires that measures taken by the Community institutions should be appropriate to achieve the objective pursued without going beyond what is necessary to that end.

45 The powers conferred on the Commission by Article 9 are appropriate for the purpose of attaining the objectives pursued by the directive, that is to say, ensuring a high level of protection for the health and safety of consumers whilst eliminating barriers to trade and distortions of competition arising as a result of disparities between national measures taken in relation to consumer products. The difficulties which might arise if the appropriate measures are determined on a case by case basis cannot lead to the opposite conclusion.

46 Those powers are not excessive in relation to the objectives pursued. Contrary to the assertion made by the German Government, the infringement procedure laid down in Article 169 of the Treaty does not permit the results set out in Article 9 of the directive to be achieved.

47 In the first place, no obligation can be placed on Member States by means of the infringement procedure to take a specified measure from among those listed in Article 6(1)(d) to (h) of the directive.

48 Secondly, as the Council and the Commission point out in their observations, even if Member States are required to adopt certain specified measures under the directive, the Commission would be obliged to bring proceedings for failure to fulfil its obligations against every Member State that had not adopted such measures, inevitably rendering the procedure more cumbersome.

49 Lastly, even if such proceedings were initiated and held by the Court to be well founded, it is not certain that a declaration by the Court to that effect would enable the objectives set out in the directive to be achieved as effectively as would be the case by a Community harmonization measure.

50 In particular, the infringement procedure would not enable consumer protection to be secured in the shortest possible time. That procedure, which comprises a pre-litigation stage and, where necessary, a contentious stage, inevitably takes a certain amount of time even though, as the German Government points out, the Commission can apply to the Court for the adoption of interim measures. Furthermore, a declaration that a Member State has failed to fulfil its obligations would, in the circumstances envisaged, presuppose a cautious appraisal, scarcely compatible with urgency, of the need to adopt a particular measure, since the directive merely requires Member States to adopt the measures necessary to compel producers, intermediaries and distributors to place and leave on the market only products which are safe.

51 The second plea in law must therefore be rejected.

52 It follows that the application of the Federal Republic of Germany must be dismissed.

DOCNUM	61992J0359
AUTHOR	Court of Justice of the European Communities
FORM	Judgment

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TREATY European Economic Community

TYPDOC 6 ; CJUS ; cases ; 1992 ; J ; judgment

PUBREF European Court reports 1994 Page I-03681

DOC 1994/08/09

LODGED 1992/09/14

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31992L0059-C3 : N 23
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61993J0041-N22 : N 22

CONCERNS Confirms 31992L0059-A09

SUB Approximation of laws ; Consumer protection

AUTLANG German

APPLICA Federal Republic of Germany ; Member States

DEFENDA Council ; Institutions

NATIONA Federal Republic of Germany

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NOTES	Micklitz, Hans-W.: Europäische Zeitschrift für Wirtschaftsrecht 1994 p.631 Mortelmans, K.J.M.: S.E.W. ; Sociaal-economische wetgeving 1994 p.763-765 Constantinesco, Vlad: Journal du droit international 1995 p.421-425 Anagnostopoulou, Despoina: Elliniki Epitheorisi Evropaïkou Dikaiou 1995 p.466-469 Gormley, Laurence: European Law Review 1996 p.63-64 X: Il Foro italiano 1996 IV Col.282-284 Rossi, Lucia Serena: Il Foro italiano 1996 IV Col.284-292
PROCEDU	Application for annulment - unfounded
ADVGEN	Jacobs
JUDGRAP	Grévisse
DATES	of document: 09/08/1994 of application: 14/09/1992

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Judgment of the Court (Fifth Chamber)
of 29 May 1997
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.
Failure of a Member State to fulfil obligations - Article 7(e) of Directive 85/374/EEC - Incorrect implementation - Defense precluding liability for defective products - State of scientific and technical knowledge.
Case C-300/95.

Approximation of laws - Liability for defective products - Directive 85/374 - Defence to liability - Condition - State of scientific and technical knowledge not such as to enable the defect to be discovered - Concept - National implementing provision - Infringement not made out

(Council Directive 85/374, Article 7(e))

In order for a producer to incur liability for defective products under Directive 85/374, the victim does not have to prove that the producer was at fault; however, in accordance with the principle of fair apportionment of risk between the injured person and the producer set forth in the seventh recital in the preamble to the directive, the producer has a defence if he can prove certain facts exonerating him from liability, including `that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'. Whilst the producer has to prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, without any restriction as to the industrial sector concerned, was not such as to enable the existence of the defect to be discovered, in order for the relevant knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation.

A national implementing provision to the effect that the producer has a defence if he can prove that the state of such knowledge was `not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control' is not manifestly contrary to that Community rule. The argument that such national provision permits account to be taken of the subjective knowledge of a producer taking reasonable care, having regard to the standard precautions taken in the industrial sector in question, selectively stresses particular terms used in the provision without demonstrating that the general legal context of the provision at issue fails effectively to secure full application of the directive.

In Case C-300/95,

Commission of the European Communities, represented by Peter Oliver, of its Legal Service, acting as Agent, and Mark Mildred, Solicitor, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and K. Paul E. Lasok QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

APPLICATION for a declaration that, by failing to take all the measures necessary to implement Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), in particular Article 7(e) thereof, the United Kingdom has failed to fulfil its obligations under that directive and under the EC Treaty,

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THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, D.A.O. Edward, J.-P. Puissochet and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 23 January 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 September 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to take all the measures necessary to implement Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29; `the Directive'), in particular Article 7(e) thereof, the United Kingdom has failed to fulfil its obligations under that directive and under the EC Treaty.

2 The object of the Directive is to bring about approximation of the laws of the Member States concerning liability for defective products, divergences in which may `distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property' (first recital in the preamble).

3 According to Article 1 of the Directive, the producer shall be liable for damage caused by a defect in his product.

4 Article 4 provides that the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

5 However, Article 7 sets out a number of defences enabling the producer to avoid liability. The seventh recital in the preamble to the Directive states in this connection that `a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances'.

6 Accordingly,

`The producer shall not be liable as a result of this Directive if he proves:

...

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;

...'.

7 Under Article 19 of the Directive, Member States were required to take the measures necessary to comply with it by no later than 30 July 1988. The United Kingdom implemented the Directive by means of Part I of the Consumer Protection Act 1987 (`the Act'), which came into force on

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1 March 1988.

8 Section 1(1) of the Act is worded as follows:

`This Part shall have effect for the purpose of making such provision as is necessary to comply with the product liability Directive and shall be construed accordingly.'

9 Section 4(1)(e), which purports to implement Article 7(e) of the Directive, provides as follows:

`In any civil proceedings by virtue of this Part against any person ... in respect of a defect in a product it shall be a defence for him to show

...

(e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'.

10 The Commission took the view that the Act did not properly transpose the Directive and, on 26 April 1989, sent the United Kingdom Government a letter of formal notice in accordance with the procedure laid down by Article 169 of the Treaty, requesting it to submit its observations on six complaints listed therein within a period of two months.

11 By letter dated 19 July 1989, the United Kingdom denied the Commission's allegations. Although it accepted that the wording of the Act was different from that of the Directive, it argued that under Article 189 of the EEC Treaty Member States were entitled to choose appropriate wording when implementing a directive, provided that the intended result of the directive was achieved.

12 On 2 July 1990, the Commission addressed a reasoned opinion to the United Kingdom pursuant to Article 169 of the Treaty. It accepted the right of a Member State to choose its own wording to implement a directive, provided that the national rules achieved the intended result. Nevertheless, it maintained its position with respect to all but one of the six complaints set out its letter of formal notice.

13 By letter of 4 October 1990, the United Kingdom reiterated its view that the Directive was correctly implemented by the Act.

14 The United Kingdom's arguments persuaded the Commission that four of its remaining complaints should be abandoned, particularly in view of the rule in section 1(1) of the Act under which the relevant provisions were to be construed in conformity with the Directive.

15 However, considering that the wording of section 4(1)(e) was unambiguous and would have to be interpreted contra legem by the courts in the United Kingdom in order to conform to the Directive, the Commission decided to seek a ruling from the Court on the compatibility of section 4(1)(e) of the Act with Article 7(e) of the Directive.

16 In its application, the Commission argues that the United Kingdom legislature has broadened the defence under Article 7(e) of the Directive to a considerable degree and converted the strict liability imposed by Article 1 of the Directive into mere liability for negligence.

17 The Commission submits that the test in Article 7(e) of the Directive is objective in that it refers to a state of knowledge, and not to the capacity of the producer of the product in question, or to that of another producer of a product of the same description, to discover the defect. However, by its use of the words `a producer of products of the same description as the product in question [who] might be expected to have discovered the defect', section 4(1)(e) of the Act presupposes a subjective assessment based on the behaviour of a reasonable producer. It is easier for the producer of a defective product to demonstrate, under section 4(1)(e), that neither he nor a producer

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of similar products could have identified the defect at the material time, provided that the standard precautions in the particular industry were taken and there was no negligence, than to show, under Article 7(e), that the state of scientific and technical knowledge was such that no-one would have been able to discover the defect.

18 The Commission adds that, whilst section 1(1) of the Act constitutes a most helpful indication to British courts, it cannot suffice to render lawful language which clearly on its face runs counter to the wording of the Directive and could be construed consistently with the Directly only by interpreting it contra legem.

19 The United Kingdom Government does not challenge the Commission's interpretation of Article 7(e) of the Directive as setting out an `objective' and not a `subjective' test. It considers, however, that section 4(1)(e) of the Act sets out the same test as Article 7(e) of the Directive and does not provide for liability founded on negligence.

20 The Government submits that, in so far as Article 7(e) can be interpreted in the abstract in a factual vacuum, it lays down an `objective' test in the sense that the `state of scientific and technical knowledge' mentioned therein does not refer to what the producer in question actually knows or does not know, but to the state of knowledge which producers of the class of the producer in question, understood in a generic sense, may objectively be expected to have. This is precisely the meaning of section 4(1)(e) of the Act.

21 The United Kingdom Government points out that, in any event, courts in the United Kingdom are required to interpret section 4(1)(e) consistently with Article 7(e) by virtue of section 1(1) of the Act or the general principle that legislation implementing Community law should be construed so as to accord therewith.

22 It argues that, in view of section 1(1) of the Act and the absence of any decision of a national court on the meaning of section 4(1)(e), the Commission is not in a position to say that it is incompatible with Article 7(e). It could succeed in its argument only if could show conclusively that section 4(1)(e) is completely incapable of bearing the same legal meaning as Article 7(e).

23 In order to determine whether the national implementing provision at issue is clearly contrary to Article 7(e) as the Commission argues, the scope of the Community provision which it purports to implement must first be considered.

24 In order for a producer to incur liability for defective products under Article 4 of the Directive, the victim must prove the damage, the defect and the causal relationship between defect and damage, but not that the producer was at fault. However, in accordance with the principle of fair apportionment of risk between the injured person and the producer set forth in the seventh recital in the preamble to the Directive, Article 7 provides that the producer has a defence if he can prove certain facts exonerating him from liability, including `that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered' (Article 7(e)).

25 Several observations can be made as to the wording of Article 7(e) of the Directive.

26 First, as the Advocate General rightly observes in paragraph 20 of his Opinion, since that provision refers to `scientific and technical knowledge at the time when [the producer] put the product into circulation', Article 7(e) is not specifically directed at the practices and safety standards in use in the industrial sector in which the producer is operating, but, unreservedly, at the state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation.

27 Second, the clause providing for the defence in question does not contemplate the state of knowledge

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of which the producer in question actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed.

28 However, it is implicit in the wording of Article 7(e) that the relevant scientific and technical knowledge must have been accessible at the time when the product in question was put into circulation.

29 It follows that, in order to have a defence under Article 7(e) of the Directive, the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. Further, in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation. On this last point, Article 7(e) of the Directive, contrary to what the Commission seems to consider, raises difficulties of interpretation which, in the event of litigation, the national courts will have to resolve, having recourse, if necessary, to Article 177 of the EC Treaty.

30 For the present, it is the heads of claim raised by the Commission in support of its application that have to be considered.

31 In proceedings brought under Article 169 of the Treaty the Commission is required to prove the alleged infringement. The Commission must provide the Court with the information necessary for it to determine whether the infringement is made out and may not rely on any presumption (see, in particular, Case C-62/89 Commission v France [1990] ECR I-925, paragraph 37).

32 The Commission takes the view that inasmuch as section 4(1)(e) of the Act refers to what may be expected of a producer of products of the same description as the product in question, its wording clearly conflicts with Article 7(e) of the Directive in that it permits account to be taken of the subjective knowledge of a producer taking reasonable care, having regard to the standard precautions taken in the industrial sector in question.

33 That argument must be rejected in so far as it selectively stresses particular terms used in section 4(1)(e) without demonstrating that the general legal context of the provision at issue fails effectively to secure full application of the Directive. Taking that context into account, the Commission has failed to make out its claim that the result intended by Article 7(e) of the Directive would clearly not be achieved in the domestic legal order.

34 First, section 4(1)(e) of the Act places the burden of proof on the producer wishing to rely on the defence, as Article 7 of the Directive requires.

35 Second, section 4(1)(e) places no restriction on the state and degree of scientific and technical knowledge at the material time which is to be taken into account.

36 Third, its wording as such does not suggest, as the Commission alleges, that the availability of the defence depends on the subjective knowledge of a producer taking reasonable care, having regard to the standard precautions taken in the industrial sector in question.

37 Fourth, the Court has consistently held that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, in particular, Case C-382/92 Commission v United Kingdom [1994] ECR I-2435, paragraph 36). Yet in this case the Commission has not referred in support of its application to any national judicial decision which, in its view, interprets the domestic provision at issue inconsistently with the Directive.

38 Lastly, there is nothing in the material produced to the Court to suggest that the courts in

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the United Kingdom, if called upon to interpret section 4(1)(e), would not do so in the light of the wording and the purpose of the Directive so as to achieve the result which it has in view and thereby comply with the third paragraph of Article 189 of the Treaty (see, in particular, Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 26). Moreover, section 1(1) of the Act expressly imposes such an obligation on the national courts.

39 It follows that the Commission has failed to make out its allegation that, having regard to its general legal context, especially section 1(1) of the Act, section 4(1)(e) clearly conflicts with Article 7(e) of the Directive. As a result, the application must be dismissed.

Costs

40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

DOCNUM	61995J0300
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1997 Page I-02649
DOC	1997/05/29
LODGED	1995/09/20
JURCIT	31985L0374-A07LE : N 5 6 23 - 39 31985L0374-C7 : N 24 31985L0374 : N 1 - 7 24 61989J0062-N37 : N 31 11992E169 : N 31 11992E177 : N 29 61992J0091-N26 : N 38 61992J0382-N36 : N 37 61995C0300-N20 : N 26

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CONCERNS	Failure concerning 31985L0374-A07LE
SUB	Approximation of laws ; Consumer protection
AUTLANG	English
APPLICA	Commission ; Institutions
DEFENDA	United Kingdom ; Member States
NATIONA	United Kingdom
NOTES	Novak, Meinhard: St. Galler Europarechtsbriefe 1997 p.305-307 Temmink, H.A.G.: Tijdschrift voor consumentenrecht 1997 p.315-316 Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1997 p.259 Gazin, F.: Europe 1997 Juillet Comm. no 228 p.16-17 O'Donoghue, Robert: European Current Law 1997 Part 11 p.ix-xii Ponzanelli, Giulio: Il Foro italiano 1997 IV Col.388-392 Di Nepi, Alessandro: Il Corriere giuridico 1997 p.1390-1393 Bonassies, Pierre: Le droit maritime français 1998 p.32-33 Penneaux, Anne: Recueil Dalloz Sirey 1998 Jur. p.490-493 Oddo, Antonio: Diritto comunitario e degli scambi internazionali 1998 p.367-375 Toriello, Fabio: La nuova giurisprudenza civile commentata 1999 I p.190-193
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Tesauro
JUDGRAP	Wathelet
DATES	of document: 29/05/1997 of application: 20/09/1995

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Judgment of the Court (Fifth Chamber)
of 10 May 2001
Henning Veedfald v Århus Amtskommune.
Reference for a preliminary ruling: Højesteret - Denmark.
Approximation of laws - Directive 85/374/EEC - Liability for defective products - Exemption from liability - Conditions.
Case C-203/99.

1. Approximation of laws - Liability for defective products - Directive 85/374 - Exemption from liability - Condition - Not put into circulation - Use of a product during the provision of a medical service

(Council Directive 85/374, Art. 7(a))

2. Approximation of laws - Liability for defective products - Directive 85/374 - Exemption from liability - Condition - Activity having no economic or business purpose - Product manufactured and used in the course of a medical service financed from public funds

(Council Directive 85/374, Art. 7(c))

3. Approximation of laws - Liability for defective products - Directive 85/374 - Damage to be taken into account - Material damage

(Council Directive 85/374, Art.9)

4. Approximation of laws - Liability for defective products - Directive 85/374 - Damage to be taken into account - Obligation of the national court to determine under which head the damage was incurred

(Council Directive 85/374, Art. 9)

1. Article 7(a) of Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, which provides that the producer is not to be liable if he proves that he did not put the product into circulation, is to be interpreted as meaning that a defective product is put into circulation when it is used during the provision of a specific medical service, consisting in preparing a human organ for transplantation, and the damage caused to the organ results from that preparatory treatment.

(see para. 18, and operative part 1)

2. Article 7(c) of Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products is to be interpreted as meaning that the exemption from liability where an activity has no economic or business purpose does not extend to the case of a defective product which has been manufactured and used in the course of a specific medical service which is financed entirely from public funds and for which the patient is not required to pay any consideration.

(see para. 22, and operative part 2)

3. Article 9 of Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products is to be interpreted as meaning that, save for non-material damage whose reparation is governed solely by national law and the exclusions detailed in that article as regards damage to an item of property, a Member State may not restrict the types of material damage, resulting from death or from personal injury, or from damage to or destruction of an item of property, which are to be made good.

(see para. 29, and operative part 3)

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4. The national court is required, under Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, to examine under which head the circumstances of the case are to be categorised, namely whether the case concerns damage covered either by point (a) or by point (b) of the first paragraph of Article 9 or non-material damage which may possibly be covered by national law. The national court may not, however, decline to award any damages at all under the Directive on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the foregoing heads.

(see para. 33, and operative part 4)

In Case C-203/99,

REFERENCE to the Court under Article 234 EC by the Højesteret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Henning Veedfald

and

Århus Amtskommune,

on the interpretation of Article 7(a) and (c) and points (a) and (b) of the first paragraph of Article 9 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevon, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Veedfald, by T. Rørdam, advokat,

- Århus Amtskommune, by J. Andersen-Møller, advokat,

- the Danish Government, by J. Molde, acting as Agent,

- the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,

- the Irish Government, by M.A. Buckley, acting as Agent, assisted by D. Barniville, BL,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the United Kingdom Government, by R. Magrill, acting as Agent, assisted by M. Hoskins, Barrister,

- the Commission of the European Communities, by M. Patakia and H. Støvlbæk, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Veedfald, represented by K. Andreasen, advokat, of Århus Amtskommune, of the French Government, of the Irish Government and of the Commission at the hearing on 16 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2000,

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gives the following

Judgment

Costs

34 The costs incurred by the Danish, French, Irish, Austrian, and United Kingdom Governments and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Højesteret by judgment of 21 May 1999, hereby rules:

1. Article 7(a) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products is to be interpreted as meaning that a defective product is put into circulation when it is used during the provision of a specific medical service, consisting in preparing a human organ for transplantation, and the damage caused to the organ results from that preparatory treatment.

2. Article 7(c) of Directive 85/374 is to be interpreted as meaning that the exemption from liability where an activity has no economic or business purpose does not extend to the case of a defective product which has been manufactured and used in the course of a specific medical service which is financed entirely from public funds and for which the patient is not required to pay any consideration.

3. Article 9 of Directive 85/374 is to be interpreted as meaning that, save for non-material damage whose reparation is governed solely by national law and the exclusions detailed in that article as regards damage to an item of property, a Member State may not restrict the types of material damage, resulting from death or from personal injury, or from damage to or destruction of an item of property, which are to be made good.

4. The national court is required, under Directive 85/374, to examine under which head the circumstances of the case are to be categorised, namely whether the case concerns damage covered either by point (a) or by point (b) of the first paragraph of Article 9 or non-material damage which may possibly be covered by national law. The national court may, however, not decline to award any damages at all under the Directive on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the foregoing heads.

1 By judgment of 21 May 1999, received at the Court on 26 May 1999, the Højesteret (Supreme Court), Denmark, referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 7(a) and (c) and points (a) and (b) of the first paragraph of Article 9 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29, hereinafter the Directive).

2 The five questions have been raised in proceedings between Henning Veedfald and Århus Amtskommune (District of Århus, hereinafter the Amtskommune) concerning the latter's refusal to meet his claim for damages following an unsuccessful kidney transplant operation performed in a hospital belonging to the Amtskommune.

Community rules

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3 Article 1 of the Directive lays down the principle that the producer is to be liable for damage caused by a defect in his product. Exemptions from liability are provided for in Article 7 of the Directive, worded as follows:

The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or

(b) ...

(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business;

...

4 Article 9 of the Directive provides:

For the purpose of Article 1, "damage" means:

(a) damage caused by death or by personal injuries;

(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of [EUR] 500, provided that the item of property:

(i) is of a type ordinarily intended for private use or consumption, and

(ii) was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

Danish law

5 The Directive was transposed into Danish law by Law No 371 on Product Liability of 7 June 1989. Article 2 of that Law provides:

1. This Law covers compensation by way of damages for loss due to personal injury and loss of family support provided by the breadwinner. The Law also covers compensation for damage to material goods in the cases mentioned in subparagraph 2.

2. Damage to material goods is covered by the Law if the object in question is, given its nature, normally intended for non-commercial use and is primarily used by the injured person in accordance with that purpose. The Law does not cover damage to the defective product itself.

6 Article 7 of Law No 371 provides:

The producer shall not be liable is he establishes:

(1) that he did not put the product into circulation;

(2) that he did not manufacture, produce, collect or put the product into circulation in the course of his business;

...

The main proceedings and the questions referred for a preliminary ruling

7 According to the order for reference, on 21 November 1990, Mr Veedfald was due to undergo a kidney transplant operation at Skejby hospital. After a kidney had been removed from the donor, in this case Mr Veedfald's brother, the kidney was prepared for transplantation through flushing with a perfusion fluid designed for that purpose.

8 This fluid proved to be defective and a kidney artery became blocked during the flushing process, making the kidney unusable for any transplant. The fluid had been manufactured in the laboratories

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of the dispensary of another hospital, the Århus District Hospital, and prepared with a view to its use in the Skejby hospital. The Amtskommune is the owner and manager of both hospitals.

9 Relying on Law No 371, Mr Veedfald claimed damages from the Amtskommune. The latter denied liability on the ground that it had not put the product into circulation and that the product had not been manufactured for an economic purpose, since the two hospitals concerned were funded entirely from public funds. Mr Veedfald then brought an action before the Vestre Landsret (Western Regional Court), Denmark, against that decision refusing to grant compensation. When his action was dismissed by judgment of 29 September 1997, he appealed to the Højesteret.

10 Being unsure as to the proper interpretation of Danish law in the light of the provisions of the Directive, the Højesteret decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

(1) Must Article 7(a) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that a defective product is not put into circulation if the producer of the defective product, in the course of providing a specific medical service, produces and uses the product on a human organ which, at the time when the damage occurred, had been removed from a donor's body in order to be prepared for transplant into another person's body, with resulting damage to the organ?

(2) Must Article 7(c) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that a publicly owned hospital is free from liability under the Directive for products produced and used by that hospital in the course of providing a specific publicly financed service to the person suffering injury and in respect of which that person has not paid any consideration?

(3) Does Community law impose requirements as to how Member States should define the expressions "damage caused by death or by personal injuries" and "damage to, or destruction of, any item of property" in Article 9 of Council Directive 85/374/EEC of 25 July 1985, or are individual Member States free to decide what meaning is to be attached to those expressions?

(4) Must Article 9(a) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that damage to a human organ which, at the time when the damage occurred, had been removed from a donor's body for immediate transplant into a certain other person's body is covered by the expression "damage caused by... personal injuries" in relation to the intended recipient of the organ?

(5) Must Article 9(b) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that damage to a human organ which, at the time when the damage occurred, had been removed from a donor's body for immediate transplant into a certain other person's body is covered by the expression "damage to, or destruction of, any [other] item of property" in relation to the intended recipient of the organ?

The first question

11 By its first question, the national court asks essentially whether Article 7(a) of the Directive is to be interpreted as meaning that a defective product is not put into circulation when the manufacturer of the product makes it and uses it in the course of providing a specific medical service, consisting in preparing a human organ for transplantation, and when the damage caused to the organ results from that preparatory treatment.

12 First, as regards the argument raised by the Amtskommune and the Danish Government that use of a product in the course of providing a service cannot in principle be covered by the Directive in the absence of any Community legislation on services, it is sufficient to observe that the present case involves the defectiveness of a product used in the course of providing a service and not any defect in the service as such.

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13 According to the Amtskommune, in a situation such as the present, no product has been put into circulation within the meaning of Article 7(a) of the Directive. In the present situation, the patient had no intention to buy the product, and that product, intended for strictly internal use by the manufacturer himself, never left the sphere of control of the unit consisting of the hospital dispensary and the doctors undertaking the treatment.

14 In response to that argument it is to be observed that the Directive provides no definition of the expression put into circulation. This concept must therefore be interpreted in accordance with the purpose and aim pursued by the Directive.

15 Article 1 of the Directive, read in the light of the second recital to its preamble, lays down the principle that a producer is to be liable without fault for a defect in his product where it causes damage. However, according to Article 7 of the Directive, a producer may be exempt from liability in a certain number of cases, exhaustively listed by that provision, if he proves that the circumstances of his case fall within their ambit. In those circumstances, such cases must, in accordance with established case-law, be interpreted strictly.

16 As Mr Veedfald, the Austrian, French and United Kingdom Governments and the Commission have rightly pointed out, the exemption from liability provided for in Article 7(a) of the Directive where the product has not been put into circulation is intended primarily to cover cases in which a person other than the producer has caused the product to leave the process of manufacture. Moreover, as the Austrian and French Governments and the Commission point out, uses of the product contrary to the producer's intention, for example where the manufacturing process is not yet complete, and use for private purposes or in similar situations are excluded from the scope of the Directive. However, the facts of the case as presented to this Court do not appear to fall within one of those situations.

17 As regards the Amtskommune's argument that the product was never put into circulation since it never left the medical sphere of control of the dispensary which made the fluid and the hospital where it was used, such circumstances are not decisive where, as in the present case, the use of the product is characterised by the fact that the person for whom it is intended must bring himself within that sphere of control. Where a patient is admitted to hospital, it cannot matter whether the product used in the course of medical treatment was made in the hospital establishment or was acquired from a third party, as it might have been in this instance, as the United Kingdom Government has pointed out. Whether a product used in the provision of a service was made by a third party, by the service provider himself or by an entity linked to the service provider cannot of itself alter the fact that the product was put into circulation.

18 The answer to be given to the first question must accordingly be that Article 7(a) of the Directive is to be interpreted as meaning that a defective product is put into circulation when it is used during the provision of a specific medical service, consisting in preparing a human organ for transplantation, and the damage caused to the organ results from that preparatory treatment.

The second question

19 By its second question, the national court asks essentially whether Article 7(c) of the Directive is to be interpreted as meaning that the exemption from liability where a product was not manufactured by the producer for an economic purpose or in the course of his business extends to the case of a defective product which has been manufactured and used in the course of providing a specific medical service, financed entirely from public funds, for which the patient is not required to pay any consideration.

20 The Amtskommune submits that, since the costs of medical care come from public funds, which is a special feature of the Danish medical system, there is no direct economic link between the hospital and the patient so that a hospital which makes a defective product is not acting for an

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economic purpose or in the course of business within the meaning of Article 7(c) of the Directive. The Danish and Irish Governments also submit that application of the Directive's system of liability to public hospitals would have harmful consequences for the entire structure of health schemes thereby placing them at a disadvantage in relation to private schemes.

21 As to that point, the fact that products are manufactured for a specific medical service for which the patient does not pay directly but which is financed from public funds maintained out of taxpayers' contributions cannot detract from the economic and business character of that manufacture. The activity in question is not a charitable one which could therefore be covered by the exemption from liability provided for in Article 7(c) of the Directive. Besides, the Amtskommune itself admitted at the hearing that, in similar circumstances, a private hospital would undoubtedly be liable for the defectiveness of the product pursuant to the provisions of the Directive.

22 The answer to be given to the second question must therefore be that Article 7(c) of the Directive is to be interpreted as meaning that the exemption from liability where an activity has no economic or business purpose does not extend to the case of a defective product which has been manufactured and used in the course of a specific medical service which is financed entirely from public funds and for which the patient is not required to pay any consideration.

The third question

23 By its third question, the national court asks whether Community law imposes any requirements as to how Member States should define the expressions damage caused by death or by personal injuries and damage to, or destruction of, any item of property other than the defective product itself in Article 9 of the Directive.

24 Mr Veedfald, the Irish Government, the United Kingdom Government and the Commission consider that those expressions must be defined by Community law so that they are applied uniformly throughout the Community. The Amtskommune, on the other hand, submits that it is for the Member States to define the meaning of those expressions.

25 It is to be noted at the outset that, unlike the terms product, producer and defective product, for which the Directive provides express definitions in Articles 2, 3 and 6 respectively, the term damage is not defined in the Directive. Neither Article 9 nor Article 1 of the Directive, to which Article 9 refers, contains any explicit definition of the term damage.

26 However, Article 9 of the Directive indicates that damage must cover both damage resulting from death or from personal injuries and damage to, or destruction of, an item of property. In the latter case, the damage must be of an amount exceeding EUR 500 whilst the item damaged must be of a type ordinarily intended for private use or consumption and must have been used as such by the injured person.

27 Although it is left to national legislatures to determine the precise content of those two heads of damage, nevertheless, save for non-material damage whose reparation is governed solely by national law, full and proper compensation for persons injured by a defective product must be available in the case of those two heads of damage. Application of national rules may not impair the effectiveness of the Directive (see, to this effect, the judgment in Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20) and the national court must interpret its national law in the light of the wording and the purpose of the Directive (see, in particular, the judgment in Case 14/83 Von Colson and Kamann [1984] ECR 891, paragraph 26).

28 A Member State cannot therefore restrict the types of material damage, resulting from death or personal injury, or from damage to or destruction of an item of property, which are to be made good.

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29 The answer to the given to the third question must therefore be that Article 9 of the Directive is to be interpreted as meaning that, save for non-material damage whose reparation is governed solely by national law and the exclusions detailed in that article as regards damage to an item of property, a Member State may not restrict the types of material damage, resulting from death or from personal injury, or from damage to or destruction of an item of property, which are to be made good.

The fourth and fifth questions

30 By its fourth and fifth questions, the national court asks for guidance on the application of the term damage to the circumstances of the case before it.

31 It must be borne in mind at the outset that under Article 234 EC the Court has no power to apply rules of Community law to a particular case, but only to rule on the interpretation of the Treaty and of acts adopted by Community institutions (see, in particular, the judgment in Joined Cases C-9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, paragraph 30).

32 As regards the aspects of the Directive which call for an interpretation by the Court, it should be observed that Article 1 of the Directive provides that the producer is to be liable for damage caused by a defect in his product. Article 9 indicates the various heads of damage covered by the Directive, namely damage caused by death or personal injuries and damage to, or destruction of, an item of property, other than that caused to the defective product itself, whilst leaving it to the Member States applying their own national laws to provide for compensation for non-material damage. Articles 1 and 9 therefore set out exhaustively the heads of damage that may be possible.

33 It follows that the national court is required, under the Directive, to examine under which head the circumstances of the case are to be categorised, namely whether the case concerns damage covered either by point (a) or by point (b) of the first paragraph of Article 9 or non-material damage which may possibly be covered by national law. The national court may, however, not decline to award any damages at all under the Directive on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the foregoing heads.

DOCNUM	61999J0203
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment
PUBREF	European Court reports 2001 Page I-03569
DOC	2001/05/10
LODGED	1999/05/26
JURCIT	61983J0014 : N 27

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31985L0374-A01 : N 3 15 25 32
31985L0374-A02 : N 25
31985L0374-A03 : N 25
31985L0374-A06 : N 25
31985L0374-A07 : N 3 15
31985L0374-A07LA : N 1 11 16 18
31985L0374-A07LC : N 1 19 - 22
31985L0374-A09 : N 4 23 25 26 29 32
31985L0374-A09LA : N 1
31985L0374-A09LB : N 1
31985L0374-C2 : N 15
31985L0374 : N 14
61988J0365 : N 27
11997E234 : N 31
61997J0009 : N 31

CONCERNS Interprets 31985L0374-A07LA
Interprets 31985L0374-A07LC
Interprets 31985L0374-A09

SUB Approximation of laws

AUTLANG Danish

OBSERV Denmark ; France ; Ireland ; Austria ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Denmark

NATCOUR *A9* Højesteret, beslutning af 21/05/1999 (Sag nr. 529/1997)
P1 Højesteret, dom af 21/08/2001 (529/1997)
- Ugeskrift for Retsvæsen A 2001 p.2338-2345

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	Taschner, Hans Claudius: Produkthaftpflicht international (PHI) 2003 p.13-17
PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Jann
DATES	of document: 10/05/2001 of application: 26/05/1999

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Judgment of the Court (Fifth Chamber)
of 25 April 2002
Commission of the European Communities v French Republic.
Failure by a Member State to fulfil its obligations - Directive 85/374/EEC - Product liability - Incorrect transposition.
Case C-52/00.

1. Approximation of laws - Measures for the establishment and functioning of the internal market - Legal basis - Article 100 of the Treaty (now Article 94 EC) - Possibility for the Member States to maintain or establish provisions departing from Community harmonisation measures - No such possibility

(EEC Treaty, Art. 100 (amended to Art. 100 of the EC Treaty, now Art. 94 EC); EC Treaty, Art. 100a (now Art. 95 EC))

2. Approximation of laws - Measures for the establishment and functioning of the internal market - Directives already adopted when Article 153 EC entered into force - Possibility for the Member States to maintain or establish more stringent consumer protection measures on the basis of Article 153 EC - No effect

(Arts 94 EC, 95 EC and 153 EC)

3. Approximation of laws - Liability for defective products - Directive 85/374 - Margin of discretion of the Member States - Degree of harmonisation achieved by the Directive

(Council Directive 85/374)

4. Approximation of laws - Liability for defective products - Directive 85/374 - Possibility of retaining a general system of product liability different from that provided for in the Directive - No such possibility

(Council Directive 85/374, Art. 13)

5. Action for failure to fulfil obligations - Disregard of obligations under a directive - Pleas in defence - Plea questioning the lawfulness of the directive - Not admissible

(Arts 226 EC, 227 EC, 230 EC and 232 EC)

6. Approximation of laws - Liability for defective products - Directive 85/374 - Scope - Different system of liability applying to the producers and victims of defective products - Whether justifiable

(Council Directive 85/374, Art. 9(b))

7. Action for failure to fulfil obligations - Subject-matter of the dispute - Delimited in the course of the pre-litigation procedure - Whether the subject-matter may subsequently be narrowed - Permissible

(Art. 226 EC)

1. Unlike Article 100a of the EC Treaty (now, after amendment, Article 95 EC), Article 100 of the EEC Treaty (amended to Article 100 of the EC Treaty, now Article 94 EC) provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures.

(see para. 14)

2. Article 153 EC is worded in the form of an instruction addressed to the Community concerning its future policy and cannot permit the Member States, owing to the direct risk that would pose for the acquis communautaire, autonomously to adopt measures contrary to the Community law contained in the directives already adopted at the time of entry into force of that law. In fact, the competence

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conferred in that respect on the Member States by Article 153(5) EC concerns only the measures mentioned at paragraph 3(b) of that article. That competence does not extend to the measures referred to in paragraph 3(a) of Article 153 EC, that is to say the measures adopted pursuant to Article 95 EC in the context of attainment of the internal market with which in that respect the measures adopted under Article 94 EC must be equated.

(see para. 15)

3. The margin of discretion available to the Member States in order to make provision for product liability is entirely determined by Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products and must be inferred from its wording, purpose and structure. The fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete. It follows that Directive 85/374 seeks to achieve, in regard to those matters, complete harmonisation of the laws, regulations and administrative provisions of the Member States.

(see paras 16, 19, 24)

4. Article 13 of Council Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.

The reference in that provision to the rights which an injured person may rely on under the rules concerning contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. Likewise the reference in the aforementioned article to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed as referring to a specific scheme limited to a given sector of production.

(see paras 21-23)

5. The system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 226 EC and 227 EC, whereby a declaration that a Member State has failed to fulfil its obligations may be sought, and those provided for in Articles 230 EC and 232 EC, which seek judicial review of the lawfulness of measures adopted by the Community institutions or of the institutions' failure to adopt measures. Those remedies serve different purposes and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision.

(see para. 28)

6. The limits set by the Community legislature to the scope of Council Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products are the result of a complex balancing of different interests. As is apparent from the first and ninth recitals in the preamble to the Directive, those interests include guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice.

The consequence of the choice made by the Community legislature is that, in order to avoid an excessive number of disputes, in the event of minor material damage the victims of defective products cannot

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rely on the rules of liability laid down in the Directive but must bring an action under the ordinary law of contractual or non-contractual liability.

In those circumstances the threshold provided for in Article 9(b) of the Directive cannot be regarded as affecting victims' rights of access to the courts.

Similarly, the fact that different systems of liability apply to the producers and victims of defective products does not constitute an infringement of the principle of equal treatment where the differentiation dependent on the nature and amount of the damage suffered is objectively justified.

(see paras 29-32)

7. Although under the Court's case-law the complaints in the application must be identical to those in the letter of formal notice and in the reasoned opinion, that requirement cannot be carried so far as to mean that in every case the statement of complaints must be exactly the same, where the subject-matter of the proceedings has not been extended or altered.

(see para. 44)

In Case C-52/00,

Commission of the European Communities, represented by M. Patakia and B. Mongin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented initially by K. Rispal-Bellanger and R. Loosli-Surrans, and subsequently by the latter and J-F. Dobelle, acting as Agents,

defendant,

APPLICATION for a declaration that:

- by including damage of less than EUR 500 in Article 3 of Law No 98-389 of 19 May 1998 on liability for defective products (JORF of 21 May 1998, p. 7744);

- by providing in Article 8 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in Article 13 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29),

the French Republic has failed to fulfil its obligations under Articles 9, 3(3) and 7 of the aforementioned directive,

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

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after hearing oral argument from the parties at the hearing on 3 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2001,

gives the following

Judgment

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission applied for costs against the French Republic and the latter has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that

- by including damage of less than EUR 500 in Article 1386-2 of the French Civil Code;

- by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,

the French Republic has failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive;

2. Orders the French Republic to pay the costs.

1 By application lodged at the Court Registry on 17 February 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

- by including damage of less than EUR 500 in Article 3 of Law No 98-389 of 19 May 1998 on liability for defective products (JORF of 21 May 1998, p. 7744);

- by providing in Article 8 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in Article 13 thereof that the manufacturer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29),

the French Republic has failed to fulfil its obligations under Articles 9, 3(3) and 7 of the aforementioned directive.

Legal framework

Community legislation

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2 The Directive seeks to approximate the laws of the Member States concerning the liability of producers for damage caused by defective products. According to the first recital in the preamble thereto, approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property.

3 Article 1 of the Directive provides that the producer shall be liable for damage caused by a defect in his product.

4 Article 3(3) of the Directive is worded as follows:

Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

5 Under Article 7 of the Directive the producer is not liable under the Directive if he proves:

...

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;

...

6 The first paragraph of Article 9 defines damage for the purposes of Article 1 as

...

(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of [EUR] 500, provided that the item of property:

(i) is of a type ordinarily intended for private use or consumption, and

(ii) was used by the injured person mainly for his own private use or consumption.

7 Article 13 of the Directive provides:

This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.

8 Article 15(1) of the Directive provides:

Each Member State may:

...

(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

9 Under Article 19(1) of the Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 July 1988 at the latest.

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National legislation

10 Law No 98-389 inserted the following provisions into the French Civil Code (hereinafter the Civil Code):

Article 1386-1:

The producer shall be liable for the damage caused by a defect in his product, whether or not he is bound to the victim by contract.

Article 1386-2:

The provisions of the... chapter (on liability for defective products) apply to compensation for damage resulting from injury to persons or property other than the defective product itself.

Article 1386-7, first paragraph:

The vendor, hirer, except a lessor under a hire-purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in their products on the same basis as the producer.

Article 1386-11, first paragraph:

The producer shall be automatically liable unless he proves:

...

4. that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;

5. or that the defect is due to compliance of the product with mandatory regulations.

Article 1386-12, second paragraph:

The producer cannot invoke the grounds of exemption from liability under subparagraphs 4 and 5 of Article 1386-11 if, in the event of a defect manifesting itself within a period of ten years after the product was put into circulation, he has failed to take appropriate measures to avert the harmful consequences thereof.

Pre-litigation procedure

11 Taking the view that the Directive had not been correctly transposed into French law within the period prescribed, the Commission initiated proceedings for failure to fulfil obligations. After placing the French Republic on notice to submit its observations, the Commission issued a reasoned opinion on 6 August 1999 requesting that Member State to take the measures necessary to comply with the opinion within two months of its notification. Since the Commission deemed the reply by the French Republic to be unsatisfactory, it brought this action.

Substance

12 The Commission puts forward three pleas, which raise the initial question whether in regard to the matters for which the Directive makes provision the result sought by it is complete, or merely a minimum, harmonisation of the laws, regulations and administrative provisions of the Member States.

The degree of harmonisation achieved by the Directive

13 In the French Government's view, the Directive must be interpreted in the light of the growing importance of consumer protection within the Community, as reflected in the latest version of Article 153 EC. The wording of Article 13 of the Directive, which uses the term rights, shows that it

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does not seek to prevent achievement of a higher national level of protection. That analysis is also borne out by the fact that the Directive itself enables the Member States to depart in certain respects from the rules which it lays down.

14 In that connection it should be pointed out that the Directive was adopted by the Council by unanimity under Article 100 of the EEC Treaty (amended to Article 100 of the EC Treaty, now Article 94 EC) concerning the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. Unlike Article 100a of the EC Treaty (now, after amendment, Article 95 EC), which was inserted into the Treaty after the adoption of the Directive and allows for certain derogations, that legal basis provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures.

15 Nor can Article 153 EC, likewise inserted into the Treaty after the adoption of the Directive, be relied on in order to justify interpreting the directive as seeking a minimum harmonisation of the laws of the Member States which could not preclude one of them from retaining or adopting protective measures stricter than the Community measures. In fact, the competence conferred in that respect on the Member States by Article 153(5) EC concerns only the measures mentioned at paragraph 3(b) of that article, that is to say measures supporting, supplementing and monitoring the policy pursued by the Member States. That competence does not extend to the measures referred to in paragraph 3(a) of Article 153 EC, that is to say the measures adopted pursuant to Article 95 EC in the context of attainment of the internal market with which in that respect the measures adopted under Article 94 EC must be equated. Furthermore, as the Advocate General noted at point 43 of his Opinion, Article 153 EC is worded in the form of an instruction addressed to the Community concerning its future policy and cannot permit the Member States, owing to the direct risk that would pose for the acquis communautaire, autonomously to adopt measures contrary to the Community law contained in the directives already adopted at the time of entry into force of that law.

16 Accordingly, the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.

17 In that connection it should be pointed out first that, as is clear from the first recital thereto, the purpose of the Directive in establishing a harmonised system of civil liability on the part of producers in respect of damage caused by defective products is to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection.

18 Secondly, it is important to note that unlike, for example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), the Directive contains no provision expressly authorising the Member States to adopt or to maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection.

19 Thirdly, the fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete.

20 Although Articles 15(1)(a) and (b) and 16 of the Directive permit the Member States to depart from the rules laid down therein, the possibility of derogation applies only in regard to the matters exhaustively specified and it is narrowly defined. Moreover, it is subject inter alia to conditions as to assessment with a view to further harmonisation, to which the penultimate recital in the preamble expressly refers. An illustration of progressive harmonisation of that kind is afforded by Directive

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1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC (OJ 1999 L 141, p. 20), which by bringing agricultural products within the scope of the Directive removes the option afforded by Article 15(1)(a) thereof.

21 In those circumstances Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.

22 The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

23 Likewise the reference in Article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production.

24 It follows that, contrary to the arguments put forward by the French Republic, the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States (see the judgments of today in Case C-154/00 Commission v Greece [2002] ECR I-3879, paragraphs 10 to 20, and Case C-183/00 Gonzalez Sanchez [2002] ECR I-3901, paragraphs 23 to 32).

25 The Commission's pleas must be examined in the light of those considerations.

First plea: incorrect transposition of Article 9(b) of the Directive

26 The Commission points out that, unlike Article 9(b) of the Directive, Article 1386-2 of the Civil Code covers all damage to private and public property, with no lower threshold of EUR 500.

27 The French Government does not deny that discrepancy but relies on four arguments in order to justify it. First, by depriving the victim of a right of action, the lower threshold infringes the fundamental right of access to the courts guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Secondly, the threshold is also contrary to the principle of equal treatment inasmuch as it creates unfair inequalities between both producers and consumers. Thirdly, it has the same effect as a rule granting total exemption from tortious liability, which under French law is contrary to public policy. Fourthly, those criticisms are borne out by the fact that in its Green Paper of 28 July 1999 on liability for defective products (COM (1999) 396 final) the Commission proposes that the threshold be abolished.

28 As regards the first two arguments, which question the legality of the threshold provided for in the Directive, it should be borne in mind in the first place that the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 226 EC and 227 EC, whereby a declaration that a Member State has failed to fulfil its obligations may be sought, and those provided for in Articles 230 EC and 232 EC, which seek judicial review of the lawfulness of measures adopted by the Community institutions or of the institutions' failure to adopt measures. Those remedies serve different purposes and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision.

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Nor can it plead the unlawfulness of a directive which the Commission alleges it to have infringed (Case C-74/91 Commission v Germany [1992] ECR I-5437, paragraph 10).

29 Moreover, as the Advocate General noted at points 66 to 68 of his Opinion, the limits set by the Community legislature to the scope of the Directive are the result of a complex balancing of different interests. As is apparent from the first and ninth recitals in the preamble to the Directive, those interests include guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice.

30 The consequence of the choice made by the Community legislature is that, in order to avoid an excessive number of disputes, in the event of minor material damage the victims of defective products cannot rely on the rules of liability laid down in the Directive but must bring an action under the ordinary law of contractual or non-contractual liability.

31 In those circumstances the threshold provided for in Article 9(b) of the Directive cannot be regarded as affecting victims' rights of access to the courts (Commission v Greece, cited above, paragraph 31).

32 Similarly, the fact that different systems of liability apply to the producers and victims of defective products does not constitute an infringement of the principle of equal treatment where the differentiation dependent on the nature and amount of the damage suffered is objectively justified (see in particular Case 8/57 Aciéries Belges v High Authority [1958] ECR 245, at p. 256, and Commission v Greece, cited above, paragraph 32).

33 As regards the third argument raised by the French Government, alleging that the threshold provided for in Article 9(b) of the Directive is incompatible with French public policy, suffice it to state that under the Court's settled case-law recourse to provisions of domestic law to restrict the scope of the provisions of Community law would have the effect of undermining the unity and efficacy of that law and cannot consequently be accepted (see, inter alia, Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 38, and Commission v Greece, cited above, paragraph 24).

34 With regard to the reference by the French Government to the Commission's Green Paper, suffice it also to recall that the fact that the Commission, with a view to a possible amendment to the Directive, decided to consult the interested parties as to the expediency of abolishing the threshold provided for in Article 9(b) of the Directive cannot dispense the Member States from the obligation to comply with the provision of Community law currently in force (see in particular Case C-236/88 Commission v France [1990] ECR I-3163, paragraph 19, and Commission v Greece, cited above, paragraph 26).

35 It follows that the Commission's first plea is well founded.

Second plea: incorrect transposition of Article 3(3) of the Directive

36 The Commission maintains that, unlike Article 3(3) of the Directive, which renders the supplier liable only on an ancillary basis, where the producer is unknown, Article 1386-7 of the Civil Code equates the supplier with the producer.

37 The French Government does not deny this discrepancy. It claims that it results from a rule of national procedure which, as such, did not come within the scope of Community competence on the date on which the Directive was adopted and which was therefore not capable of being altered by the Community legislation. Moreover, Article 1386-7 of the Civil Code achieves the result sought by the Directive since the supplier sued by the victim may join the producer as a party, who will then be liable to pay the compensation, precisely as intended by the Directive.

38 Inasmuch as the French Government challenges the Council's competence to adopt Article 3(3)

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of the Directive, it should be noted, first of all, that, as has been pointed out at paragraph 28 hereof, a Member State cannot rely, as a defence to an action for failure to fulfil obligations, on the unlawfulness of the directive which the Commission alleges it to have infringed.

39 Moreover, that argument cannot be upheld. Since the Community legislature had competence to harmonise the laws of the Member States in the field of product liability, it was also competent to determine the person who was to bear that liability and the conditions under which that person was to be sued.

40 As to the alleged equivalence of result as between the system of liability provided for in the Directive and that established by Law No 98-389, it should be pointed out that the possibility afforded to the supplier under that law of joining the producer has the effect of multiplying proceedings, a result which the direct action afforded to the victim against the producer under the conditions provided for in Article 3 of the Directive is specifically intended to avoid.

41 It follows that the Commission's second plea must be upheld.

Third plea: incorrect transposition of Article 7 of the Directive

42 The Commission claims that, unlike Article 7(d) and (e) of the Directive, which provides for grounds on which the producer may be exempted from liability which are unconditional, the first paragraph of Article 1386-11 and the second paragraph of Article 1386-12 of the Civil Code make application of those grounds of exemption subject to observance by the producer of an obligation to monitor the product.

43 As a preliminary issue the French Government contests the admissibility of two arguments raised by the Commission in support of the third plea on the ground that they were not included in the reasoned opinion.

44 In that connection it should be observed that, although under the Court's case-law the complaints in the application must be identical to those in the letter of formal notice and in the reasoned opinion, that requirement cannot be carried so far as to mean that in every case the statement of complaints must be exactly the same, where the subject-matter of the proceedings has not been extended or altered (Case C-365/97 Commission v Italy [1999] ECR I-7773, paragraph 25). In the present case that condition is satisfied and accordingly the plea of inadmissibility raised by the French Government cannot be upheld.

45 As to the substance, the French Government points out that the third plea relates to a point which in its Green Paper the Commission itself has envisaged amending. It states that Article 15 of the Directive provides the Member States with an option concerning the derogation in connection with the state of scientific and technical knowledge at the time when the product is put into circulation, since it is possible for that derogation to be excluded. It would therefore be logical for such an exclusion to be made subject to a condition such as the requirement to monitor products, which is warranted by the obligations imposed on the Member States by Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24).

46 With regard to the reference to the Commission's Green Paper it is sufficient to refer to paragraph 34 of this judgment.

47 In regard to the arguments based on Article 15 of the Directive, it should be noted that whilst that provision enables the Member States to remove the exemption from liability provided for in Article 7(e) thereof, it does not authorise them to alter the conditions under which that exemption is applied. Nor does Article 15 authorise them to cancel or amend the rules governing derogations provided for in Article 7(d). That interpretation is not negated by Directive 92/59, which does not concern the producer's liability for products which he puts into circulation.

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48 Accordingly, the Commission's third plea is also well founded.

49 In those circumstances it must be held that:

- by including damage of less than EUR 500 in Article 1386-2 of the Civil Code;

- by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of the Directive,

the French Republic has failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive.

DOCNUM	62000J0052
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; J ; judgment
PUBREF	European Court reports 2002 Page I-03827
DOC	2002/04/25
LODGED	2000/02/17
JURCIT	11957E100 : N 14 61957J0008 : N 32 31985L0374-A04 : N 22 31985L0374-A09L1LB : N 31 33 34 31985L0374-A13 : N 13 31985L0374 : N 20 61988J0236 : N 34 61991J0074 : N 28 11992E100A : N 14 31992L0059 : N 47 31993L0013-A07LD : N 47 31993L0013-A07LE : N 47 31993L0013-A15: N 45 47 31993L0013-A15P1LA : N 20 31993L0013-A15P1LB : N 20 31993L0013-A16 : N 20 31993L0013 : N 18 21 - 23

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61993J0473 : N 33
11997E094 : N 15
11997E095 : N 15
11997E153-P3LA : N 15
11997E153-P3LB : N 15
11997E153-P5 : N 15
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11997E226 : N 28
11997E227 : N 28
61997J0365 : N 44
31999L0034 : N 20
62000J0154 : N 24 31 - 34
62000J0183 : N 24

CONCERNS Failure concerning 31985L0374-A03P3
Failure concerning 31985L0374-A07
Failure concerning 31985L0374-A09L1LB

SUB Approximation of laws ; Consumer protection

AUTLANG French

APPLICA Commission ; Institutions

DEFENDA France ; Member States

NATIONA France

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PROCEDU Proceedings concerning failure by Member State - successful

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ADVGEN Geelhoed

JUDGRAP Jann

DATES of document: 25/04/2002
of application: 17/02/2000

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Judgment of the Court (Sixth Chamber)
of 12 December 1990
SARPP - Société d'application et de recherches en pharmacologie et phytotherapie SARL v Chambre syndicale des raffineurs et conditionneurs de sucre de France and others.
Reference for a preliminary ruling: Tribunal de grande instance de Paris - France.
Artificial sweeteners - Labelling - Advertising.
Case C-241/89.

++++

1 . Approximation of laws - Labelling and presentation of foodstuffs - Directive 79/112 - National rules prohibiting any statement alluding to sugar in the labelling of artificial sweeteners - Not permissible

(Council Directive 79/112)

2 . Free movement of goods - Quantitative restrictions - Measures having equivalent effect - National rules prohibiting any statement alluding to sugar in the advertising of artificial sweeteners - Not permissible

(EEC Treaty, Arts 30 and 36)

1 . The provisions of Council Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, and in particular Articles 2 and 15, must be interpreted as meaning that they preclude the application to national and imported products of national provisions which prohibit any statement in the labelling of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess.

2 . Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude the application to imported products of national provisions which prohibit any statement in the advertising of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess.

In Case C-241/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de grande instance de Paris (Regional Court, Paris) for a preliminary ruling in the proceedings pending before that court between

SARPP, Société d' application et de recherches en pharmacologie et phytothérapie SARL,

and

Chambre syndicale des raffineurs et conditionneurs de sucre de France,

Groupement d' achat Edouard Leclerc SA,

Bayer France SA,

Laboratoire Human Pharm,

Pierre Fabre Industrie SA,

Laboratoires Vendôme SA,

Famar France,

Searle Expansion SA,

on the interpretation of Article 30 of the EEC Treaty,

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THE COURT (Sixth Chamber),

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

Advocate General : G. Tesauro

Registrar : D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of

SARPP, by D. Menard and F. Marion-Menard, of the Nantes Bar,

Pierre Fabre Industrie, by J.-Y. Dupeux, of the Paris Bar,

Bayer France, by M.-O. Vaissie, of the Paris Bar,

Famar France, by J.-B. Barennes, of the Paris Bar,

the Groupement d' achat Edouard Leclerc, by G. Parleani, of the Paris Bar,

the Chambre syndicale des raffineurs et conditionneurs de sucre de France, by F. Mollet Vieville, bâtonnier, and by R. Collin and M.-C . Mitchell, both of the Paris Bar,

the French Government, by E. Belliard, Deputy Director of Legal Affairs, acting as Agent, and M. Giacomini, Secretary for Foreign Affairs, acting as Deputy Agent,

the Commission of the European Communities, by R. Wainwright, Legal Adviser, and H. Lehman, a French civil servant on secondment to the Commission' s Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations presented by Famar France, represented by C. Momege, avocat, the Groupement d' achat Edouard Leclerc, the Chambre syndicale des raffineurs et conditionneurs de sucre de France, the French Government and the Commission of the European Communities at the hearing on 27 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 October 1990,

gives the following

Judgment

Costs

34 The costs incurred by the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings 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 Tribunal de grande instance de Paris, by judgment of 5 July 1989, hereby rules :

(1) The provisions of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, and in particular Articles 2 and 15, must be interpreted as meaning that they preclude the application to national and imported products of national provisions

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which prohibit any statement in the labelling of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess.

(2) Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude the application to imported products of national provisions which prohibit any statement in the advertising of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess.

1 By judgment of 5 July 1989, which was received at the Court on 1 August 1989, the Tribunal de grande instance de Paris referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30 of the EEC Treaty with a view to determining whether the French rules on the labelling, presentation and advertising of artificial sweeteners are compatible with the aforementioned article of the Treaty.

2 The rules in question appear in Article 10(1) of Law No 88-14 of 5 January 1988 on legal actions brought by approved consumers' associations and on the provision of information to consumers. Article 10(1) prohibits all statements alluding to the physical, chemical or nutritional properties of sugar or to the word "sugar" in the labelling of sweeteners that are sweeter than sugar but do not have the same nutritional qualities, in the labelling of foodstuffs containing such substances, as well as in the sale and presentation of such substances and foodstuffs and in the information supplied to consumers on them. However, the names and trade marks of sweeteners marketed before 1 December 1987 by the medical and pharmaceutical sector may be retained. Those provisions were supplemented by the Order of 11 March 1988 amending the Order of 20 July 1987 on dietary products .

3 The question referred by the Tribunal de grande instance de Paris was raised in proceedings brought by SARPP (Société d' application et de recherches en pharmacologie et phytothérapie, hereinafter referred to as "SARPP ") against the Chambre syndicale des raffineurs et conditionneurs de sucre de France (hereinafter referred to as "the Association ") and a number of companies that import or market artificial sweeteners in France.

4 By decision of 5 January 1989, the President of the Tribunal de grande instance de Nantes (Regional Court, Nantes), on application from the Association, ordered the withdrawal from sale of products marketed by SARPP under the trade-mark "Sucrandel", the packaging of which did not comply with Article 10(1) of Law No 88-14. Following that decision, SARPP brought an action against the Association before the Tribunal de grande instance de Paris for a declaration that that law and the Order of 11 March 1988 were contrary to Article 30 of the EEC Treaty .

5 The Tribunal de grande instance de Paris considered that the French legislation, and in particular the prohibition on any statement alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar in the labelling of artificial sweeteners could constitute a measure having equivalent effect to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty, and the question therefore arose whether that legislation could be justified by reasons relating to consumer protection or public health.

6 Accordingly, the Tribunal de grande instance de Paris decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling :

"Are Article 10(1) of Law No 88-14 of 5 January 1988 and the Order of 11 March 1988 compatible with Article 30 of the Treaty of Rome, inasmuch as they prohibit any statement alluding to the physical, chemical or nutritional properties of sugar or to the word 'sugar' in the labelling or advertising of artificial sweeteners?"

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7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, 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.

8 By way of a preliminary observation, it should be pointed out that although the Court may not, within the framework of Article 177 of the Treaty, rule on the compatibility of a provision of national law with the Treaty, it may provide the national court with all those elements by way of interpretation of Community law which may enable it to assess that compatibility for the purposes of the case before it. Moreover, in doing so it may deem it necessary to consider provisions of Community law to which the national court has not referred in its question .

9 The documents before the Court show that by its question, the national court seeks to determine whether Community law precludes the application, to national and imported products, of national rules prohibiting any statement alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar in the labelling and advertising of artificial sweeteners intended to be supplied to consumers .

The applicable Community provisions

10 On 18 December 1978 the Council adopted Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (Official Journal 1979 L 33, p. 1).

11 As is evident from its preamble, the objective of the directive is to promote the free movement of foodstuffs by the approximation of the laws of the Member States on labelling. To that end, it lays down a number of common general rules applicable horizontally to all foodstuffs put on the market.

12 Article 2 of the directive lays down the principle upon which any provisions on labelling and advertising must be based. Article 2(1)(a) provides that the labelling of foodstuffs intended for sale to the ultimate consumer must not be such as could mislead the purchaser, particularly "as to the characteristics of the foodstuff" or "by attributing to the foodstuff effects or properties which it does not possess", or "by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics ". In addition, Article 2(1)(b) provides that labelling may not attribute medicinal properties to foodstuffs. Article 2(3) extends those prohibitions to the presentation and advertising of foodstuffs.

13 In order to ensure that consumers are informed and protected, Article 3 of the directive lists the only particulars which are compulsory on the labelling of foodstuffs. The conditions under which those particulars must appear on labelling are given in Articles 4 to 14, which also lay down a certain number of derogations from Article 3

14 Article 15(1) of the directive provides that Member States may not forbid trade in foodstuffs which comply with the rules laid down in the directive by the application of non-harmonized national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general. However, under Article 15(2) that prohibition does not apply to non-harmonized national provisions justified on one of the grounds exhaustively listed in that provision . Those grounds include, in particular, the protection of public health and the prevention of unfair competition.

15 It should be pointed out that the provisions of the directive relating to labelling differ in one essential way from those relating to advertising. As is evident from the ninth recital, because the directive is general and applicable horizontally, it allows the Member States to maintain or adopt rules in addition to those laid down by the directive. With regard to labelling, the limits of the power retained by the Member States are set by the directive itself in so far as it lists

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exhaustively, in Article 15(2), the grounds on which the application of non-harmonized national provisions prohibiting trade in foodstuffs may be justified. However, that provision is not applicable to advertising. Consequently, the question whether in this field Community law precludes the application of national rules in addition to those laid down by the directive must be considered in the light, in particular, of the provisions of the Treaty on the free movement of goods and especially Articles 30 and 36.

16 That difference gives rise to an important consequence. As the Court pointed out in its judgment in Case 98/86 Ministère public v Mathot [1987] ECR 809, paragraph 11, Directive 79/112 created obligations concerning the labelling of foodstuffs marketed throughout the Community without permitting any distinction to be drawn according to the origin of those foodstuffs, subject only to the condition contained in Article 3(2). Consequently, if the provisions of the directive preclude the application of certain national rules on the labelling of foodstuffs, such rules may not be applied either to imported foodstuffs or to national foodstuffs. However, when national rules on advertising are contrary to Articles 30 and 36 of the Treaty, the application of those rules is prohibited only in respect of imported products and not national products.

17 Having regard to that difference, separate consideration must be given to the aspects of the national rules at issue relating to labelling on the one hand and to advertising on the other.

The aspects of the rules at issue relating to labelling

18 With regard to the aspects of the national rules relating to labelling, it should be pointed out, first of all, that the prohibition of any statement alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar in the labelling of artificial sweeteners exceeds the requirements laid down by Article 2(1) of Directive 79/112 in order to prevent the consumer from being misled as to the characteristics, effects or properties of that foodstuff . In order to achieve that objective, it is sufficient to prohibit any particulars which indicate, suggest or lead one to believe that artificial sweeteners possess properties similar to those of sugar when in fact they do not. However, concern to ensure that consumers are not misled cannot justify a general prohibition of any statement alluding to the word "sugar" or to the properties of sugar that artificial sweeteners also possess, such as their sweetening effect .

19 The national prohibition at issue must be regarded as a "non-harmonized" rule within the meaning of Article 15 of the directive . It forbids trade in artificial sweeteners whose labelling complies with the rules laid down in the directive, since that foodstuff may not be marketed if its labelling includes inter alia any statement alluding to the word "sugar" or to the properties of sugar. Consequently, the prohibition of any statement in the labelling of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess can be applied to that foodstuff, whether imported or domestic, only if it is justified on one of the grounds mentioned in Article 15(2) of the directive.

20 In this regard, the Association claimed that the purpose of the prohibition was to prevent unfair competition between sugar and artificial sweeteners. It maintained that as a result of repeated campaigns disparaging sugar mounted by the producers of artificial sweeteners, any allusion to the word "sugar" or to the properties of that product in the labelling of artificial sweeteners constitutes unfair competition.

21 That argument cannot be upheld. Not every statement in the labelling of artificial sweeteners alluding to the word "sugar" or to its properties necessarily has the effect of denigrating sugar. That applies particularly to the brand names of artificial sweeteners that include the radical "suc ". Consequently, although the objective of the prohibition at issue is to prevent unfair competition, it is manifestly disproportionate to that objective, which can be achieved either by having recourse

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to the general rules against unfair competition or by prohibiting in the labelling of artificial sweeteners only statements whose object or effect is to disparage sugar .

22 It should be pointed out, moreover, that the French legislature allowed for an exception to the prohibition at issue in so far as it provided that the names and trade marks of artificial sweeteners marketed before 1 December 1987 by the medical and pharmaceutical sector might be retained, regardless of their form. It follows that the French legislature itself does not consider that the prohibition of any allusion to the word "sugar" in the labelling of artificial sweeteners is necessary to prevent all unfair competition between those products, since some artificial sweeteners may be marketed under a trade mark alluding to the word "sugar", while the fact that those sweeteners were previously marketed by the medical and pharmaceutical sector is no guarantee against unfair trading.

23 Moreover, a derogation on grounds of protection of public health cannot apply to a national provision such as the one at issue.

24 The prohibition at issue is not intended to warn purchasers of any risks to human health involved in consuming artificial sweeteners

25 Consequently, the reply to the national court must be that the provisions of Directive 79/112, and in particular Articles 2 and 15, must be interpreted as meaning that they preclude the application to national and imported products of national rules which prohibit any statement in the labelling of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties which artificial sweeteners also possess.

The aspects of the rules at issue relating to advertising

26 With regard to the aspects of the national rules relating to advertising, it should be pointed out, first, that those rules are identical to the rules relating to labelling and that, secondly, the provisions of Article 2(1) of Directive 79/112 applicable to advertising are also identical to those governing labelling. Consequently, having regard to what has been said above (paragraphs 18 and 19), the prohibition of any statement in the advertising of artificial sweeteners alluding to sugar or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess must be considered to be a rule which has not been harmonized by the aforementioned directive.

27 It must therefore be considered whether, and to what extent, Article 30 of the Treaty precludes the application of that prohibition

28 The Court has consistently held (for the first time in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837) that the prohibition of measures having an effect equivalent to quantitative restrictions on imports laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade

29 Legislation such as that at issue here which restricts or prohibits certain forms of advertising may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products (see the judgment in Case 286/81 Oosthoek' s Uitgeversmaatschappij [1982] ECR 4575, paragraph 15). The possibility cannot be ruled out that to compel a producer either to modify the form or the content of an advertising campaign depending on the Member States concerned or to discontinue an advertising scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.

30 Moreover, that obstacle to intra-Community trade is the result of a disparity between the national legislative schemes. The documents before the Court show that although French law prohibits any

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statements alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar in the advertising of artificial sweeteners, such statements are allowed in other Member States.

31 In this regard, the Court has consistently held (see, in particular, the judgments in Case 120/78 REWE V Bundesmonopolverwaltung fuer Branntwein [1979] ECR 649, Case 261/81 Rau v De Smedt [1982] ECR 3961 and Case 178/84 Commission v Germany [1987] ECR 1227) that in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted provided that such rules are applicable without distinction to domestic and to imported products and can be justified as being necessary on one of the grounds of public interest set out in Article 36 of the Treaty, such as the protection of human health, or to satisfy imperative requirements relating inter alia to consumer protection . Nevertheless, the rules must be proportionate to the aim to be achieved. If a Member State has a choice between various measures to attain the same objective, it should choose the means which least restricts free trade.

32 The grounds relied on to justify the aspects of the national rules at issue relating to advertising are identical in scope to the grounds relied on to justify the aspects of those rules relating to labelling, namely the prevention of unfair trading and the protection of human health. For the reasons already given (in paragraphs 20 to 24, above), the arguments relied on in this regard cannot be accepted

33 Consequently, the reply to the national court must be that Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude the application to imported products of national provisions which prohibit any statement in the advertising of artificial sweeteners alluding to the word "sugar" or to the physical, chemical or nutritional properties of sugar that artificial sweeteners also possess.

DOCNUM	61989J0241
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1990 Page I-04695
DOC	1990/12/12
LODGED	1989/08/01
JURCIT	11957E030 : N 1 5 6 15 16 27 - 33 11957E036 : N 15 16 31 33 11957E177 : N 8 9 61974J0008 : N 28 61978J0120 : N 31

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31979L0112-A02P1 : N 18 25 26
31979L0112-A02P1LA : N 12
31979L0112-A02P1LB : N 12
31979L0112-A02P3 : N 12
31979L0112-A03 : N 13
31979L0112-A03P2 : N 16
31979L0112-A15 : N 19 25
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31979L0112-A15P2 : N 14 15 19
31979L0112-C : N 11
31979L0112-C9 : N 15
31979L0112 : N 10 - 26
61981J0261 : N 31
61981J0286 : N 29
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61986J0098 : N 16

CONCERNS Interprets 11957E030
Interprets 11957E036
Interprets 31979L0112-A02
Interprets 31979L0112-A15

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Approximation of laws ; Agriculture ; Foodstuffs ; Sugar

AUTLANG French

OBSERV France ; Commission ; Member States ; Institutions

NATIONA France

NATCOUR *A8* Tribunal de grande instance de Nantes, ordonnance de référé du 05/01/89 (1052/88)
A9 Tribunal de grande instance de Paris, 1re chambre, jugement du 05/07/89 (RP 54 160 - RG 7 107/89)
- Gazette du Palais 1989 II Som. p.16-17
- Bulletin d'information de la Cour de Cassation 1990 no 297 p.32

NOTES Raymond, Guy: Contrats - concurrence - consommation 1991 no 3 p.12-14
Teubner, A.M.M.: S.E.W. ; Sociaal-economische wetgeving 1991 p.800-801
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Wissel, Holger: European Food Law Review 1991 p.219-220
Berr, Claude J.: Journal du droit international 1992 p.438-439

PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP O'Higgins

DATES of document: 12/12/1990
of application: 01/08/1989

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Judgment of the Court (Fifth Chamber)
of 18 June 1991
Piageme and others v BVBA Peeters.
Reference for a preliminary ruling: Rechtbank van Koophandel Leuven - Belgium.
Interpretation of Article 30 of the EEC Treaty and Article 14 of Directaive 79/112/EEC - Labelling and presentation of foodstuffs for sale to the consumer - Labelling in the language of the linguistic region in which the product is offered for sale.
Case C-369/89.

++++

Approximation of laws - Labelling and presentation of foodstuffs - Directive 79/112 - Obligation on Member States to prohibit trade in products lacking information given in a language easily understood by consumers - Scope - Requirements going beyond that obligation - Not permissible - Breach of Article 30 of the Treaty

(EEC Treaty, Art. 30; Council Directive 79/112, Art. 14)

Article 14 of Directive 79/112 on labelling and presentation of foodstuffs, which requires Member States to prohibit the sale of such products within their territories if certain particulars "do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed", requires only the prohibition of trade in products whose labelling is not easily comprehensible for the consumer, without imposing the obligation to use a particular language.

National legislation which, on the one hand, imposes a stricter obligation than the use of a language easily understood, such as, for example, exclusive use of a language of the linguistic region where the goods are marketed and, on the other hand, fails to acknowledge the possibility of ensuring that the consumer is informed by other means, goes beyond the requirements of that provision.

The obligation to use exclusively the language of the linguistic region is a measure having equivalent effect to a quantitative restriction on imports, prohibited by Article 30 of the Treaty.

In Case C-369/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Rechtbank van Koophandel (Commercial Court), Louvain (Belgium), for a preliminary ruling in the proceedings pending before that court between

PIAGEME ASBL (Groupement des Producteurs, Importateurs et Agents Généraux d' Eaux Minérales Etrangères) and Others

and

Peeters BVBA

on the interpretation of Article 30 of the EEC Treaty and of Article 14 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (Official Journal 1979 L 33, p. 1),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, G.C. Rodríguez Iglesias, Sir Gordon Slynn, F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

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Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the plaintiffs in the main action, by Guy Horsmans and Aloïs Puts, of the Brussels Bar,

- the Commission of the European Communities, by René Barents, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiffs in the main action, of Peeters BVBA, represented by Joelle Danckaerts, of the Louvain Bar, and of the Commission, at the hearing on 11 December 1990,

after hearing the Opinion of the Advocate General at the sitting on the same day,

gives the following

Judgment

1 By order of 5 December 1989 which was lodged at the Court Registry on 8 December 1989, the Rechtbank van Koophandel, Louvain (Belgium), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30 of the EEC Treaty and on Article 14 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (Official Journal 1979 L 33, p. 1).

2 The question arose in the context of proceedings between on the one hand the Association des Producteurs, Importateurs et Agents Généraux d' Eaux Minérales Etrangères (PIAGEME), the Société Générale des Grandes Sources et Eaux Minérales Françaises (SGGSEMF) and the Evian, Apollinaris and Vittel companies ("plaintiffs in the main action"), who import and distribute various mineral waters in Belgium, and on the other hand Peeters, a company established in the Flemish-speaking region of that country where it sells those mineral waters in bottles labelled only in French or in German.

3 Considering themselves to have suffered damage, the plaintiffs in the main action started proceedings against Peeters in the Rechtbank van Koophandel, Louvain, their case being that Article 10 of the Royal Decree of 2 October 1980, replaced by Article 11 of the Royal Decree of 13 November 1986 (Moniteur Belge of 2.12.1986, p. 16317), which was intended to transpose Directive 79/112 into Belgian law, provides that the particulars required on labels must at least appear in the language or languages of the linguistic region where the foodstuffs are offered for sale.

4 Peeters pleaded the incompatibility of the Belgian legislation with Article 30 of the EEC Treaty and Article 14 of the directive, which provides that the relevant particulars are to appear "in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed". Consequently, the Rechtbank stayed the proceedings and referred the following question to the Court:

> "Is Article 10 of the Royal Decree of 2 October 1980, now Article 11 of the Royal Decree of 13 November 1986, contrary to Article 30 of the EEC Treaty and Article 14 of Directive 79/112/EEC of 18 December 1978?"

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

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Jurisdiction

6 The plaintiffs in the main action contest the Court' s jurisdiction on two grounds. First of all, they maintain that the Court has no jurisdiction to assess the conformity of the national provisions with Community law nor consequently to reply to the question referred by the national court. Secondly, they contend that the preliminary question which has been asked is unnecessary.

7 On the first point it should be noted that the Court has consistently held that, whereas it is not for the Court, in the context of Article 177 of the Treaty, to rule on the compatibility of a national law with Community law, it does have jurisdiction to provide the national court with all the elements of interpretation under Community law to enable it to assess that compatibility for the purpose of deciding the case before it (see for example the judgment in Case C-373/89 Caisse d' assurances sociales pour travailleurs indépendants "Integrity" v Rouvroy [1990] ECR I-4243, paragraph 9).

8 By the preliminary question, the national court seeks to establish, in substance, whether Article 30 of the EEC Treaty and Article 14 of Directive 79/112 preclude a Member State from requiring by legislation the use of the language of the linguistic region in which the foodstuffs are marketed and preventing the possible use of another language easily understood by purchasers, or any derogation in cases where the purchaser is informed by other means.

9 By their second submission, the plaintiffs in the main action maintain that the issue in the proceedings before the national court is not whether Belgian legislation should provide, by way of derogation, for the possibility of informing the purchaser by means other than a label worded in the language of the region, but whether, in so far as that derogation were permitted, other means would enable the purchaser to be informed effectively. The proceedings relate therefore to a question of evidence falling exclusively within the jurisdiction of the national court and not within that of the Court, to which a preliminary question having no relevance to the outcome of the main proceedings has been referred.

10 It is worth remembering that it has been consistently held that it is only for national courts before which actions have been brought, and which must assume responsibility for the subsequent judgment, to assess, in the light of the circumstances of each case, both the necessity for a preliminary ruling in order to be able to give their judgment and the relevance of the questions they refer to the Court. Consequently where questions referred by national courts relate to the interpretation of a Community-law provision, the Court is, in principle, obliged to make a ruling (judgment in Case C-231/89 Gmurzynska-Bscher v Oberfinanzdirektion Koeln [1990] ECR I-4003, paragraph 20).

The preliminary question

11 The plaintiffs in the main action consider that the requirement to label in the language of the linguistic region where the products are offered for sale is reasonable in the light of the aim of the directive, which is to supply the consumer with details of the products sold and in that respect to ensure the necessary legal certainty in view of the different languages spoken in a region; they stress that Article 14 of the directive imposes on Member States the obligation to prohibit the marketing of products whose labelling is not in accordance with the rules and does not limit itself to a requirement of tolerance allowing labelling which is easily understood by the purchaser.

12 It should be noted that the requirement imposed on Member States by Article 14 of the directive consists in "ensuring that the sale of foodstuffs within their own territories is prohibited" if the required particulars "do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed".

13 The only obligation is therefore to prohibit the sale of products whose labelling is not easily

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understood by the purchaser rather than to require the use of a particular language.

14 It is true that, according to a literal interpretation, Article 14 does not preclude a national law which allows, for the information of the consumer, only the use of the language or languages of the region where the products are sold, in so far as such a law would allow purchasers to understand easily the particulars appearing on the products. The language of the linguistic region is the language which seems to be the most "easily understood".

15 Such an interpretation of Article 14 fails, however, to take account of the aims of the directive. It follows from the first three recitals in the preamble that Directive 79/112 seeks in particular to eliminate the differences which exist between national provisions and which hinder the free movement of goods. It is because of that aim that Article 14 is limited to the requirement of a language easily understood by the purchaser and provides that the entry of foodstuffs into the territory of a Member State may be authorized where the relevant particulars do not appear in a language easily understood "if other measures have been taken to ensure that the purchaser is informed".

16 It follows from the foregoing that, on the one hand, imposing a stricter obligation than the use of a language easily understood, that is to say for example the exclusive use of the language of a linguistic region and, on the other hand, failing to acknowledge the possibility of ensuring that the purchaser is informed by other measures, goes beyond the requirements of the directive. The obligation exclusively to use the language of the linguistic region constitutes a measure having equivalent effect to a quantitative restriction on imports, prohibited by Article 30 of the Treaty.

17 Consequently, the reply to the question referred by the national court should be that Article 30 of the EEC Treaty and Article 14 of Directive 79/112 preclude a national law from requiring the exclusive use of a specific language for the labelling of foodstuffs, without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other measures.

Costs

18 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, cannot be recovered. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in reply to the question referred to it by the Rechtbank van Koophandel, Louvain, by order of 5 December 1989, hereby rules:

Article 30 of the EEC Treaty and Article 14 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer preclude a national law from requiring the exclusive use of a specific language for the labelling of foodstuffs, without allowing for the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other measures.

DOCNUM 61989J0369

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1991 Page I-02971
DOC	1991/06/18
LODGED	1989/12/08
JURCIT	11957E030 : N 1 4 8 16 17 11957E177 : N 6 - 10 31979L0112-A14 : N 1 4 8 11 - 17 31979L0112-C : N 15 61989J0231 : N 10 61989J0373 : N 7
CONCERNS	Interprets 11957E030 Interprets 31979L0112-A14
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Approximation of laws
AUTLANG	Dutch
OBSERV	Commission ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Voorzitter van de rechtbank van koophandel Leuven, uitspraak van 05/12/89 (38.126) - Revue de droit commercial belge 1990 p.959-963 ºNOTESº - Wytinck, Peter: Revue de droit commercial belge 1990 p.925-946 *P1* Hof van beroep Brussel, 8e kamer, arrest van 24/02/94 (AR 554/90)
NOTES	Van Bunnen, Louis: Journal des tribunaux 1991 p.765 Meyer, Thomas: European Food Law Review 1991 p.391-393 Gérard, Alain: European Food Law Review 1992 p.46-53 Wytinck, Peter: Revue de droit commercial belge 1992 p.415-420 Van Nuffel, Pieter: S.E.W. ; Sociaal-economische wetgeving 1992 p.395-402 Berr, Claude J.: Journal du droit international 1992 p.437-438 Gonzalez Vaqué, L. ; Pirotte, Ch.: Revue du marché unique européen 1994 no 1 p.25-49
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Sir Gordon Slynn
DATES	of document: 18/06/1991

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of application: 08/12/1989

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Judgment of the Court (Fifth Chamber)
of 16 July 1998
Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung.
Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany.
Marketing standards for eggs - Promotional descriptions or statements liable to mislead the purchaser - Reference consumer.
Case C-210/96.

1 Agriculture - Common organisation of the markets - Eggs - Marketing standards - Marking of eggs or packaging - Rules on terms used to indicate the type of farming of laying hens - Scope - Statements concerning the type of feed given to the animals - Not included

(Council Regulation No 1907/90, Art. 10(3); Commission Regulation No 1274/91, Art. 18)

2 Agriculture - Common organisation of the markets - Eggs - Marketing standards - Marking of eggs or packaging - Statements intended to promote sales - Prohibition on misleading the consumer - Assessment by the national court of misleading nature - Criteria

(Council Regulation No 1907/90, Art. 10(2)(e))

1 Article 10(3) of Regulation No 1907/90 and Article 18 of Regulation No 1274/91, which concern the terms used to indicate the type of farming of laying hens, do not preclude egg packs from bearing a description such as `six-grain - 10 fresh eggs'. Such a statement, which concerns the type of feed given to the animals, does not fall within the scope of those provisions, which are confined to regulating the description of the type of farming which packaging may bear.

2 In order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90 on certain marketing standards for eggs, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment.

In Case C-210/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Gut Springenheide GmbH,

Rudolf Tusky

and

Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung,

Joined party: Oberbundesanwalt beim Bundesverwaltungsgericht,

"on the interpretation of Article 10(2)(e) of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5),

THE COURT

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J.C. Moitinho de Almeida, D.A.O. Edward and J.-P. Puissochet (Rapporteur), Judges,

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Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gut Springenheide GmbH and Rudolf Tusky, by Bernhard Stüer, Rechtsanwalt, Münster,

- the French Government, by Catherine de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, seconded to that directorate from the central administration, acting as Agents,

- the Austrian Government, by Franz Cede, Botschafter at the Federal Ministry of Foreign Affairs, acting as Agent,

- the Swedish Government, by Lotty Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg,$

having regard to the Report for the Hearing,

after hearing the oral observations of Gut Springenheide GmbH and Rudolf Tusky, represented by Bernhard Stüer; of the German Government, represented by Corinna Ullrich, Regierungsrätin zur Anstellung in the Federal Ministry of Justice, acting as Agent; and of the Commission, represented by Klaus-Dieter Borchardt and Hans-Jürgen Rabe, at the hearing on 29 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1998,

gives the following

Judgment

Costs

38 The costs incurred by the German, French, Austrian and Swedish Governments and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber)

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 8 February 1996, hereby rules:

In order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment.

1 By order of 8 February 1996, received by the Court on 20 June 1996, the Bundesverwaltungsgericht

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referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5).

2 The questions have been raised in proceedings brought by Gut Springenheide GmbH (hereinafter `Gut Springenheide') and its director, Rudolf Tusky, against Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung (Chief Administrative Officer of the Rural District of Steinfurt - Office for Supervision of Foodstuffs, hereinafter `the Office for Supervision of Foodstuffs') concerning a description appearing on packs of eggs marketed by Gut Springenheide and an insert enclosed in the packs.

Community legislation

3 Regulation (EEC) No 2771/75 of the Council of 29 October 1975 on the common organisation of the market in eggs (OJ 1975 L 282, p. 49) provides for the adoption of marketing standards relating in particular to grading by quality and weight, packaging, storage, transport, presentation and marketing of eggs. On the basis of that regulation, the Council adopted Regulation No 1907/90, which repealed and replaced Regulation (EEC) No 2772/75 of 29 October 1975 on marketing standards for eggs (OJ 1975 L 282, p. 56).

4 Article 10(1) of Regulation No 1907/90 lists the particulars which packs of eggs must bear. These include the name or business name, and address of the undertaking which has packed the eggs or had them packed; however the name, business name or the trade mark used by that undertaking may be shown only if it contains no wording incompatible with the regulation relating to the quality or freshness of the eggs, to the type of farming used for their production or to the origin of the eggs (Article 10(1)(a)).

5 Article 10(2) of the regulation provides that packs may also carry certain additional information, including statements designed to promote sales, provided that such statements and the manner in which they are made are not likely to mislead the purchaser (Article 10(2)(e)). That provision was amended by Council Regulation (EEC) No 2617/93 of 21 September 1993 (OJ 1993 L 240, p. 1), so as to make clear that the optional additional information for publicity purposes on egg packs may include symbols and refer to eggs and to other items. However that amendment is of no relevance in the present case.

6 Under the first subparagraph of Article 10(3) of Regulation No 1907/90, further dates and indications concerning the type of farming and the origin of the eggs may only be used in accordance with rules to be laid down under the procedure set out in Article 17 of Regulation No 2771/75. Those rules are to cover in particular the terms used in indications of the type of farming and the criteria concerning the origin of the eggs.

7 Article 14 of Regulation No 1907/90 provides that packs may not bear any indications other than those laid down in the Regulation.

8 On 15 May 1991, the Commission adopted Regulation (EEC) No 1274/91 introducing detailed rules for implementing Regulation (EEC) No 1907/90 (OJ 1991 L 121, p. 11). Article 18 of that regulation lists, in particular, the terms indicating the type of farming as referred to in Article 10(3) of Regulation (EEC) No 1907/90 which eggs as well as small packs may carry. Article 18 was amended by Commission Regulation (EC) No 2401/95 of 12 October 1995 (OJ 1995 L 246, p. 6).$

The main proceedings

9 Gut Springenheide markets eggs ready-packed under the description `6-Korn - 10 frische Eier' (six-grain - 10 fresh eggs). According to the company, the six varieties of cereals in question account for 60% of the feed mix used to feed the hens. A slip of paper enclosed in each pack of

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eggs extols the beneficial effect of this feed on the quality of the eggs.

10 On 24 July 1989, having repeatedly advised Gut Springenheide of its reservations with regard to the description `six-grain - 10 fresh eggs' and the pack insert, the Office for the Supervision of Foodstuffs gave the company notice that it must remove them. Also, a fine was imposed on its director, Rudolf Tusky, on 5 September 1990.

11 By judgment of 11 November 1992, the Verwaltungsgericht (Administrative Court), Münster, dismissed the declaratory action brought by Gut Springenheide and Rudolf Tusky on the ground that the description and the pack insert infringed Paragraph 17(1) of the Lebensmittel- und Bedarfsgegenständegesetz (Foodstuffs and Consumer Goods Law) under which misleading descriptions were prohibited.

12 Gut Springenheide and Rudolf Tusky appealed unsuccessfully against that judgment. The appeal court considered that the description and the pack insert in question infringed Article 10(1)(a) and (2)(e) of Regulation No 1907/90. According to that court, the description `six-grain - 10 fresh eggs', which is also a trade mark, and the pack insert were likely to mislead a significant proportion of consumers in that they implied falsely that the feed given to the hens is made up exclusively of the six cereals indicated and that the eggs have particular characteristics.

13 Gut Springenheide and Rudolf Tusky then brought an appeal on a point of law before the Bundesverwaltungsgericht (Federal Administrative Court). They argued that the description and the pack insert at issue provided the consumer with vital information and that the appeal court had not produced any expert opinion to prove that they misled the purchaser.

14 The Bundesverwaltungsgericht took the view that the outcome of the proceedings turned on Article 10 of Regulation No 1907/90, but had doubts regarding the interpretation of Article 10(2)(e), which allows packs to bear statements designed to promote sales provided that they are not likely to mislead the purchaser. According to the referring court, that provision could be interpreted in two ways. Either the misleading nature of the statements in question is to be assessed in the light of the actual expectations of consumers, in which case those expectations ought, if necessary, to be ascertained by means of a survey of a representative sample of consumers or on the basis of an expert's report, or the provision in question is based on an objective notion of a purchaser, which is only open to legal interpretation, irrespective of the actual expectations of consumers.

15 Accordingly, the Bundesverwaltungsgericht ordered that proceedings be stayed and the following questions be referred to the Court of Justice for a preliminary ruling:

`1. In order to assess whether, for the purposes of Article 10(2)(e) of Regulation (EEC) No 1907/90, statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation?

2. If it is consumers' actual expectations which matter, the following questions arise:

(a) Which is the proper test: the view of the informed average consumer or that of the casual consumer?

(b) Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?

3. If an objectified concept of a purchaser open only to legal interpretation is the right test, how is that concept to be defined.'

Preliminary considerations

16 In the first place, the French Government expresses doubts about the admissibility of the questions referred, since Regulation No 1907/90 came into force on 1 October 1990, that is to say, after the events in issue in the main proceedings.

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17 On this point, it should be noted, first, that the provisions of Article 10(2)(e) of that regulation which are of relevance in the present case are substantially equivalent to those contained in the second paragraph of Article 21 of Regulation No 2772/75, as amended by Council Regulation (EEC) No 1831/84 of 19 June 1984 (OJ 1984 L 172, p. 2), which Regulation No 1907/90 repealed and replaced.

18 Second, Gut Springenheide, the German Government and the Commission all pointed out at the hearing that, since, in the main proceedings, the appellants seek to have their practices declared to be in compliance with the rules in force, the referring court must take account of the provisions applicable at the time when it gives judgment, or, at the very least, those in force when the action was brought. Thus, the action in the main proceedings does not concern the fine imposed on the director of the appellant company.

19 The questions referred by the Bundesverwaltungsgericht must therefore be answered (see, to that effect, Case C-203/90 Gutshof-Ei [1992] ECR I-1003, paragraph 12).

20 The French Government also takes the view that there is no need to consider the interpretation of Article 10(2)(e) of Regulation No 1907/90, sought by the referring court, because that provision prohibits in any event a description such as that in issue in this case. It argues that the description `six-grain - 10 fresh eggs' refers to the feeding of laying hens and therefore concerns the type of poultry farming as referred to in Article 10(3) of the Regulation. Article 18(1) of Regulation No 1274/91, which lists exhaustively the terms, indicating the type of farming, that may appear on packs, does not list the description in issue.

21 That interpretation cannot be upheld.

22 Under Article 18 of Regulation No 1274/91, as amended by Regulation No 2401/95, small packs containing a certain category of eggs may carry one of the following terms to indicate the type of farming as referred to in Article 10(3) of Regulation No 1907/90: `Free range eggs', `Semi-intensive eggs', `Deep litter eggs', `Perchery eggs (Barn eggs)' and `Eggs from caged hens'. Those terms may be used only for eggs produced in poultry enterprises meeting the criteria set out in Annex II to the regulation, which essentially concern the ground or floor area available for the hens, and not the type of feed.

23 According to the 18th recital of Regulation No 1274/91, those provisions are intended to safeguard the consumer from misleading statements which might otherwise be made with the fraudulent intention to obtain prices higher than those prevailing for eggs of hens raised in batteries. They are thus confined to regulating the description of the type of farming which egg packs may bear, irrespective of the type of feed given to the animals, which in any case does not depend on the type of farming.

24 Commission Regulation (EEC) No 1538/91 of 5 June 1991 introducing detailed rules for implementing Regulation (EEC) No 1906/90 on certain marketing standards for poultry (OJ 1991 L 143, p. 11) does not support any other conclusion.

25 Whilst it is true that Article 10 of that regulation, read together with its Annex IV, includes amongst the optional descriptions of the type of farming some referring to the type of feed, those are separate rules, with specific provisions, which, for the reasons given by the Advocate General at paragraphs 31 to 38 of his Opinion, cannot be relied on in this case in order to interpret Regulation No 1274/91.

26 It follows from the foregoing that the provisions of Regulations Nos 1907/90 and 1274/91 regarding the descriptions of the type of farming of laying hens do not preclude egg packs from bearing a description such as `six-grain - 10 fresh eggs'.

The questions referred for a preliminary ruling

27 By its three questions, which it is appropriate to answer together, the referring court is essentially

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asking the Court of Justice to define the concept of consumer to be used as a standard for determining whether a statement designed to promote sales of eggs is likely to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90.

28 In answering those questions, it should first be noted that provisions similar to Article 10(2)(e), intended to prevent consumers from being misled, also appear in a number of pieces of secondary legislation, applying generally or in particular fields, such as Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), or Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13).

29 The protection of consumers, competitors and the general public against misleading advertising is also regulated by Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17). Under Article 2(2) of that directive, misleading advertising means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

30 There have been several cases in which the Court of Justice has had to consider whether a description, trade mark or promotional text is misleading under the provisions of the Treaty or of secondary legislation. Whenever the evidence and information before it seemed sufficient and the solution clear, it has settled the issue itself rather than leaving the final decision for the national court (see, in particular, Case C-362/88 GB-INNO-BM [1990] ECR I-667; Case C-238/89 Pall [1990] ECR I-4827; Case C-126/91 Yves Rocher [1993] ECR I-2361; Case C-315/92 Verband Sozialer Wettbewerb [1994] ECR I-317; Case C-456/93 Langguth [1995] ECR I-1737; and Case C-470/93 Mars [1995] ECR I-1923).

31 In those cases, in order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll.

32 So, national courts ought, in general, to be able to assess, on the same conditions, any misleading effect of a description or statement designed to promote sales.

33 It should be noted, further, that, in other cases in which it did not have the necessary information at its disposal or where the solution was not clear from the information before it, the Court has left it for the national court to decide whether the description, trade mark or promotional description or statement in question was misleading or not (see, in particular, Gutshof-Ei, cited above; Case 94/82 De Kikvorsch [1983] ECR 947; and Case C-313/94 Graffione [1996] ECR I-6039).

34 In Case C-373/90 X [1992] ECR I-131, paragraphs 15 and 16, in which Directive 84/450 was in point, the Court held, inter alia, that it was for the national court to ascertain in the circumstances of the particular case and bearing in mind the consumers to which the advertising was addressed, whether advertising describing cars as new despite the fact that they had been registered for the purposes of importation, without ever having been driven on a road, could be misleading in so far as, on the one hand, it sought to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, that fact would have deterred a significant number of consumers from making a purchase. The Court also held that advertising regarding the lower prices of the cars could be held to be misleading only if it were established that the decision to buy

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on the part of a significant number of consumers to whom the advertising in question was addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer.

35 The Court has not therefore ruled out the possibility that, in certain circumstances at least, a national court might decide, in accordance with its own national law, to order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not.

36 In the absence of any Community provision on this point, it is for the national court, which may find it necessary to order such a survey, to determine, in accordance with its own national law, the percentage of consumers misled by a promotional description or statement that, in its view, would be sufficiently significant in order to justify, where appropriate, banning its use.

37 The answer to be given to the questions referred must therefore be that, in order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation No 1907/90, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgment.

DOCNUM	61996J0210
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1998 Page I-04657
DOC	1998/07/16
LODGED	1996/06/20
JURCIT	31975R2771-A17 : N 6 31975R2771 : N 3 31975R2772-A21 : N 17 31975R2772 : N 3 31979L0112 : N 28 61982J0094 : N 33 31984L0450-A02PT2 : N 29 31984L0450 : N 29 34 31984R1831 : N 17 61988J0362 : N 30 - 32

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31989R2392 : N 28
61989J0238 : N 30 - 32
31990R1907-A10P1 : N 4
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61991J0126 : N 30 - 32
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61993J0470 : N 30 - 32
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CONCERNS Interprets 31990R1907-A10P2LE

SUB Agriculture ; Eggs and poultry

AUTLANG German

OBSERV Federal Republic of Germany ; France ; Austria ; Sweden ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A8* Oberverwaltungsgericht Nordrhein-Westfalen, Urteil vom 21/02/1994 (13 A 4016/92)
- Agrarrecht 1995 p.308 (résumé)
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P1 Bundesverwaltungsgericht, Urteil vom 23/03/1999 (1 C 1.99)
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PROCEDU Reference for a preliminary ruling

ADVGEN Mischo

JUDGRAP Puissochet

DATES of document: 16/07/1998
of application: 20/06/1996

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Judgment of the Court (Fifth Chamber)
of 16 January 1992
Criminal proceedings against X.
Reference for a preliminary ruling: Tribunal de grande instance de Bergerac - France.
Motor vehicles - Misleading advertising.
Case C-373/90.

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Approximation of laws - Misleading advertising - Directive 84/450/EEC - Advertising describing motor vehicles already registered as new, less expensive and guaranteed by the manufacturer - Permissibility

- Conditions

(Council Directive 84/450, Art. 2(2))

Directive 84/450/EEC relating to misleading advertising does not preclude motor vehicles from being advertised as new, less expensive and guaranteed by the manufacturer when the vehicles concerned have been registered solely for the purpose of importation, have never been on the road and are sold in a Member State at a price lower than that charged by dealers established in that Member State because they are equipped with fewer accessories.

In Case C-373/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Juge d' Instruction attached to the Tribunal de Grande Instance of Bergerac (France) for a preliminary ruling in the complaint against

X

on the interpretation of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (Official Journal L 250, p. 17),

THE COURT (Fifth Chamber),

composed of: Sir Gordon Slynn (President of Chamber, acting as President), F. Grévisse, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of the Commission of the European Communities by Xavier Lewis and Maria Condou-Durande, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Jean-Pierre Richard, the civil party in the main proceedings, represented by J.M. Reynaud, Avocat, of the Versailles Bar, and of the Commission at the hearing on 25 September 1991,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1991,

gives the following

Judgment

1 By a letter of 12 December 1990, which was received at the Court on 17 December 1990, the Juge

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d' Instruction (Examining Magistrate) at the Tribunal de Grande Instance (Regional Court), Bergerac, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (Official Journal L 250, p. 17).

2 The question arose in the context of a complaint lodged against X, together with a claim for civil indemnity, by Jean-Pierre Richard, the Chairman of the Board of Directors of the Société Richard-Nissan, which enjoys an exclusive importation contract for Nissan vehicles on French territory. The complaint, brought under Article 44 of French Law No 73-1193 of 27 December 1973 on the Orientation of Business and Crafts, known as the "Loi Royer", alleges untruthful and unlawful advertising.

3 The French legal provision in question was communicated by the French Government to the Commission as the legislative measure implementing the directive.

4 The complaint concerned a garage in Bergerac which placed display advertisements in the press with the words "buy your new vehicle cheaper", followed by the words "one year manufacturer' s guarantee". It transpires from the letter containing the reference that the advertising refers to vehicles imported from Belgium, registered for import purposes but never having been driven, being sold in France below local dealers' prices because Belgian basic models have fewer accessories than the basic models sold in France.

5 On those facts, the Examining Magistrate dealing with the dispute at the Tribunal de Grande Instance of Bergerac decided to stay the proceedings pending a preliminary ruling from the Court of Justice on the question "whether such a marketing practice is in compliance with the European rules currently in force".

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

7 It should be recalled at the outset that, by a line of authority now well-established by the Court, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts, and that, in applying national law, the national court is therefore required to interpret it in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (see Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26, and Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8).

8 The national court' s question must therefore be understood as asking whether or not Council Directive 84/450, referred to above, precludes advertising of the type at issue in the main proceedings.

9 As is clear from the preamble, this directive, adopted under Article 100 of the Treaty, aims to improve consumer protection and to put an end to distortions of competition and hindrances to the free movement of goods and services arising from disparities between the Member States' laws against misleading advertising. With those objectives in mind, it seeks to establish minimum and objective criteria as a basis for determining whether advertising is misleading.

10 Article 2(2) of the directive defines "misleading advertising" as:

> "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive

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nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor".

11 In interpreting this provision in relation to the features of advertising such as that at issue in the main proceedings, one must consider in turn the three claims made in the advertising, namely that the cars in question are new, that they are cheaper, and that they are guaranteed by the manufacturer.

12 Before embarking on such an examination, it should be emphasized that these aspects of the advertising are of great practical importance for the business of parallel car importers, and that, as the Advocate General has pointed out in paragraphs 5 and 6 of his Opinion, parallel imports enjoy a certain amount of protection in Community law because they encourage trade and help reinforce competition.

13 On the first point, concerning the claim that the cars in question are new, it should be noted that such advertising cannot be considered misleading within the meaning of Article 2 just because the cars were registered before importation.

14 It is when a car is first driven on the public highway, and not when it is registered, that it loses its character as a new car. Moreover, as the Commission has pointed out, registration before importation makes parallel import operations considerably easier.

15 It is for the national court, however, to ascertain in the circumstances of the particular case and bearing in mind the consumers to which the advertising is addressed, whether the latter could be misleading in so far as, on the one hand, it seeks to conceal the fact that the cars advertised as new were registered before importation and, on the other hand, that fact would have deterred a significant number of consumers from making a purchase, had they known it.

16 On the second point, concerning the claim that the cars are cheaper, such a claim can only be held misleading if it is established that the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer.

17 Thirdly and finally, regarding the claim about the manufacturer' s guarantee, it should be pointed out that such information cannot be regarded as misleading advertising if it is true.

18 It should be remembered in this respect that in Case 31/85 ETA v DK Investment [1985] ECR 3933 the Court held that a guarantee scheme under which a supplier of goods restricts the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition within the meaning of Article 85(1) of the Treaty (paragraph 14).

19 In answer to the question referred to the Court for a preliminary ruling it must therefore be held that Council Directive 84/450 of 10 September 1984 must be interpreted as meaning that it does not preclude vehicles from being advertised as new, less expensive and guaranteed by the manufacturer when the vehicles concerned are registered solely for the purpose of importation, have never been on the road, and are sold in a Member State at a price lower than that charged by dealers established in that Member State because they are equipped with fewer accessories.

Costs

20 The costs incurred by the Commission of the European Communities, which has 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 before the national court, the decision on costs is a matter for that court.

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On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Examining Magistrate of the Tribunal de Grande Instance, Bergerac, by a letter of 12 December 1990, hereby rules :

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising must be interpreted as meaning that it does not preclude vehicles from being advertised as new, less expensive and guaranteed by the manufacturer when the vehicles concerned are registered solely for the purpose of importation, have never been on the road, and are sold in a Member State at a price lower than that charged by dealers established in that Member State because they are equipped with fewer accessories.

DOCNUM	61990J0373
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1990 ; J ; judgment
PUBREF	European Court reports 1992 Page I-00131
DOC	1992/01/16
LODGED	1990/12/17
JURCIT	11957E005 : N 7 11957E085-P1 : N 18 11957E100 : N 9 11957E189-L3 : N 7 61983J0014 : N 7 31984L0450-A02P2 : N 10 - 19 31984L0450-C : N 9 31984L0450 : N 1 8 19 61985J0031 : N 18 61989J0106 : N 7
CONCERNS	Interprets 31984L0450
SUB	Approximation of laws
AUTLANG	French

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OBSERV	Commission ; Institutions
NATIONA	France
NATCOUR	*A9* Tribunal de grande instance de Bergerac, demande du 12/12/90 (41/90) *P1* Tribunal de grande instance de Bergerac, ordonnance de non-lieu du 29/06/92 (41/90)
NOTES	Heinemann, Klaus: Zeitschrift für Wirtschaftsrecht 1992 p.720-722 Soulard, Christophe: Revue de science criminelle et de droit pénal comparé 1992 p.645-648 Wytinck, Peter: Revue de droit commercial belge 1993 p.16-19
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Rodriguez Iglesias
DATES	of document: 16/01/1992 of application: 17/12/1990

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Judgment of the Court
of 18 May 1993
Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition of advertising using price comparisons.
Case C-126/91.

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Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Rules prohibiting advertisements making use of comparisons of prices charged on the same product at different times ° Application to an advertising campaign relating to products imported from another Member State ° Not permissible ° Justification ° Protection of consumers ° Fair trading ° None

(EEC Treaty, Art. 30)

Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law of a Member State which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from another Member State, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

Such a prohibition, by compelling a trader either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective, may constitute an obstacle to imports even if it applies to domestic products and imported products without distinction. In so far as the prohibition affects all eye-catching advertisements making use of price comparisons, whether they are true or false, it cannot be justified by urgent requirements relating either to consumer protection, since the objective pursued can be ensured by measures which are less restrictive of intra-Community trade, or to the protection of fair trading, since correct price comparisons cannot in any way distort the conditions of competition.

In Case C-126/91,

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

Schutzverband gegen Unwesen in der Wirtschaft e.V.

and

Yves Rocher GmbH

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

THE COURT,

composed of: O. Due, President, C.N. Kakouris, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: M Darmon,

Registrar: D. Triantafyllou, Administrator,

after considering the written observations submitted on behalf of:

° Schutzverband gegen Unwesen in der Wirtschaft, by Rudolf Friedrich, Rechtsanwalt, Karlsruhe,

° Yves Rocher GmbH, by Dirk Schroeder, Rechtsanwalt, Cologne, and Robert Colin and Marie-Laure

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Coignard, of the Paris Bar,

° the Government of the Federal Republic of Germany, by Joachim Karl, Regierungsdirektor in the Federal Ministry of Economic Affairs, and Alexander von Muehlendahl, Ministerialrat in the Ministry of Justice, acting as Agents,

° the Government of the French Republic, by Edwige Belliard, Deputy Director for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Jean-Louis Falconi, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Deputy Agent,

° the Commission of the European Communities, by Rafael Pellicer, of its Legal Service, assisted by Roberto Hayder, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Yves Rocher GmbH, the German Government, the French Government and the Commission of the European Communities at the hearing on 2 June 1992,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1992,

gives the following

Judgment

1 By order of 11 April 1991, received at the Court on 30 April 1991, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of the Treaty, in order to assess the compatibility with those provisions of a rule of national law on commercial advertising.

2 That question was raised in proceedings between the Schutzverband gegen Unwesen in der Wirtschaft e.V., a non-profit-making association based in Munich (hereinafter "the Schutzverband"), and Yves Rocher GmbH (hereinafter "Yves Rocher"), a subsidiary of the French company Laboratoires de Biologie Végétale Yves Rocher, concerning advertisements by Yves Rocher which consisted in a comparison between the old and new prices of its products.

3 Before 1986 advertising by means of comparisons between prices charged by the same undertaking was lawful in so far as it was not unfair or liable to mislead consumers. Following pressure by certain retailers, the German legislature adopted the Gesetz zur AEnderung wirtschafts-, verbraucher-, arbeits- and sozialrechtlicher Vorschriften (Law amending certain provisions of economic, consumer, labour and social welfare legislation) of 25 July 1986 inserting into the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, hereinafter "the UWG") of 7 June 1909 a Paragraph 6e prohibiting advertisements making use of individual price comparisons. That prohibition is intended to protect consumers and competitors against advertising by means of price comparisons.

4 However, the prohibition under Paragraph 6e of the UWG is not absolute. There is an exception in favour of price comparisons which are not "eye-catching" (blickfangmaessig) (Paragraph 6e(2)(1) of the UWG) and advertising by means of catalogues (Paragraph 6e(2)(2) of the UWG).

5 Yves Rocher sells by mail order in the Federal Republic of Germany cosmetics supplied by its parent company, most of which are manufactured in France. Advertising for those products is produced by the parent company to a standard design for the various Member States in question, and is distributed in catalogues and sales brochures. As part of its sales activities, Yves Rocher distributed a brochure which, under the heading "Save up to 50% and more on 99 of your favourite Yves Rocher products", showed, next to the crossed-out old prices, the new lower prices of those products, in large red characters.

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6 The Schutzverband considered that such advertising was contrary to Paragraph 6e (2)(1) of the UWG and brought proceedings against Yves Rocher in the Landgericht Muenchen I (Munich I Regional Court). The Landgericht took the view that that provision of the UWG prohibited advertising in which old and new prices were compared, if that advertising was "eye-catching", and ordered Yves Rocher not to distribute such advertising.

7 Yves Rocher appealed against that decision to the Oberlandesgericht Muenchen (Higher Regional Court, Munich), which set aside the Landgericht' s order on the basis of Paragraph 6e(2)(2) of the UWG. The Schutzverband appealed on a point of law against that decision to the Bundesgerichtshof, which held that Paragraph 6e(2)(2) did not apply. However, the Bundesgerichtshof considered that the application of Paragraph 6e(1) of the UWG raised a question concerning the interpretation of Community law, and therefore stayed the proceedings pending a preliminary ruling by the Court on the following question:

> "Must Article 30 of the EEC Treaty be interpreted as precluding the application of a rule of law of Member State A prohibiting an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which there is an eye-catching display of the new price and reference is made to a higher price shown in an earlier catalogue or sales brochure?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 Dassonville [1974] ECR 837, paragraph 5).

10 The Court has also held that national legislation which restricts or prohibits certain forms of advertising or certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel an economic operator either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction (see the judgments in Case 286/81 Oosthoek' s Uitgeversmaatschappij [1982] ECR 4575, paragraph 15; Case 382/87 Buet [1989] ECR 1235, paragraph 7; Case C-362/88 GB-INNO-BM [1990] ECR I-667, paragraph 7; and Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, paragraph 10).

11 A prohibition of the kind at issue in the main proceedings is thus capable of restricting imports of products from one Member State into another and therefore constitutes, in that respect, a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

12 However, 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 fair trading (see, in particular, GB-INNO-BM,

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cited above, paragraph 10). Those rules must, however, as the Court has repeatedly held (see, in particular, Buet, cited above, paragraph 11), be proportionate to the goals pursued.

13 It is undisputed that a prohibition of the kind at issue in the main proceedings applies both to domestic products and to imported products.

14 Moreover, the German Government has stated that the prohibition in Paragraph 6e of the UWG is intended to protect consumers against the special lure of advertising containing price comparisons, which is frequently liable to mislead. First, it is particularly easy to deceive consumers, since they are generally not in a position to verify the comparison between the old and the new prices. Second, advertising by means of price comparisons may suggest a level of prices which is favourable as a whole, without that being true for the entire range of products.

15 Since the protection of consumers against misleading advertising is a legitimate objective from the point of view of Community law, the Court must examine, in accordance with the settled case-law, whether the national provisions are suitable for attaining the aim pursued and do not go beyond what is necessary for that purpose.

16 It should be observed, first, that a prohibition of the kind at issue in the main proceedings applies where price comparisons catch the eye, whether or not they are correct. The prohibition does not therefore apply to price comparisons which are not eye-catching. In the present case the advertising is prohibited not because it is alleged to be incorrect, but because it is eye-catching. It follows that any eye-catching advertising making use of price comparisons is prohibited, whether it is true or false.

17 Moreover, the prohibition in question goes beyond the requirements of the objective pursued, in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts.

18 Furthermore, a comparative examination of the laws of the Member States shows that information and protection of the consumer can be ensured by measures which are less restrictive of intra-Community trade than those at issue in the main proceedings (see paragraph 52 of the Opinion of the Advocate General).

19 It follows that a prohibition of the kind at issue in the main proceedings is not proportionate to the aim pursued.

20 The German Government argues further that the prohibition in question cannot be incompatible with Article 30 of the Treaty, in that it causes only a marginal restriction of the free movement of goods.

21 On this point, leaving aside rules having merely hypothetical effect on intra-Community trade, it has been consistently held that Article 30 of the Treaty does not make a distinction between measures which can be described as measures having equivalent effect to a quantitative restriction according to the magnitude of the effects they have on trade within the Community.

22 As for the protection of fair trading, and hence of competition, it is important to note that correct price comparisons, prohibited by a rule of law of the kind at issue, cannot in any way distort the conditions of competition. On the other hand, a rule which has the effect of prohibiting such comparisons may restrict competition.

23 Accordingly, the answer to the national court' s question must be that Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the

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new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

Costs

24 The costs incurred by the German and French Governments 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,

in answer to the question referred to it by the Bundesgerichtshof by order of 11 April 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

DOCNUM	61991J0126
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; J ; judgment
PUBREF	European Court reports 1993 Page I-02361 Swedish special edition XIV Page I-00191 Finnish special edition XIV Page I-00201
DOC	1993/05/18
LODGED	1991/04/30
JURCIT	11957E030 : N 1 7 9 11 21 22 23 11957E036 : N 1 61974J0008-N5 : N 9 61981J0286-N15 : N 10 61987J0382-N11 : N 12 61987J0382-N7 : N 10 61988J0362-N10 : N 12 61988J0362-N7 : N 10

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61990J0001-N10 : N 10

CONCERNS Interprets 11957E030

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect

AUTLANG German

OBSERV Federal Republic of Germany ; France ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A7 Landgericht München I, Urteil vom 30/06/1988 (4 HKO 8716/88)
A8 Oberlandesgericht München, Urteil vom 06/04/1989 (6 U 5387/88)
A9 Bundesgerichtshof, Vorlagebeschluß vom 11/04/1991 (I ZR 131/89)
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Darmon
JUDGRAP	Murray
DATES	of document: 18/05/1993 of application: 30/04/1991

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Judgment of the Court
of 9 July 1997
Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95).
Reference for a preliminary ruling: Marknadsdomstolen - Sweden.
'Television without frontiers' Directive - Television advertising broadcast from a Member State - Prohibition of misleading advertising - Prohibition of advertising directed at children.
Joined cases C-34/95, C-35/95 and C-36/95.

1 Freedom to provide services - Television broadcasting - Directive 89/552 - Television advertising - Monitoring of compliance with the directive - Monitoring to be carried out by the Member State from which broadcasts originate - National legislation on the protection of consumers against misleading advertising - Measures taken against an advertiser in relation to television advertising broadcast from another Member State - Whether permissible - Condition - Retransmission, as such, of television broadcasts from that Member State must not be prevented

(Council Directives 84/450 and 89/552)

2 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Concept - Obstacles resulting from national provisions regulating selling arrangements in a non-discriminatory way - Inapplicability of Article 30 of the Treaty - Television advertising - Legislation on misleading advertising - Measures taken against an advertiser in relation to television advertising broadcast from another Member State - Whether permissible - Conditions

(EC Treaty, Arts 30 and 36)

3 Freedom to provide services - Restrictions - Television advertising - Legislation on misleading advertising - Measures taken against an advertiser in relation to television advertising broadcast from another Member State - Justification based on grounds of general interest - Conditions

(EC Treaty, Arts 56 and 59)

4 Freedom to provide services - Television broadcasting - Directive 89/552 - Television advertising - Monitoring of compliance with the directive - Monitoring to be carried out by the Member State from which broadcasts originate - National provisions specifically designed to control the content of television advertising with regard to minors - Application of such provisions to broadcasts from other Member States - Not permissible

(Council Directive 89/552, Arts 16 and 22)

5 Directive 89/552, 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 taking, pursuant to general legislation on protection of consumers against misleading advertising, measures such as prohibitions and injunctions against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.

Although the directive provides that the Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes and, in particular, of national rules which have the general aim of consumer protection, provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.

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Moreover, Directive 84/450, relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and this would be in contradiction with the express intention of the Community legislature.

6 National measures restricting or prohibiting certain selling arrangements are not covered by Article 30 of the Treaty, so long as they apply to all 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. Legislation which prohibits television advertising in a particular sector must be regarded as concerning such selling arrangements for products in that sector in that it prohibits a form of promotion of a certain method of marketing products.

It follows that, on a proper construction, Article 30 of the Treaty does not preclude a Member State from taking, on the basis of provisions of its domestic legislation on misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States, are necessary for meeting overriding requirements of general public importance, such as fair trading and the protection of consumers, or one of the aims laid down in Article 36 of the Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade.

7 On a proper construction of Article 59 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation on misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State. However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance, such as fair trading and the protection of consumers, or one of the aims stated in Article 56 of the Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

8 Directive 89/552, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, is to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.

Directive 89/552 contains a set of provisions specifically devoted to the protection of minors in relation to television programmes in general and television advertising in particular, the observance of which must be ensured by the broadcasting State. Although they do not have the effect of prohibiting application of legislation of the receiving State designed in general to protect consumers or minors provided that this does not prevent retransmission, as such, in its territory of broadcasts from another Member State, those provisions preclude the receiving State from applying, to broadcasts from other Member States, provisions specifically designed to control the content of television advertising with regard to minors, thereby adding a secondary control to the control which the broadcasting Member State must exercise under that directive.

In Joined Cases C-34/95, C-35/95 and C-36/95,

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REFERENCES to the Court under Article 177 of the EC Treaty by the Marknadsdomstol (Sweden) for a preliminary ruling in the proceedings pending before that court between

Konsumentombudsmannen (KO)

and

De Agostini (Svenska) Förlag AB (C-34/95),

and between

Konsumentombudsmannen (KO)

and

TV-Shop i Sverige AB (C-35/95 and C-36/95)

on the interpretation of Articles 30 and 59 of the EC Treaty and 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray (Rapporteur) and L. Sevon (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted:

- in Case C-34/95, by the Konsumentombudsman, Axel Edling,

- in Cases C-35/95 and C-36/95, on behalf of the Konsumentombudsman, by Per Eklund, Ställföreträdande Konsumentombudsman,

- for De Agostini (Svenska) Förlag AB, by Peter Danowsky and Ulf Isaksson, Advocates, Stockholm,

- for TV-Shop i Sverige AB, by Lars-Erik Ström, Advocate, Malmö,

- for the Swedish Government, by Lotty Nordling, Under-Secretary for Legal Affairs at the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,

- for the Belgian Government, by Jan Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, acting as Agent,

- for the Greek Government, by Panagiotis Kamarineas, Legal Adviser to the State Legal Council, and Ioanna Kiki, Secretary at the Special Department for Contentious Community Affairs of the Ministry of Foreign Affairs, and Sofia Chiniadou, Legal Adviser to the Minister for the Press and Media, acting as Agents,

- for the Finnish Government, by Holger Rotkirch, Ambassador, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent,

- for the Norwegian Government, by Didrik Tønseth, Attorney General for Civil Cases, acting as Agent,

- for the Commission of the European Communities, by Berend Jan Drijber, of its Legal Service, acting as Agent,

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having regard to the Report for the Hearing,

after hearing the oral observations of the Konsumentombudsman, Axel Edling; of De Agostini (Svenska) Förlag AB, represented by Peter Danowsky and Ulf Isaksson; of TV-Shop i Sverige AB, represented by Lars-Erik Ström; of the Swedish Government, represented by Lotty Nordling; of the Greek Government, represented by Georgios Kanellopoulos, Deputy Legal Adviser to the State Legal Council, acting as Agent; of the Finnish Government, represented by Tuula Pynnä, Legal Adviser to the Ministry of Foreign Affairs, acting as Agent; of the Norwegian Government, represented by Didrik Tønseth; and of the Commission, represented by Berend Jan Drijber and Karin Oldfelt, Principal Legal Adviser, acting as Agents, at the hearing on 11 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1996,

gives the following

Judgment

Costs

63 The costs incurred by the Swedish, Belgian, Greek, Finnish and Norwegian Governments, and by 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 proceedings pending 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 Marknadsdomstol, by orders of 7 February 1995, hereby rules:

1. 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 taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.

2. On a proper construction of Article 30 of the EC Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States, are necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 of the EC Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade.

3. On a proper construction of Article 59 of the EC Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims stated in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

4. Directive 89/552/EEC is to be interpreted as precluding the application to television broadcasts

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from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.

1 By three orders of 7 February 1995, received at the Court on 13 February 1995, the Marknadsdomstol referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 30 and 59 of the EC Treaty and 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, hereinafter `the Directive').

2 The questions have been raised in connection with three applications made by the Konsumentombudsman (Consumer Ombudsman) for injunctions to restrain De Agostini (Svenska) Förlag AB (hereinafter `De Agostini') and TV-Shop i Sverige AB (hereinafter `TV-Shop') from using certain marketing practices in television advertising concerning a children's magazine (Case C-34/95), skin-care products (Case C-35/95) and a detergent (Case C-36/95).

General provisions of the Directive

3 As the Court held in Case C-412/93 Leclerc-Siplec [1995] ECR I-179, the main purpose of the Directive, which was adopted on the basis of Articles 57(2) and 66 of the EEC Treaty, is to ensure freedom to provide television broadcasting services. As is clear from the 13th and 14th recitals of the preamble to the Directive, it lays down minimum rules for broadcasts which emanate from the Community and which are intended to be received within it (paragraphs 28 and 29).

4 Article 1 of the Directive defines `television broadcasting' as meaning the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It also defines `television advertising' as including any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with, inter alia, a trade in order to promote the supply of goods or services in return for payment. Finally, the same provision provides that, except for the purposes of Article 18 of the Directive, television advertising does not include direct offers to the public for the sale, purchase or rental of products or for the provision of services in return for payment.

5 Article 2 of the Directive then provides:

`1. Each Member State shall ensure that all television broadcasts transmitted

- by broadcasters under its jurisdiction

...

comply with the law applicable to broadcasts intended for the public in that Member State.

2. 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. Member States may provisionally suspend retransmissions of television broadcasts if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;

(b) during the previous 12 months, the broadcaster has infringed the same provision on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the

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alleged infringements and of its intention to restrict retransmission should any such infringement occur again;

(d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification period provided for in point (c), and the alleged infringement persists.

The Commission shall ensure that the suspension is compatible with Community law. It may ask the Member State concerned to put an end to a suspension which is contrary to Community law, as a matter of urgency. This provision is without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.

...'

6 Finally, under Article 3(1) of the Directive, Member States remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by the Directive. Under Article 3(2), Member States must ensure that television broadcasters under their jurisdiction comply with the provisions of the Directive.

Swedish law

7 Under the first paragraph of Article 2 of the Marknadsföringslag (1975:1418, hereinafter `the Marketing Practices Law'), the Marknadsdomstol may prohibit a trader who, in the marketing of goods, services or other commodities, engages in advertising or any other activity which, by being contrary to good commercial practice or otherwise, is unfair towards consumers or other traders, from continuing so to act or from engaging in other similar activity. That provision also applies to television broadcasts which may be received in any country bound by the Agreement on the European Economic Area.

8 Article 3 of the Marketing Practices Law authorizes the Marknadsdomstol, in particular, to order a trader to provide in his advertising information which the Marknadsdomstol considers relevant for the consumer.

9 Article 11 of the Radiolag (1966:755, hereinafter `the Broadcasting Law') provides that an advertisement broadcast during a commercial break on television must not be designed to attract the attention of children under 12 years of age.

10 In its order for reference the Marknadsdomstol points out that, according to its established case-law, marketing practices which are contrary to mandatory legal provisions and misleading advertising are regarded as unfair within the meaning of Article 2 of the Marketing Practices Law.

The facts of the cases before the Marknadsdomstol

11 TV3 is a company established in the United Kingdom. It broadcasts television programmes by satellite from the United Kingdom to Denmark, Sweden and Norway.

12 TV4 and Homeshopping Channel are channels operating in Sweden under licence in accordance with the Broadcasting Law.

13 In the three cases, the television advertising in question was retransmitted to Sweden by satellite from the United Kingdom and shown on TV3. In parallel, the advertising was broadcast on TV4 in Case C-34/95 and on Homeshopping Channel in Cases C-35/95 and C-36/95, without having been previously broadcast from another Member State.

Case C-34/95

14 During September 1993, De Agostini, a Swedish company belonging to the Italian group Istituto

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Geografico De Agostini, whose main business consists in the publication of magazines, advertised on the television channels TV3 and TV4 the magazine Allt om dinosaurier! (`Everything about Dinosaurs!').

15 This children's magazine is, apparently, an encyclopedic magazine which contains information about dinosaurs and a related model dinosaur. It is published in series, each consisting of several issues. With each issue comes a constituent part of a model dinosaur: when an entire series has been purchased, all parts of the model will have been collected. The magazine, which is published in several languages, has been launched in many Member States since 1993. All the language versions of the magazine are apparently printed in Italy.

16 The Consumer Ombudsman has applied to the Marknadsdomstol under Article 2 of the Marketing Practices Law for an order prohibiting De Agostini, subject to a penalty payment, from marketing the magazine Allt om dinosaurier! in the manner described above, on the ground that the advertising in question is designed to attract the attention of children less than 12 years of age and that it is therefore contrary to Article 11 of the Broadcasting Law. If the Marknadsdomstol does not uphold this claim, the Consumer Ombudsman has asked that De Agostini be ordered, subject to a penalty payment, pursuant to Article 3 of the Marketing Practices Law, to indicate in its television advertising aimed at children the number of magazines needed to obtain the complete model and its total price. Finally, pursuant to Article 2 of the Marketing Practices Law, the Consumer Ombudsman has asked that De Agostini be prohibited, subject to a penalty payment, from using in its television advertising the statement `Every two weeks you can collect the parts for a fluorescent dinosaur model and collect the magazines which together form an encyclopedia: all for only 7.50 crowns' or any other statement having essentially the same meaning.

Cases C-35/95 and C-36/95

17 These cases concern the activities of TV-Shop, which is the Swedish subsidiary of the company TV-Shop Europe. Its business consists in presenting products in television spots, whereafter the customer can place an order for the product by telephone. Sales servicing and contact with customers take place in the various countries of reception. The products are delivered by post.

18 In 1993 TV-Shop broadcast on TV3 and on Homeshopping Channel two `infomercials' for Body de Lite skin-care products and the detergent Astonish.

19 In Case C-35/95, the Consumer Ombudsman has, pursuant to Article 2 of the Marketing Practices Law, applied to the Marknadsdomstol for an order restraining TV-Shop from doing any of the following things in connection with the marketing of skin-care products:

- making statements about the products' effects on the skin without being able to substantiate all the statements at the time of marketing;

- stating that the products have healing or therapeutic effects when the products have not been approved as listed pharmaceuticals;

- stating or intimating that when purchasing a skin-care set the consumer will receive extra items without extra cost if the skin-care set is not normally sold at the same price as that at which it is sold if not accompanied by additional products;

- comparing the price of the skin-care set with products of other makes if the company cannot show that the comparison relates to the same, or equivalent, products; and

- indicating that in order to receive certain extra items the consumer must place an order within 20 minutes or in a comparably short period of time.

20 Pursuant to Article 3 of the Marketing Practices Law the Consumer Ombudsman further asks the Marknadsdomstol to order TV-Shop, subject to a penalty payment, to state in crowns, when marketing

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products on television, any additional costs for postage, cash on delivery charges and any similar charges.

21 In Case C-36/95 the Consumer Ombudsman has asked the Marknadsdomstol, pursuant to Article 2 of the Marketing Practices Law, to grant an order restraining TV-Shop, subject to a penalty payment, from

- making statements about the detergents' effectiveness without being able, at the time of marketing, to prove that the statements are correct;

- using the words `environmentally friendly' or similar imprecise phrases implying that the detergent is beneficial for the environment, and

- using the expression `biodegradable' or similar terms in relation to the detergent without being able to prove, at the time of marketing, that all the statements made are correct.

22 In those circumstances, the Marknadsdomstol has requested the Court of Justice to give a preliminary ruling on the following questions:

`Are Article 30 or Article 59 of the Treaty or Directive 89/552/EEC of 3 October 1989 to be interpreted as:

(a) preventing a Member State from taking action against television advertisements which an advertiser has broadcast from another Member State (Cases C-34/95, C-35/95 and C-36/95);

(b) precluding application of Article 11(1) of the Radiolag prohibiting advertisements directed at children (in Case C-34/95).'

23 By order of 20 March 1995, made pursuant to Article 43 of the Rules of Procedure, the President of the Court of Justice ordered Cases C-34/95, C-35/95 and C-36/95 to be joined for the purposes of the written and oral procedure and of the judgment.

The first question

The Directive

24 As regards the possible application of the Directive, in spite of its defective drafting, it is clear from its title that the Directive is designed to coordinate certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities in order to eliminate obstacles to freedom of broadcasting within the Community.

25 It is also clear from the eighth, ninth and tenth recitals in the preamble to the Directive that the obstacles which the Community legislature intended to abolish are those which result from disparities existing between the provisions of the Member States concerning the pursuit of broadcasting activities and of distribution of television programmes.

26 It follows that the fields coordinated by the Directive are coordinated only in so far as television broadcasting, as defined in Article 1(a), is concerned as such.

27 In order to ensure freedom to provide television broadcasts, Article 2 of the Directive provides that all broadcasts emanating from the Community and intended for reception within the Community, in particular those intended for reception in another Member State, must comply with the legislation of the originating Member State applicable to broadcasts intended for the public in that Member State and with the provisions of the Directive. The corollary of this is that, subject to the power accorded to them by Article 2(2), Member States must ensure freedom of reception and must not impede retransmission on their territory of television broadcasts coming from other Member States for reasons which fall within the fields coordinated by the Directive.

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28 Further, according to the 13th recital of the preamble to the Directive, the Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting and therefore does not affect the responsibility of the Member States with regard to the organization and financing of broadcasts and the content of programmes. It is clear from the 17th recital that the Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy overriding considerations of consumer protection, fair trading and competition.

29 It must also be borne in mind that, according to the judgment of the Court in Case C-222/94 Commission v United Kingdom [1996] ECR I-4025, paragraph 42, a Member State's jurisdiction ratione personae over a broadcaster can be based only on the broadcaster's connection to that State's legal system, which in substance overlaps with the concept of establishment as used in the first paragraph of Article 59 of the Treaty, the wording of which presupposes that the supplier and the recipient of a service are `established' in two different Member States.

30 As regards, more particularly, the matter of advertising, the Directive, in Chapter IV concerning television advertising and sponsorship, lays down a number of principles concerning broadcasting conditions, the use of certain advertising techniques and the amount of broadcasting time which may be devoted to this type of activity (Articles 10, 11, 17 and 18).

31 The Directive also covers the content of television advertising. Thus, Article 12 provides that television advertising must not prejudice respect for human dignity, include any discrimination on grounds of race, sex or nationality, be offensive to religious or political beliefs, encourage behaviour prejudicial to health or to safety or encourage behaviour prejudicial to the protection of the environment. Articles 13 and 14 lay down an absolute prohibition of television advertising for cigarettes and other tobacco products and of television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls. Article 15 lays down a number of restrictions concerning television advertising for alcoholic beverages. Article 16 lays down a number of principles regarding, more particularly, the protection of minors, which is also dealt with in Chapter V by Article 22.

32 Consequently, it follows that, as regards the activity of broadcasting and distribution of television programmes, the Directive, whilst coordinating provisions laid down by law, regulation or administrative action on television advertising and sponsorship, does so only partially.

33 Although the Directive provides that the Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes.

34 Thus the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.

35 Consequently, where a Member State's legislation such as that in question in the main proceedings which, for the purpose of protecting consumers, provides for a system of prohibitions and restraining orders to be imposed on advertisers, enforceable by financial penalties, application of such legislation to television broadcasts from other Member States cannot be considered to constitute an obstacle prohibited by the Directive.

36 According to De Agostini, TV-Shop and the Commission, the principle that broadcasts are to be controlled by the State having jurisdiction over the broadcaster would be seriously undermined in both its purpose and effect if the Directive were held to be inapplicable to advertisers. They

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argue that a restriction relating to advertising has an impact on television broadcasts, even if the restriction concerns only advertising.

37 In response to that objection, it is sufficient to observe that Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature (see, to this effect, the judgment of the Court of the European Free Trade Association of 16 June 1995 in Joined Cases E-8/94 and E-9/94 Forbrukerombudet v Mattel Scandinavia and Lego Norge, Report of the EFTA Court, 1 January 1994 - 30 June 1995, 113, paragraphs 54 to 56 and paragraph 58).

38 It follows from the foregoing that the Directive does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.

As regards Article 30 of the Treaty

39 In paragraph 22 of its judgment in Leclerc-Siplec, cited above, the Court held that legislation which prohibits television advertising in a particular sector concerns selling arrangements for products belonging to that sector in that it prohibits a particular form of promotion of a particular method of marketing products.

40 In Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, at paragraph 16, the Court held that national measures restricting or prohibiting certain selling arrangements are not covered by Article 30 of the Treaty, so long as they apply to all 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.

41 The first condition is clearly fulfilled in the cases before the national court.

42 As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

43 Although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it is to be noted that in its observations De Agostini stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.

44 Consequently, an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, is not covered by Article 30 of the Treaty, unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.

45 In the latter case, it is for the national court to determine whether the ban is necessary to satisfy overriding requirements of general public importance or one of the aims listed in Article 36 of the EC Treaty if it is proportionate to that purpose and if those aims or requirements could not have been attained or fulfilled by measures less restrictive of intra-Community trade.

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46 Further, according to settled case-law, fair trading and the protection of consumers in general are overriding requirements of general public importance which may justify obstacles to the free movement of goods (Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein (`Cassis de Dijon') [1979] ECR 649, paragraph 8).

47 Consequently, the answer to the question must be that, on a proper construction of Article 30 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising, provided that those provisions affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States, are necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 of the Treaty, are proportionate for that purpose, and those aims or overriding requirements could not be met by measures less restrictive of intra-Community trade.

As regards Article 59 of the Treaty

48 As was held in Case 352/85 Bond van Adverteerders [1988] ECR 2085, advertising broadcast for payment by a television broadcaster established in one Member State for an advertiser established in another Member State constitutes provision of a service within the meaning of Article 59 of the Treaty.

49 Consequently, it must be examined whether domestic rules such as those in question in the cases before the national court constitute restrictions, prohibited by Article 59 of the Treaty, on freedom to provide services.

50 Provisions such as those in question in the main proceedings, where they restrict the possibility for television broadcasters established in the broadcasting State to broadcast, for advertisers established in the receiving State, television advertising specifically directed at the public in the receiving State, involve a restriction on freedom to provide services.

51 Where the rules applicable to services have not been harmonized, restrictions on the freedom guaranteed by the Treaty in this field may result from application of national rules affecting any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation (Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraph 12).

52 In such a case, it is for the national court to determine whether those provisions are necessary to meet overriding requirements of general public importance or one of the aims laid down in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether the aims or overriding requirements could have been met by less restrictive means.

53 Further, according to settled case-law, fair trading and the protection of consumers in general are overriding requirements of public interest which may justify restrictions on freedom to provide services (see, in particular, Collectieve Antennevoorziening Gouda, cited above, paragraph 14, and Case C-384/93 Alpine Investments [1995] ECR I-1141).

54 The answer to be given must therefore be that, on a proper construction of Article 59 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims mentioned in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

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The second question

55 By its second question the Marknadsdomstol asks the Court for an interpretation of Community law with regard to a provision of a domestic broadcasting law which provides that advertisements broadcast during commercial breaks on television must not be designed to attract the attention of children under 12 years of age.

56 Application of such a domestic provision to advertising broadcast by a television broadcaster established in the same State cannot be contrary to the Directive since Article 3(1) of that provision does not contain any restriction as regards the interests which the Member States may take into consideration when laying down more strict rules for television broadcasters established in their territory. However, the situation is not the same where television broadcasters established in another Member State are concerned.

57 In Articles 16 and 22, the Directive contains a set of provisions specifically devoted to the protection of minors in relation to television programmes in general and television advertising in particular.

58 The broadcasting State must ensure that those provisions are complied with.

59 This certainly does not have the effect of prohibiting application of legislation of the receiving State designed to protect consumers or minors in general, provided that its application does not prevent retransmission, as such, in its territory of broadcasts from another Member State.

60 However, the receiving Member State may no longer, under any circumstances, apply provisions specifically designed to control the content of television advertising with regard to minors.

61 If provisions of the receiving State regulating the content of television broadcasts for reasons relating to the protection of minors against advertising were applied to broadcasts from other Member States, this would add a secondary control to the control which the broadcasting Member State must exercise under the Directive.

62 It follows that the Directive is to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.

DOCNUM	61995J0034
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1997 Page I-03843
DOC	1997/07/09

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LODGED 1995/02/13

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CONCERNS
Interprets 31989L0552
Interprets 11992E030
Interprets 11992E056
Interprets 11992E059

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Freedom of establishment and services ; Free movement of services

AUTLANG Swedish

MISCINF Joined cases : 695J0035 695J0036

OBSERV Sweden ; Belgium ; Greece ; Finland ; Norway ; Commission ; Member States ; Institutions

NATIONA Sweden

NATCOUR
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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Murray

DATES

of document: 09/07/1997
of application: 13/02/1995

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Judgment of the Court (Fifth Chamber)
of 25 October 2001
Toshiba Europe GmbH v Katun Germany GmbH.
Reference for a preliminary ruling: Landgericht Düsseldorf - Germany.
Comparative advertising - Marketing of spare parts and consumable items - References made by a supplier of non-original spare parts and consumable items to the product numbers specific to the original spare parts and consumable items - Directive 84/450/EEC and Directive 97/55/EC.
Case C-112/99.

1. Approximation of laws - Misleading and comparative advertising - Directive 84/450 - Comparative advertising - Scope - Indication, in the catalogue of a supplier of spare parts, of product numbers by which an equipment manufacturer designates his own spare parts - Included - Conditions under which it is lawful - Objective comparison - Infringement - None

(Council Directive 84/450, Art. 2(2a) and 3a(1)(c))

2. Approximation of laws - Misleading and comparative advertising - Directive 84/450 - Comparative advertising - Conditions under which it is lawful - Protection of distinguishing marks - Assessment of the existence of those marks - Criteria - Competence of the national court

(Council Directive 84/450, Art. 3a(1)(g))

3. Approximation of laws - Misleading and comparative advertising - Directive 84/450 - Comparative advertising - Conditions under which it is lawful - Protection of distinguishing marks - Abuse of reputation - Meaning - Criteria of assessment

(Council Directive 84/450, Art. 3a(1)(g))

1. Articles 2(2a) and 3a(1)(c) of Directive 84/450 concerning misleading and comparative advertising, as amended by Directive 97/55, must be interpreted as meaning that the indication, in the catalogue of a supplier of spare parts and consumable items suitable for the products of an equipment manufacturer, of product numbers (OEM numbers) by which the equipment manufacturer designates the spare parts and consumable items which he himself sells may constitute comparative advertising which objectively compares one or more material, relevant, verifiable and representative features of goods.

(see para. 40, and operative part 1)

2. It is for the national court to determine whether the equipment manufacturer's product numbers (OEM) numbers by which he designates the spare parts and consumable items sold by him are distinguishing marks within the meaning of Article 3a(1)(g) of Directive 84/450 concerning misleading and comparative advertising, as amended by Directive 97/55, in the sense that they are identified as coming from a particular undertaking. In order to do so, it will have to take into account the perception of an average individual who is reasonably well informed and reasonably observant and circumspect. Account should also be taken of the type of persons at whom the advertising is directed, in particular whether those persons are specialist traders who are much less likely than final consumers to associate the reputation of the equipment manufacturer's products with those of the competing supplier.

(see para. 52)

3. Article 3a(1)(g) of Directive 84/450 concerning misleading and comparative advertising, as amended by Directive 97/55, must be interpreted as meaning that where product numbers (OEM numbers) of an equipment manufacturer are, as such, distinguishing marks within the meaning of that provision, their use in the catalogues of a competing supplier enables him to take unfair advantage of the reputation attached to those marks only if the effect of the reference to them is to create, in the mind of the persons at whom the advertising is directed, an association between the manufacturer whose products are identified and the competing supplier, in that those persons associate the reputation

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of the manufacturer's products with the products of the competing supplier. In order to determine whether that condition is satisfied, account should be taken of the overall presentation of the advertising at issue and the type of persons for whom the advertising is intended.

(see para. 60, and operative part 2)

In Case C-112/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landgericht Düsseldorf (Germany) for a preliminary ruling in the proceedings pending before that court between

Toshiba Europe GmbH

and

Katun Germany GmbH,

on the interpretation of Article 2(2a) and Article 3a(1)(c) and (g) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, L. Sevon (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Toshiba Europe GmbH, by P.-M. Weisse, Rechtsanwalt,

- Katun Germany GmbH, by W. Mielke, Rechtsanwalt,

- the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,

- the Austrian Government, by F. Cede, acting as Agent,

- the Commission of the European Communities, by U. Wölker, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Toshiba Europe GmbH, represented by C. Osterrieth, Rechtsanwalt; of Katun Germany GmbH, represented by M. Magotsch, Rechtsanwalt; and of the Commission, represented by U. Wölker, at the hearing on 19 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2001,

gives the following

Judgment

Costs

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

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On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Landgericht Düsseldorf by order of 19 January 1999, hereby rules:

1. On a proper construction of Articles 2(2a) and 3a(1)(c) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, the indication, in the catalogue of a supplier of spare parts and consumable items suitable for the products of an equipment manufacturer, of product numbers (OEM numbers) by which the equipment manufacturer designates the spare parts and consumable items which he himself sells may constitute comparative advertising which objectively compares one or more material, relevant, verifiable and representative features of goods.

2. On a proper construction of Article 3a(1)(g) of Directive 84/450 as amended by Directive 97/55, where product numbers (OEM numbers) of an equipment manufacturer are, as such, distinguishing marks within the meaning of that provision, their use in the catalogues of a competing supplier enables him to take unfair advantage of the reputation attached to those marks only if the effect of the reference to them is to create, in the mind of the persons at whom the advertising is directed, an association between the manufacturer whose products are identified and the competing supplier, in that those persons associate the reputation of the manufacturer's products with the products of the competing supplier. In order to determine whether that condition is satisfied, account should be taken of the overall presentation of the advertising at issue and the type of persons for whom the advertising is intended.

1 By order of 19 January 1999, received at the Court on 1 April 1999, the Landgericht Düsseldorf (Regional Court, Düsseldorf) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), three questions on the interpretation of Articles 2(2a) and 3a(1)(c) and (g) of Council Directive 84/450/EEC of 10 September 1984 on misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290 p. 18; hereinafter Directive 84/450 as amended).

2 These questions have been raised in proceedings between a German company, Toshiba Europe GmbH (Toshiba Europe), and another German company, Katun Germany GmbH (Katun), concerning Katun's advertising in the course of selling spare parts and consumable items that can be used for the photocopiers distributed by Toshiba Europe.

Legal background

Directive 84/450 as amended

3 Directive 84/450, which concerned only misleading advertising, was amended in 1997 by Directive 97/55 in order to cover also comparative advertising. The title of Directive 84/450 was therefore amended by Article 1(1) of Directive 97/55.

4 Under Article 2(1) of Directive 84/450 as amended, advertising means, for the purposes of that directive, the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

5 According to Article 2(2a) of Directive 84/450 as amended, comparative advertising, within the meaning of that directive, is any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

6 Article 3a(1) of Directive 84/450 as amended provides as follows:

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Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

(a) it is not misleading according to Article 2(2), 3 and 7(1);

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

7 The second recital of the preamble to Directive 97/55 states as follows:

Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised; whereas if these conditions are met, this will help demonstrate objectively the merits of the various comparable products; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage.

8 The sixth recital of the preamble to Directive 97/55 states that it is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising.

9 The seventh recital states:

Whereas conditions of permitted comparative advertising, as far as the comparison is concerned, should be established in order to determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice; whereas such conditions of permitted advertising should include criteria of objective comparison of the features of goods and services.

National law

10 Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) of 7 June 1909 (the UWG) provides:

Any person who acts contra bonos mores in business dealings for a competitive purpose shall be liable to proceedings for a restraining injunction and damages.

11 According to the order for reference, under the settled case-law of the Bundesgerichtshof (Germany) an undertaking's comparison of its own goods with those of a competitor was in principle contra bonos mores within the meaning of Paragraph 1 of the UWG. However, in view of the entry into force of Directive 97/55, the Bundesgerichtshof held, in judgments delivered on 5 February 1998

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(GRUR 1998, 824 - Testpreis-Angebot) and on 23 April 1998 (BB 1998, 2225 - Preisvergleichsliste II), that, even though that directive had not then been transposed into Germany law and the period for its transposition had not expired, comparative advertising should thenceforth be regarded as permissible where the conditions referred to in Article 3a of Directive 84/450 as amended were satisfied.

The main proceedings and the questions referred for a preliminary ruling

12 Toshiba Europe is the German subsidiary of Toshiba Corporation, a Japanese company. It distributes, in Europe, photocopiers and spare parts and consumable items for them.

13 Katun also sells spare parts and consumable items which may be used for Toshiba photocopiers.

14 In order to identify its photocopier models, Toshiba Europe uses particular model references, such as Toshiba 1340. In order to identify its equipment, it also uses distinguishing marks, known as product descriptions. Furthermore, each product has an order number, the so-called product number.

15 In Katun's catalogues the spare parts and consumable items are set out in categories listing the products specific to a group of particular models of Toshiba photocopiers. Reference is made there, for example, to Katun products for Toshiba photocopiers 1340/1350. Each list of spare parts and consumable items is made up of four columns. In the first column, headed OEM product number, is Toshiba Europe's order number for the corresponding product sold by it. According to the national court, in the relevant business sector OEM means, without any doubt, Original Equipment Manufacturer. The second column headed Katun product number, contains Katun's order number. The third column contains a description of the product. The fourth column refers to the number of the particular model or models for which the product is intended.

16 As regards prices, the documents before the Court show that the catalogues refer to the prices in the order form. Moreover, with regard to some products statements are made in the catalogues, between the lists, such as you can reduce your costs without loss of quality or performance, thanks to their cost and the lower servicing they require, these quality products are clearly a more profitable alternative for businesses or an ideal solution for many high-performance Toshiba photocopiers.

17 In the main proceedings, Toshiba Europe complains solely of the fact that in Katun catalogues its own product number appears alongside the Katun product number. Relying on a judgment of the Bundesgerichtshof of 28 March 1996 (AZ I ZR 39/94, GRUR 1996, 781 - Verbrauchsmaterialen), Toshiba Europe claims that the indication of its own product number is not indispensable in order to explain to customers the possible use of products offered by Katun and that it would suffice to refer to the corresponding models of Toshiba photocopiers. By using the Toshiba Europe product number, Katun is making use of original goods in order to boost its own. It misleads the customer by asserting that the products are of equivalent quality and unlawfully exploits Toshiba's reputation. The use of Toshiba Europe product numbers is not necessary since Katun can use detailed diagrams to identify the products. Lastly, the use of Toshiba Europe product numbers is not necessary in order to compare the prices of the products.

18 Katun contends that its advertising is directed exclusively at specialised traders, who are aware that the products which it offers are not those of the original manufacturers. Furthermore, in view of the large number of spare parts and consumable items involved in a photocopier model, a reference to the Toshiba Europe product number is objectively necessary in order to identify the products. Furthermore, the parallel indication of the Toshiba Europe product number and the Katun product number allows the customer to compare prices.

19 Katun also submits that the decision of the Bundesgerichtshof of 28 March 1996 is incompatible with Community law in the light of Directive 84/450 as amended, which allows comparative advertising.

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That directive in principle allows advertising enabling a price comparison to be made between spare parts and accessories of the original manufacturer and those of a competing supplier. Katun could not indicate the actual product being compared if it were unable to use Toshiba Europe's product numbers and could refer only to the corresponding photocopier model, there being numerous, mutually indistinguishable accessories and spare parts for different photocopier models.

20 Considering that the determination of the dispute before it depended in particular on the interpretation of Articles 2(2a) and 3a(1)(c) and (g) of Directive 84/450 as amended, the Landgericht Düsseldorf decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is advertising by a supplier of spare parts and consumable items for an equipment manufacturer's product to be regarded as comparative advertising within the meaning of Article 2(2a) of the directive if the advertising indicates the manufacturer's product numbers (OEM numbers) for the relevant original spare parts and consumable items for reference purposes in order to identify the supplier's products?

2. If Question 1 is to be answered in the affirmative:

(a) Does the display of the equipment manufacturer's product numbers (OEM numbers) alongside the supplier's own order numbers constitute a comparison of goods permissible under Article 3a(1)(c) of the directive, in particular a comparison of the prices?

(b) Are the product numbers (OEM numbers) "distinguishing marks of a competitor" within the meaning of Article 3a(1)(g)?

3. If Question 2 is to be answered in the affirmative:

(a) What are the criteria to be used when assessing whether an advertisement within the meaning of Article 2(2a) takes unfair advantage of the reputation of a distinguishing mark of a competitor within the meaning of Article 3a(1)(g)?

(b) Is the fact that the equipment manufacturer's product numbers (OEM numbers) appear alongside the supplier's own order numbers sufficient to justify an allegation that unfair advantage is being taken of the reputation of the distinguishing mark of a competitor within the meaning of Article 3a(1)(g), if the third party competitor could instead indicate in each case the product for which the consumable item or spare part is suitable?

(c) When assessing unfairness, does it matter whether a reference (solely) to the product for which the consumable item or spare part is suitable, rather than to the product number (OEM number), is likely to make sale of the supplier's products difficult, particularly because customers generally go by the equipment manufacturer's product numbers (OEM numbers)?

Question 1 and Question 2(a)

21 By its first question, the national court asks in substance whether, on a proper construction of Article 2(2a) of Directive 84/450 as amended, indications, in the catalogue of a supplier of spare parts and consumable items suitable for the products of an equipment manufacturer, of product numbers (OEM numbers) allocated by the equipment manufacturer to the spare parts and consumable items which it itself sells is to be regarded as comparative advertising. By question 2(a), it asks whether, on a proper construction of Article 3a(1)(c) of Directive 84/450 as amended, such indications constitute lawful comparisons within the meaning of that provision, in particular price comparison.

Observations submitted to the Court

22 Toshiba Europa submits that Directive 84/450 as amended does not apply in the present case,

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because there is no comparison of product features. The listing of the product numbers alongside each other is a generalised assertion that the products are equivalent, not an objective comparison of material, relevant, verifiable and representative features of those products within the meaning of Article 3a(1)(c) of the directive. Moreover, the fact that this indication allows the price of its products to be compared with the price of Katun's products does not render it comparative advertising for the purposes of the directive.

23 Katun and the Commission submit that Katun's catalogues constitute comparative advertising within the meaning of Article 2(2a) of Directive 84/450 as amended. The Austrian Government submits more generally that there is comparative advertising where the customers to which it is addressed can identify the manufacturer of the original models through the product numbers.

24 According to Katun and the Austrian Government, the comparison of the product numbers is a shorthand way of comparing the technical features of a product, indicating its suitability for use in the original manufacturer's equipment.

25 Katun states that, since such a comparison is being made, it is irrelevant whether prices are also being compared. The Austrian Government submits in that regard that there is no price comparison since the setting out of product numbers alongside each other does not reveal the prices of the products. The Commission, on the other hand, takes into consideration the order form containing the prices to which Katun catalogues refer and submits that in the case in point there is solely a comparison of prices.

26 The French Government points out that the definition of comparative advertising in Article 2(2a) of Directive 84/450 as amended does not require that there be a comparison. Either the Community legislature wished to avoid tautology, or identification of the competitor is sufficient to introduce a comparison since any potential customer can himself obtain information concerning the features of the products, or the concept of a comparison has to be taken into account only at the stage where the lawfulness of the comparative advertising is assessed.

27 Having settled on the last of these interpretations, the French Government examines the scope of the conditions laid down in Article 3a of Directive 84/450 as amended. Since that article uses the expression as far as the comparison is concerned, it may be that the conditions which it lays down do not have to be satisfied where there is no comparison. In that case, the advertising at issue in the main proceedings may not be unlawful for the purposes of Article 3a but, on the other hand, be misleading within the meaning of Article 3 of the directive. However, Article 3a may also signify that the conditions which it lays down must be satisfied as soon as there is comparative advertising within the meaning of Article 2(2a). Examining the question from that point of view, the French Government submits that one may question the usefulness to customers of having lists which merely establish that product reference numbers tally with each other.

Findings of the Court

28 As regards, first, the definition of comparative advertising, it must be observed that, according to Article 2(1) of Directive 84/450 as amended, advertising means, for the purposes of that directive, the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations. In view of that especially broad definition, advertising, including comparative advertising, may occur in very different forms.

29 As regards the comparative nature of advertising within the meaning of Directive 84/450 as amended, it is apparent from Article 2(2a) that the test is that comparative advertising identifies, explicitly or by implication, a competitor or goods or services offered by a competitor.

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30 Likewise, as far as that test is concerned, the Community legislature has laid down a broad definition, as is confirmed by the sixth recital of the preamble to Directive 97/55, which states that the legislature wished to lay down a broad concept of comparative advertising so as to cover all its forms.

31 In order for there to be comparative advertising within the meaning of Article 2(2a) of Directive 84/450 as amended, it is therefore sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor.

32 As regards, second, the conditions under which comparative advertising is lawful, it must be observed that they are laid down in Article 3a of Directive 84/450 as amended. Amongst those conditions, Article 3a(1)(c) requires that this type of advertising should objectively compare one or more material, relevant, verifiable and representative features of the goods and services, which may include price.

33 It follows from a comparison of Article 2(2a) of Directive 84/450 as amended, on the one hand, and Article 3a of that directive, on the other, that, on a literal interpretation, they would render unlawful any reference enabling a competitor, or the goods or services which he offers, to be identified in a representation which did not contain a comparison within the meaning of Article 3a. That would have to be the case where there were mere mention of the trade mark of the manufacturer of the original models or of the reference numbers of models for which the spare parts and consumable items are manufactured. In the main proceedings, Toshiba Europe does not contest Katun's use of such marks or reference numbers.

34 However, it is apparent from Article 6(1)(c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) and the case-law of the Court (Case C-63/97 BMW [1999] ECR I-905, paragraphs 58 to 60) that the use of another person's trade mark may be legitimate where it is necessary to inform the public of the nature of the products or the intended purpose of the services offered.

35 A literal interpretation of Directive 84/450 as amended results in a contradiction with Directive 89/104 and cannot therefore be accepted.

36 In those circumstances, it is necessary to take account of the objectives of Directive 84/450 as amended. According to the second recital of the preamble to Directive 97/55, comparative advertising will help demonstrate objectively the merits of the various comparable products and thus stimulate competition between suppliers of goods and services to the consumer's advantage.

37 For those reasons, the conditions required of comparative advertising must be interpreted in the sense most favourable to it.

38 In a situation such as that in the main proceedings, specification of the product numbers of the equipment manufacturer alongside a competing supplier's product numbers enables the public to identify precisely the products of the equipment manufacturer to which that supplier's products correspond.

39 Such an indication does however constitute a positive statement that the two products have equivalent technical features, that is to say, a comparison of material, relevant, verifiable and representative features of the products within the meaning of Article 3a(1)(c) of Directive 84/450 as amended.

40 The answer to Question 1 and Question 2(a) must therefore be that, on a proper construction of Articles 2(2a) and 3a(1)(c) of Directive 84/450 as amended, the indication, in the catalogue of a supplier of spare parts and consumable items suitable for the products of an equipment manufacturer,

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of product numbers (OEM numbers) by which the equipment manufacturer designates the spare parts and consumable items which he himself sells may constitute comparative advertising which objectively compares one or more material, relevant, verifiable and representative features of goods.

Question 2(b) and Question 3

41 By Question 2(b) and Question 3, the national court asks in substance whether, on a proper construction of Article 3a(1)(g) of Directive 84/450 as amended, product numbers (OEM numbers) of an equipment manufacturer are distinguishing marks within the meaning of that provision and whether their use in catalogues of a competing supplier enables the latter to take unfair advantage of the reputation attached to them.

42 Under Article 3a(1)(g) of Directive 84/450 as amended, comparative advertising is to be permitted where, inter alia, it does not take unfair advantage of the reputation of a trade mark, trade name or the distinguishing marks of a competitor or the designation of origin of competing products.

43 Toshiba Europe, the French and Austrian Governments and the Commission submit that the product numbers of an equipment manufacturer can be regarded as distinguishing marks within the meaning of Article 3a(1)(g) of Directive 84/450 as amended, where the relevant public identifies the manufacturer's products by means of those numbers. Katun, on the other hand, submits that a manufacturer uses those numbers in order to differentiate between his own products and not to distinguish them from the products of other manufacturers. They are not therefore distinguishing marks within the meaning of that provision.

44 Toshiba Europe submits that, for the use of a distinguishing mark to take unfair advantage of the reputation attached to it, it suffices that such use is not necessary within the meaning of Article 6(1)(c) of Directive 89/104. In the case in point, the use of the equipment manufacturer's product numbers is not necessary since the competing supplier could describe the product which he sells and indicate the model for which the product is suitable.

45 The French Government submits that advertising which cites an equipment manufacturer's product numbers takes unfair advantage of the reputation attached to them if the advertising does not have an objective comparative purpose and a fortiori where it is apt to create confusion.

46 Katun and the Austrian Government emphasise the need for rapid and reliable identification of spare parts and consumable items. According to Katun, the indication of the product numbers of various manufacturers enables a rapid comparison to be made between the prices of products and can thereby help to stimulate competition.

47 According to the Commission, the fact that a supplier uses the product numbers of an equipment manufacturer does not of itself establish that the supplier is taking unfair advantage of the reputation of a distinguishing mark.

48 With regard to the distinctiveness of a mark, the Court has already held that in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819, paragraph 22).

49 In the same way, a sign used by an undertaking may be a distinguishing mark within the meaning of Article 3a(1)(g) of Directive 84/450 as amended if the public identifies it as coming from a particular undertaking.

50 As regards product numbers used by an equipment manufacturer to identify spare parts and consumable items, it is not established that, in themselves, that is to say when they are used alone without an indication of the manufacturer's trade mark or the equipment for which the spare parts and consumable

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items are intended, they are identified by the public as referring to the products manufactured by a particular undertaking.

51 They are in fact combinations of numbers or of letters and numbers and it is questionable whether they would be identified as product numbers of an equipment manufacturer if they were not found, as in the present case, in a column headed OEM product number. Likewise, it may be wondered whether those combinations would enable the manufacturer to be identified if they were not used in combination with his trade mark.

52 However, it is for the national court to determine whether the equipment manufacturer's product numbers in question in the case before it are distinguishing marks within the meaning of Article 3a(1)(g) of Directive 84/450 as amended, in the sense that they are identified as coming from a particular undertaking. In order to do so, it will have to take into account the perception of an average individual who is reasonably well informed and reasonably observant and circumspect. Account should be taken of the type of persons at whom the advertising is directed. In the present case, those persons appear to be specialist traders who are much less likely than final consumers to associate the reputation of the equipment manufacturer's products with those of the competing supplier.

53 Even assuming that the equipment manufacturer's product numbers are, as such, distinguishing marks within the meaning of Article 3a(1)(g) of Directive 84/450 as amended, it will in any event be necessary, when assessing whether the condition laid down in that provision has been observed, to have regard to the 15th recital of the preamble to Directive 97/55, which states that the use of a trade mark or distinguishing mark does not breach the right to the mark where it complies with the conditions laid down by Directive 84/450 as amended, the aim being solely to distinguish between the products and services of the advertiser and those of his competitor and thus to highlight differences objectively.

54 An advertiser cannot be considered as taking unfair advantage of the reputation attached to distinguishing marks of his competitor if effective competition on the relevant market is conditional upon a reference to those marks.

55 Further, the Court has already held that a third party's use of a mark may take unfair advantage of the distinctive character or the reputation of the mark or be detrimental to them, for example by giving the public a false impression of the relationship between the advertiser and the trade mark owner (see the judgment in BMW, cited above, paragraph 40).

56 As stated in paragraph 39 above, the indication of an equipment manufacturer's product numbers alongside a competing supplier's product numbers constitutes a positive statement that the technical features of the two products are equivalent, that is to say, it is a comparison within the meaning of Article 3a(1)(c) of Directive 84/450 as amended.

57 It is, however, necessary to determine also whether that indication could cause the public to associate the equipment manufacturer, whose products are those identified, with the competing supplier, in that the public might associate the reputation of that manufacturer's products with the products of the competing supplier.

58 In order to make that determination, the overall presentation of the advertising at issue must be considered. The equipment manufacturer's product number may be only one of several indications in it relating to that manufacturer and his products. The trade mark of the competing supplier and the specific nature of his products may also be highlighted in such a way that no confusion or association is possible between the manufacturer and the competing supplier or between their respective products.

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59 In the present case, it appears that Katun would have difficulty in comparing its products with those of Toshiba Europe if it did not refer to the latter's order numbers. It also seems clear from the examples of Katun's lists of spare parts and consumable items set out in the order for reference that a clear distinction is made between Katun and Toshiba Europe, so that they do not appear to give a false impression concerning the origin of Katun's products.

60 In the light of those considerations, the answer to be given to Question 2(b) and Question 3 is that, on a proper construction of Article 3a(1)(g) of Directive 84/450 as amended, where product numbers (OEM numbers) of an equipment manufacturer are, as such, distinguishing marks within the meaning of that provision, their use in the catalogues of a competing supplier enables him to take unfair advantage of the reputation attached to those marks only if the effect of the reference to them is to create, in the mind of the persons at whom the advertising is directed, an association between the manufacturer whose products are identified and the competing supplier, in that those persons associate the reputation of the manufacturer's products with the products of the competing supplier. In order to determine whether that condition is satisfied, account should be taken of the overall presentation of the advertising at issue and the type of persons for whom the advertising is intended.

DOCNUM	61999J0112
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment
PUBREF	European Court reports 2001 Page I-07945
DOC	2001/10/25
LODGED	1999/04/01
JURCIT	31984L0450-A02PT1 : N 4 28 31984L0450-A02PT2BIS : N 1 5 20 29 31 33 40 31984L0450-A03BIS : N 32 33 31984L0450-A03BISP1 : N 6 31984L0450-A03BISP1LC : N 1 20 32 39 40 56 31984L0450-A03BISP1LG : N 1 20 42 49 52 53 60 31984L0450 : N 3 35 31989L0104-A06P1LC : N 34 31989L0104 : N 35 31997L0055-A01PT1 : N 3 31997L0055-C15 : N 53 31997L0055-C2 : N 7 36 31997L0055-C6 : N 8 30

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	31997L0055-C7 : N 9 31997L0055 : N 3 61997J0063 : N 34 55 61997J0342 : N 48
CONCERNS	Interprets 31984L0450-A02PT2BIS Interprets 31984L0450-A03BISP1LC Interprets 31984L0450-A03BISP1LG
SUB	Approximation of laws ; Consumer protection
AUTLANG	German
OBSERV	France ; Austria ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Landgericht Düsseldorf, Vorlagebeschluß vom 19/01/1999 (4 O 8/99) - Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 1999 p.782-784 - European Current Law 1999 Part 12 no 56 (résumé)
NOTES	Glöckner, Jochen: European Law Reporter 2001 p.345-347 Schotthöfer, Peter: The European Legal Forum 2001 p.529-530 (I) Schotthöfer, Peter: The European Legal Forum 2001 p.529-530 (EN) Schotthöfer, Peter: The European Legal Forum 2001 p.529-530 (D) Kabel, Jan J.C.: Intellectuele eigendom & Reclamerecht 2002 p.50-52 Verkade, D.W.F.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2002 no 142 Sack, Rolf: Wettbewerb in Recht und Praxis 2002 p.363-367 De Santo, Giuseppe: Diritto pubblico comparato ed europeo 2002 p.355-360 Fletcher, Stella ; Fussing, Pia ; Indraccolo, Alpha: European Intellectual Property Review 2003 p.570-574 Verkade, D.W.F.: Nederlandse jurisprudentie ; Intellectuele eigendomsrecht : gepubliceerde rechtspraak met annotaties in 2001 en 2002 (Ed. Kluwer - Deventer) 2003 p.505-507
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Sevon
DATES	of document: 25/10/2001 of application: 01/04/1999

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Judgment of the Court (First Chamber)
of 14 March 1991
Criminal proceedings against Patrice Di Pinto.
Reference for a preliminary ruling: Cour d'appel de Paris - France.
Consumer protection - Doorstep canvassing.
Case C-361/89.

++++

1. Approximation of laws - Protection of consumers in respect of contracts negotiated away from business premises - Directive 85/577 - Protected consumer - Concept - Trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business - Not covered

(Council Directive 85/577, Art. 2)

2. Approximation of laws - Protection of consumers in respect of contracts negotiated away from business premises - Directive 85/577 - National legislation extending to traders the protection provided by the directive - Whether permissible

(Council Directive 85/577, Art. 8)

1. A trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Council Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises.

It follows from Article 2 of that directive that the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he has been canvassed lies outside his trade or profession. Acts which are preparatory to the sale of a business are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader.

2. Directive 85/577 does not preclude national legislation on canvassing from extending the protection which it affords to cover traders acting with a view to the sale of their business.

Article 8 of that directive, which leaves Member States free to adopt or maintain more favourable provisions to protect consumers in the field covered by the directive, cannot be interpreted as precluding those States from adopting measures in an area with which it is not concerned, such as that of the protection of traders.

In Case C-361/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d' Appel de Paris (Court of Appeal, Paris) for a preliminary ruling in the criminal proceedings pending before that court against

Patrice Di Pinto

on the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (Official Journal L 372, p. 31),

THE COURT (First Chamber),

composed of: G. C. Rodríguez Iglesias (President of the Chamber), Sir Gordon Slynn and R. Joliet, Judges,

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Advocate General: J. Mischo,

Registrar: H. A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

Mr Di Pinto, by Maitre M. Hayat, of the Paris Bar,

the French Government, by E. Belliard, Sub-Director in the Directorate for Legal Affairs of the Ministry of Foreign Affairs, and C. Chavance, Principal Attaché in the Central Administration of the Directorate for Legal Affairs in the said Ministry, acting as Agents,

the United Kingdom, by R. M. Caudwell, of the Treasury Solicitor' s Department, acting as Agent,

the Commission of the European Communities, by M. Condou Durande, a Member of its Legal Department, and G. Pons, a French official on secondment to the Legal Department of the Commission, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from Mr Di Pinto, the French Government, the United Kingdom, represented by M. Paines, Barrister, and the Commission at the hearing on 14 November 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 December 1990,

gives the following

Judgment

1 By judgment dated 17 November 1989, which was received at the Court on 29 November 1989, the Cour d' Appel de Paris referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (Official Journal L 372, p. 31, hereinafter referred to as "the directive").

2 The questions arose in the course of criminal proceedings brought against Mr Di Pinto for contravention of Law No 72-1137 of 22 December 1972 on the protection of consumers regarding canvassing and door-to-door selling (Official Gazette of the French Republic of 23 December 1972, hereinafter referred to as "the Law on canvassing"). As in the case of the directive, that Law provides that a consumer who is canvassed may renounce the effects of his undertaking within a period of seven days and that this option must be specified in the contract.

3 Mr Di Pinto is the manager of the private limited liability company Groupement de l' Immobilier et du Fonds de Commerce, which publishes a periodical entitled "GI Commerce. Le Partenaire du Commerçant et de la Franchise", in which businesses are advertised for sale. For the purpose of collecting such advertisements, Mr Di Pinto employs representatives to canvass, either at their homes or at their places of business, those traders who express an intention to sell their business during an initial contact by phone.

4 On 28 March 1989 the Tribunal de Grande Instance (Regional Court), Paris, imposed on Mr Di Pinto a one year suspended prison sentence and a fine of FF 15 000 for having, in July 1985 and during 1986 and 1987, contravened the Law on canvassing. Although Article 4 of that Law prohibits canvassers from requesting payment in cash before expiry of the seven-day period for reflection, the contracts concluded by the representatives of Mr Di Pinto in the course of their canvassing were accompanied by immediate payment of the price of the service, which varied between FF 3 000 and FF 30 000 depending on the format of the advertisement. In addition, the contracts did not refer to the consumer' s right of cancellation within the period for reflection.

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5 Mr Di Pinto and the Public Prosecutor both appealed on 4 April 1989 against this judgment to the Cour d' Appel de Paris. On 7 July 1989, that court confirmed, by default, the judgment of first instance on the criminal liability of Mr Di Pinto and sentenced him to one year' s imprisonment and to a fine of FF 15 000. On 11 July 1989, Mr Di Pinto appealed against the enforcement of that judgment.

6 In the course of those proceedings he submitted that, contrary to what had been decided on several occasions by the French Cour de Cassation, traders canvassed in connection with the sale of their business were not entitled to the protection introduced by the Law on canvassing and that the Law would otherwise be contrary to the directive.

7 According to Article 1, the French Law on canvassing applies in principle to

> "whosoever canvasses a natural person, or arranges for such a person to be canvassed, either at his home or at his place of work, for the purpose of offering for sale, hire or hire-purchase goods or objects of any kind whatsoever, or for the purpose of offering services".

8 Article 8(I)(e), however, excludes from the scope of the Law

> "the sale, hire or hire-purchase of goods or objects or the provision of services offered for the requirements of an agricultural, industrial or commercial undertaking or a professional activity".

9 Article 1 of the directive provides that it shall apply to

> "contracts under which a trader supplies goods or services to a consumer and which are concluded:
>
> ...
>
> - during a visit by a trader
>
> (i) to the consumer' s home or to that of another consumer;
>
> (ii) to the consumer' s place of work;
>
> where the visit does not take place at the express request of the consumer".

10 Article 2 provides that:

> '" consumer' means a natural person who, in transactions covered by this directive, is acting for purposes which can be regarded as outside his trade or profession;
>
> ' trader' means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader".

11 Pursuant to Article 9, Member States were required to comply with the directive by 23 December 1987 at the latest.

12 Being uncertain as to the proper interpretation to be given to the directive, the Cour d' Appel de Paris referred the following two questions to the Court of Justice for a preliminary ruling:

> "(1) Is a trader canvassed at home in connection with the sale of his business entitled to the protection accorded to consumers by the Directive of the Council of the European Communities of 20 December 1985?
>
> (2) Is Article 8(I)(e) of the Law of 22 December 1972 compatible with the aforementioned directive and the other provisions of Community law protecting consumers in cases of doorstep canvassing?"

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

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of the Court.

The first question

14 In its first question, the Cour d' Appel de Paris seeks in substance to ascertain whether a trader who is canvassed for the purpose of concluding an advertising contract concerning the sale of his business must be regarded as a consumer entitled to protection under the directive.

15 It is necessary on this point to refer to Article 2 of the directive. It follows from that provision that the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he is canvassed lies outside his trade or profession. Article 2, which is drafted in general terms, does not make it possible, with regard to acts performed in the context of such a trade or profession, to draw a distinction between normal acts and those which are exceptional in nature.

16 Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader.

17 The Commission, which favours the application of the directive in such a case, objects that a trader, when canvassed in connection with the sale of his business, finds himself in an unprepared state similar to that of an ordinary consumer. For that reason, it argues, traders ought also to be entitled to the protection which the directive confers.

18 That argument cannot be accepted. There is every reason to believe that a normally well-informed trader is aware of the value of his business and that of every measure required by its sale, with the result that, if he enters into an undertaking, it cannot be through lack of forethought and solely under the influence of surprise.

19 The answer to the first question must therefore be that a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Directive 85/577.

The second question

20 In its second question, the Cour d' Appel de Paris seeks in substance to ascertain whether the directive precludes national legislation on canvassing from extending the protection which it affords to cover traders acting with a view to the sale of their business.

21 It should be recalled in this regard that Article 8 of the directive provides that it "shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers".

22 The object of that provision is to determine the freedom left to Member States in the area covered by the directive, namely that of consumer protection. It cannot therefore be interpreted as precluding States from adopting measures in an area with which it is not concerned, such as that of the protection of traders.

23 The answer to the second question must therefore be that the directive does not preclude national legislation on canvassing from extending the protection which it affords to cover traders acting with a view to the sale of their business.

Costs

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24 The costs incurred by the French Government, the United Kingdom 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 proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Cour d' Appel de Paris by judgment dated 17 November 1989, hereby rules:

(1) A trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;

(2) That directive does not preclude national legislation on canvassing from extending the protection which it affords to cover traders acting with a view to the sale of their business.

DOCNUM	61989J0361
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1989 ; J ; judgment
PUBREF	European Court reports 1991 Page I-01189
DOC	1991/03/14
LODGED	1989/11/29
JURCIT	31985L0577-A01 : N 9 31985L0577-A02 : N 10 15 31985L0577-A08 : N 21 31985L0577-A09 : N 11 31985L0577 : N 1 - 23
CONCERNS	Interprets 31985L0577
SUB	Approximation of laws ; Consumer protection
AUTLANG	French
OBSERV	France ; United Kingdom ; Commission ; Member States ; Institutions

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NATIONA	France
NATCOUR	*A7* Tribunal de grande instance de Paris, 31e chambre, jugement du 28/03/89 (P 87 175 0367 O) *A8* Cour d'appel de Paris, 9e chambre correctionnelle, arrêt du 07/07/89 (89/3849) *A9* Cour d'appel de Paris, 9e chambre, arrêt du 17/11/89 (89/3849) *P1* Cour d'appel de Paris, 9e chambre, arrêt du 18/09/92 (89-3849) *P2* Cour de cassation (France), Chambre criminelle, arrêt du 26/05/93 (92-85.285) - Bulletin d'information de la Cour de Cassation 1993 no 928 p.14 - Bulletin des arrêts de la Cour de Cassation - Chambre criminelle 1993 no 193
NOTES	Mortelmans, K.J.M.: Tijdschrift voor consumentenrecht 1991 p.185-197 Planchuelo Sainz, Gregorio: Noticias CEE 1992 no 85 p.65-67 Perugini, Maria Roberta: Giurisprudenza commerciale 1992 II p.719-723
PROCEDU	Reference for a preliminary ruling
ADVGEN	Mischo
JUDGRAP	Joliet
DATES	of document: 14/03/1991 of application: 29/11/1989

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Judgment of the Court
of 14 July 1994
Paola Faccini Dori v Recreb Srl.
Reference for a preliminary ruling: Giudice conciliatore di Firenze - Italy.
Consumer protection in the case of contracts negotiated away from business premises - Availability in disputes between private individuals.
Case C-91/92.

++++

1. Approximation of laws ° Consumer protection in the case of contracts negotiated away from business premises ° Directive 85/577 ° Article 1(1) and (2) and Article 5 ° Determination of the persons for whose benefit they were adopted and of the minimum period within which the right of cancellation must be exercised ° Unconditional and sufficiently precise

(Directive 85/577, Art. 1(1) and (2) and Art. 5)

2. Measures adopted by the Community institutions ° Directives ° Direct effect ° Limits ° Possibility of relying on a directive against an individual ° Excluded

(EEC Treaty, Art. 189)

3. Approximation of laws ° Consumer protection in the case of contracts negotiated away from business premises ° Directive 85/577 ° Possibility of relying on the right of cancellation against a private individual in the absence of measures transposing the directive ° Excluded

(EEC Treaty, Art. 189, third para.; Directive 85/577, Art. 1(1) and (2) and Art. 5)

4. Measures adopted by the Community institutions ° Directives ° Implementation by the Member States ° Need to ensure that directives are effective ° Obligations of the national courts

(EEC Treaty, Art. 189, third para.)

5. Community law ° Rights conferred on individuals ° Breach by a Member State of the obligation to transpose a directive ° Obligation to make good the damage caused to individuals ° Conditions ° Procedures for providing compensation ° Application of national law

(EEC Treaty, Art. 189, third para.)

1. The provisions of Article 1(1) and (2) and Article 5 of Directive 85/577, concerning protection of the consumer in respect of contracts negotiated away from business premises, are unconditional and sufficiently precise as regards determination of the persons for whose benefit they were adopted and the minimum period within which notice of cancellation must be given. Although Articles 4 and 5 of the directive allow the Member States some latitude regarding consumer protection when information on the right of cancellation is not provided by the trader and in determining the time-limit and conditions for cancellation, that latitude does not make it impossible to determine minimum rights which must on any view be provided to consumers.

2. The possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to each Member State to which it is addressed and has been established in order to prevent a State from taking advantage of its own failure to comply with Community law. It would be unacceptable if a State, when required by Community legislature to adopt certain rules intended to govern the State' s relations ° or those of State entities ° with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefit of those rights.

The effect of extending that principle to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect,

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whereas it has competence to do so only where it is empowered to adopt regulations.

It follows that, in the absence of measures of transposition within the prescribed time-limit, an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court.

3. In the absence of measures transposing within the prescribed time-limit Directive 85/577, concerning protection of the consumer in respect of contracts negotiated away from business premises, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract away from business premises or enforce such a right in a national court.

4. The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

5. If a Member State fails to comply with the obligation to transpose a directive which it has under the third paragraph of Article 189 of the Treaty and if the result prescribed by the directive cannot be achieved by way of interpretation of national law by the courts, Community law requires that Member State to make good the damage caused to individuals through failure to transpose the directive, provided that three conditions are fulfilled, namely that the result prescribed by the directive must entail the grant of rights to individuals, the content of those rights must be identifiable on the basis of the provisions of the directive and there must be a causal link between the breach of the State' s obligation and the damage suffered. In those circumstances, it is for the national court to uphold the right of aggrieved persons to obtain reparation in accordance with national law on liability.

In Case C-91/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Giudice Conciliatore di Firenze (Judge-Conciliator, Florence), Italy, for a preliminary ruling in the proceedings pending before that court between

Paola Faccini Dori

and

Recreb Srl

on the interpretation of Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31),

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida, M. Diez de Velasco and D.A.O. Edward (Presidents of Chambers), C.N. Kakouris, R. Joliet (Rapporteur), F. A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

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° Paola Faccini Dori, by Vinicio Premuroso, of the Milan Bar, and Annalisa Premuroso and Paolo Soldani Benzi, of the Florence Bar,

° Recreb Srl, by Michele Trovato, of the Rome Bar, and Anna Rita Alessandro, Procuratore, Florence,

° the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, and Claus-Dieter Quassowski, Regierungsdirektor in the same Ministry, acting as Agents,

° the Greek Government, by Vasileios Kontolaimos, Assistant Legal Adviser, and Panagiotis Athanasoulis, judicial representative, acting as Agents,

° the Italian Government, by Luigi Ferrari Bravo, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Marcello Conti, Avvocato dello Stato,

° the Commission of the European Communities, by Lucio Gussetti, of its Legal Service, acting as Agent,

having regard to the answers given to the written question put by the Court:

° for the German Government, by Ernst Roeder and Claus-Dieter Quassowski,

° for the French Government, by Jean-Pierre Puissochet, Director, Direction des Affaires Juridiques, Ministry of Foreign Affairs, and Catherine de Salins, Adviser in the same Ministry, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Danish Government, represented by Joergen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the German Government, represented by Ernst Roeder and Claus-Dieter Quassowski, acting as Agents, the Greek Government, represented by Vasileios Kontolaimos and Panagiotis Athanasoulis, acting as Agents, the French Government, represented by Catherine de Salins, acting as Agent, the Italian Government, represented by Luigi Ferrari Bravo, acting as Agent, assisted by Ivo Braguglia, Avvocato dello Stato, the Netherlands Government, represented by Ton Heukels, Assistant Legal Adviser in the Ministry of Foreign Affairs, the United Kingdom, represented by J.E. Collins, acting as Agent, assisted by Derrick Wyatt, Barrister, and the Commission, represented by Lucio Gussetti, acting as Agent, at the hearing on 16 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 9 February 1994,

gives the following

Judgment

1 By order of 24 January 1992, received at the Court on 18 March 1992, the Giudice Conciliatore di Firenze (Judge-Conciliator, Florence), Italy, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 85/577/EEC, concerning protection of the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31, hereinafter "the directive"), and on the possibility of relying on that directive in proceedings between a trader and a consumer.

2 The question was raised in proceedings between Paola Faccini Dori, of Monza, Italy, and Recreb Srl ("Recreb").

3 It appears from the order for reference that on 19 January 1989, without having been previously approached by her, Interdiffusion Srl concluded a contract with Miss Faccini Dori at Milan Central Railway Station for an English language correspondence course. Thus the contract was concluded

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away from Interdiffusion' s business premises.

4 Some days later, by registered letter of 23 January 1989, Miss Faccini Dori informed that company that she was cancelling her order. The company replied on 3 June 1989 that it had assigned its claim to Recreb. On 24 June 1989, Miss Faccini Dori wrote to Recreb confirming that she had cancelled her subscription to the course, indicating inter alia that she relied on the right of cancellation provided for by the directive.

5 As is apparent from its preamble, the directive is intended to improve consumer protection and eliminate discrepancies between national laws providing such protection, which may affect the functioning of the common market. According to the fourth recital in the preamble, where contracts are concluded away from the business premises of the trader, it is as a rule the trader who initiates the negotiations, for which the consumer is wholly unprepared and is therefore often taken by surprise. In most cases, the consumer is not in a position to compare the quality and price of the offer with other offers. According to the same recital, that surprise element generally exists not only in contracts made on the doorstep but also in other forms of contract for which the trader takes the initiative away from his business premises. The purpose of the directive is thus, as indicated by the fifth recital in its preamble, to grant the consumer a right of cancellation for a period of at least seven days in order to enable him to assess the obligations arising under the contract.

6 On 30 June 1989, Recreb asked the Giudice Conciliatore di Firenze to order Miss Faccini Dori to pay it the agreed sum with interest and costs.

7 By order of 20 November 1989, the judge ordered Miss Faccini Dori to pay the sums in question. She lodged an objection to that order with the same judge. She again stated that she had withdrawn from the contract under the conditions laid down by the directive.

8 However, it is common ground that at the material time Italy had not taken any steps to transpose the directive into national law, although the period set for transposition had expired on 23 December 1987. It was not until the adoption of Decreto Legislativo No 50 of 15 January 1992 (GURI, ordinary supplement to No 27 of 3 February 1992, p. 24), which entered into force on 3 March 1992, that Italy transposed the directive.

9 The national court was uncertain whether, even though the directive had not been transposed at the material time, it could nevertheless apply its provisions.

10 It therefore referred the following question to the Court for a preliminary ruling:

> "Is Community Directive 85/577/EEC of 20 December 1985 to be regarded as sufficiently precise and detailed and, if so, was it capable, in the period between the expiry of the 24-month time-limit given to the Member States to comply with the directive and the date on which the Italian State did comply with it, of taking effect as between individuals and the Italian State and as between individuals themselves?"

11 The directive requires the Member States to adopt certain rules intended to govern legal relations between traders and consumers. In view of the nature of the dispute, which is between a consumer and a trader, the question submitted by the national court raises two issues, which should be considered separately. The first is whether the provisions of the directive concerning the right of cancellation are unconditional and sufficiently precise. The second is whether a directive which requires the Member States to adopt certain rules specifically intended to govern relations between private individuals may be relied on in proceedings between such persons in the absence of measures to transpose the directive into national law.

Whether the provisions of the directive concerning the right of cancellation are unconditional and sufficiently precise

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12 Article 1(1) of the directive provides that the directive is to apply to contracts concluded between a trader supplying goods and services and a consumer, either during an excursion organized by the trader away from his business premises or during a visit by him to the consumer' s home or place of work, where the visit does not take place at the express request of the consumer.

13 Article 2 states that "consumer" means a natural person who, in transactions covered by the directive, is acting for purposes which can be regarded as outside his trade or profession and that "trader" means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity.

14 Those provisions are sufficiently precise to enable the national court to determine upon whom, and for whose benefit, the obligations are imposed. No specific implementing measure is needed in that regard. The national court may confine itself to verifying whether the contract was concluded in the circumstances described by the directive and whether it was concluded between a trader and a consumer as defined by the directive.

15 In order to protect consumers who have concluded contracts in such circumstances, Article 4 of the directive provides that traders are to be required to give consumers written notice of their right of cancellation, together with the name and address of a person against whom that right may be exercised. It adds that, in the case of Article 1(1), that information must be given to the consumer at the time of conclusion of the contract. Finally, it provides that Member States are to ensure that their national legislation lays down appropriate consumer protection measures for cases where the information in question is not supplied.

16 Furthermore, pursuant to Article 5(1) of the directive, the consumer is to have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from the time at which the trader informed him of his rights in accordance with the terms and conditions laid down by national law. Article 5(2) provides that the giving of such notice is to have the effect of releasing the consumer from any obligations under the contract.

17 Admittedly, Articles 4 and 5 allow the Member States some latitude regarding consumer protection when information is not provided by the trader and in determining the time-limit and conditions for cancellation. That does not, however, affect the precise and unconditional nature of the provisions of the directive at issue in this case. The latitude allowed does not make it impossible to determine minimum rights. Article 5 provides that the cancellation must be notified within a period of not less than seven days after the time at which the consumer received the prescribed information from the trader. It is therefore possible to determine the minimum protection which must on any view be provided.

18 As regards the first issue therefore, the answer to be given to the national court must be that Article 1(1), Article 2 and Article 5 of the directive are unconditional and sufficiently precise as regards determination of the persons for whose benefit they were adopted and the minimum period within which notice of cancellation must be given.

Whether the provisions of the directive concerning the right of cancellation may be invoked in proceedings between a consumer and a trader

19 The second issue raised by the national court relates more particularly to the question whether, in the absence of measures transposing the directive within the prescribed time-limit, consumers may derive from the directive itself a right of cancellation against traders with whom they have concluded contracts and enforce that right before a national court.

20 As the Court has consistently held since its judgment in Case 152/84 Marshall v Southampton and South-West Hampshire Health Authority [1986] ECR 723, paragraph 48, a directive cannot of

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itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.

21 The national court observes that if the effects of unconditional and sufficiently precise but untransposed directives were to be limited to relations between State entities and individuals, this would mean that a legislative measure would operate as such only as between certain legal subjects, whereas, under Italian law as under the laws of all modern States founded on the rule of law, the State is subject to the law like any other person. If the directive could be relied on only as against the State, that would be tantamount to a penalty for failure to adopt legislative measures of transposition as if the relationship were a purely private one.

22 It need merely be noted here that, as is clear from the judgment in Marshall, cited above (paragraphs 48 and 49), the case-law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to "each Member State to which it is addressed". That case-law seeks to prevent "the State from taking advantage of its own failure to comply with Community law".

23 It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State' s relations ° or those of State entities ° with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognized that certain provisions of directives on conclusion of public works contracts and of directives on harmonization of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839 and the judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

24 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

25 It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

26 It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 Marleasing v La Comercial Internacional de Alimentacion [1990] ECR I-4135, paragraph 8, and Case C-334/92 Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

27 If the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of

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the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered.

28 The directive on contracts negotiated away from business premises is undeniably intended to confer rights on individuals and it is equally certain that the minimum content of those rights can be identified by reference to the provisions of the directive alone (see paragraph 17 above).

29 Where damage has been suffered and that damage is due to a breach by the State of its obligation, it is for the national court to uphold the right of aggrieved consumers to obtain reparation in accordance with national law on liability.

30 So, as regards the second issue raised by the national court, the answer must be that in the absence of measures transposing the directive within the prescribed time-limit consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court. However, when applying provisions of national law, whether adopted before or after the directive, the national court must interpret them as far as possible in the light of the wording and purpose of the directive.

Costs

31 The costs incurred by the Danish, German, Greek, French, Italian, Netherlands and United Kingdom Governments 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,

in answer to the question referred to it by the Giudice Conciliatore di Firenze, by order of 24 January 1992, hereby rules:

Article 1(1), Article 2 and Article 5 of Council Directive 85/577/EEC of 20 December 1985, concerning protection of the consumer in respect of contracts negotiated away from business premises, are unconditional and sufficiently precise as regards determination of the persons for whose benefit they were adopted and the minimum period within which notice of cancellation must be given.

In the absence of measures transposing Directive 85/577 within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court. However, when applying provisions of national law, whether adopted before or after the directive, the national court must interpret them as far as possible in the light of the wording and purpose of the directive.

DOCNUM	61992J0091
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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TYPDOC 6 ; CJUS ; cases ; 1992 ; J ; judgment

PUBREF European Court reports 1994 Page I-03325
Swedish special edition XVI Page I-00001
Finnish special edition XVI Page I-00001

DOC 1994/07/14

LODGED 1992/03/18

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CONCERNS Interprets 31985L0577-A01P1
Interprets 31985L0577-A02
Interprets 31985L0577-A05

SUB Approximation of laws ; Consumer protection

AUTLANG Italian

OBSERV Denmark ; Federal Republic of Germany ; Greece ; France ; Italy ; Netherlands ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Italy

NATCOUR *A9* Giudice conciliatore di Firenze, ordinanza del 24/01/1992 06/02/1992 (50)
P1 Giudice conciliatore di Firenze, lettera del 02/07/1998

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PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Joliet

DATES of document: 14/07/1994
of application: 18/03/1992

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Judgment of the Court (Fifth Chamber)
of 17 March 1998
Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Protection of the consumer in respect of contracts negotiated away from business premises - Guarantees.
Case C-45/96.

Approximation of laws - Protection of the consumer in respect of contracts negotiated away from business premises - Directive 85/577 - Scope - Contract of guarantee for the repayment of a debt contracted by a person acting within the course of his trade or profession - Excluded

(Council Directive 85/577, Art. 2, first indent)

On a proper construction of the first indent of Article 2 of Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, which defines a `consumer' for the purposes of the directive, a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession.

In that connection, although it cannot be excluded that the directive applies to a contract of guarantee, it is apparent from the wording of Article 1 thereof and from the ancillary nature of guarantees that the directive covers only a guarantee ancillary to a contract whereby, in the context of `doorstep selling', a consumer assumes obligations towards the trader with a view to obtaining goods or services from him. Furthermore, since the directive is designed to protect only consumers, a guarantee comes within the scope of the directive only where, in accordance with the first indent of Article 2, the guarantor has entered into a commitment for a purpose which can be regarded as unconnected with his trade or profession.

In Case C-45/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Bayerische Hypotheken- und Wechselbank AG

and

Edgar Dietzinger

on the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting for the President of the Fifth Chamber, J.C. Moitinho de Almeida, D.A.O. Edward, P. Jann and L. Sevon (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Dietzinger, by Eberhard Bubb, Rechtsanwalt, Landshut,

- the German Government, by Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, and Bernd Kloke, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agents,

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- the Belgian Government, by Jan Devadder, General Adviser in the Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent,

- the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Régine Loosli-Surrans, Chargée de Mission in the same Directorate, acting as Agents,

- the Finnish Government, by Tuula Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by Carmel O'Reilly and Ulrich Wölker, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Dietzinger, of the German Government, of the French Government, of the Finnish Government and of the Commission at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By order of 11 January 1996, received at the Court on 15 February 1996, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question concerning the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

2 That question has been raised in proceedings between Bayerische Hypotheken- und Wechselbank AG (`the Bank') and Edgar Dietzinger concerning the performance of a contract of guarantee concluded by Mr Dietzinger with the Bank.

3 Article 1(1) of Directive 85/577 provides as follows:

`This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

- during an excursion organised by the trader away from his business premises, or

- during a visit by a trader

(i) to the consumer's home or to that of another consumer;

(ii) to the consumer's place of work;

where the visit does not take place at the express request of the consumer.'

4 Next, Article 2 provides:

`For the purposes of this Directive:

- "consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;

- "trader" means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.'

5 Under Article 4 of Directive 85/577, traders are required to give consumers written notice of their right to cancel the contract within a specified period. Article 5 provides that that period is to be not less than seven days from receipt by the consumer of the notice of his right to renounce

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the effects of the contract.

6 Mr Dietzinger's father ran a building firm in respect of which the Bank, inter alia, granted a current account overdraft facility. On 11 September 1992, Mr Dietzinger gave a direct recourse written guarantee, for a sum not to exceed DM 100 000, covering his parents' obligations to the Bank.

7 The contract of guarantee was concluded at the house of Mr Dietzinger's parents during a visit by an employee of the Bank to which Mr Dietzinger's mother had agreed over the telephone. Mr Dietzinger was not informed of his right of cancellation.

8 In May 1993, the Bank called in, with immediate effect, all the loans which it had granted to Mr Dietzinger's parents, which at that time totalled more than DM 1.6 million. It also sued Mr Dietzinger for payment of DM 50 000 under the guarantee. Mr Dietzinger sought to renounce the guarantee, maintaining that he had not been informed of his right of cancellation, contrary to the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the Cancellation of `Doorstep' Transactions and Analogous Transactions, BGBl. I, p. 122) of 16 January 1986, which transposed Directive 85/577 into German law.

9 The Landgericht (Regional Court) found in favour of the Bank. Mr Dietzinger then appealed to the Oberlandesgericht (Higher Regional Court), which quashed the decision given at first instance.

10 The Bank then appealed on a point of law to the Bundesgerichtshof, which held that an interpretation of Directive 85/577 was necessary in order to determine the dispute. It therefore referred the following question to the Court for a preliminary ruling:

`Where a contract of guarantee or suretyship is concluded under German law between a financial institution and a natural person who is not acting in that connection in the course of his trade or profession, in order to secure a claim by the financial institution against a third party in respect of a loan, is it covered by the words "contracts under which a trader supplies goods or services to a consumer" (Article 1(1) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372, p. 31)?'

11 By its question, the Bundesgerichtshof is asking in effect whether a contract of guarantee concluded by a natural person who is not acting in the course of a trade or profession is covered by Directive 85/577.

12 Mr Dietzinger and the Commission consider that Directive 85/577 applies to a contract of guarantee by virtue of the directive's aim, which is to protect those consumers who conclude a contract where, because it involved `doorstep selling', they were unable to prepare themselves for its negotiation. Like a purchaser, a guarantor undertakes to perform obligations and is even more in need of protection since he receives no consideration in exchange for his commitment.

13 In the Commission's view, Article 1 of Directive 85/577 is applicable to any contract concluded between a natural person and a trader who, in the course of his business activities, supplies goods or services to consumers in general, even if the contract in question does not involve such consideration. In referring to `contracts under which a trader supplies goods or services to a consumer', the directive is simply making clear that its scope is not restricted to sellers of goods.

14 The German, Belgian, French and Finnish Governments, on the other hand, consider that guarantees are not covered by Directive 85/577, essentially because a guarantee is not a contract `under which a trader supplies goods or services to a consumer' within the meaning of Article 1.

15 According to those Governments, the wording of the provision implies that goods or services are supplied by a trader to a consumer who relies on the protection afforded by Directive 85/577,

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so that it is not enough for the trader to be a supplier of goods or services in general. They point out that such an interpretation is strongly suggested by the English version of the directive (`contracts under which a trader supplies goods or services to a consumer'). In circumstances such as those of the instant case, the guarantor's commitment gives rise to no consideration, in the sense that the guarantor receives no goods or services from the trader to whom the commitment was given.

16 Those Governments argue further that Directive 85/577 does not cover guarantees; if it did, the directive would have contained specific rules providing, in particular, for the fate of the contract whose performance is guaranteed by the guarantor in the event of his exercising the right of cancellation. Consequently, protection of guarantors is a matter for national law alone. In particular, the French Government argues that, since Directive 85/577 does not govern the effects, on the principal contract, of possible invalidity of a contract of guarantee, such guarantees must, in view of their ancillary nature, be excluded from the scope of the directive.

17 The Court observes that, according to Article 1, Directive 85/577 applies to `contracts under which a trader supplies goods or services to a consumer' which are concluded away from the trader's business premises, unless the trader was expressly requested by the consumer to visit him with a view to the negotiation of the contract.

18 In determining whether a contract of guarantee securing performance of a credit agreement by the principal debtor can fall within the scope of Directive 85/577, it should be noted that, apart from the exceptions listed in Article 3(2), the scope of the directive is not limited according to the nature of the goods or services to be supplied under a contract; the only requirement is that the goods or services must be intended for private consumption. The grant of a credit facility is indeed the provision of a service, the contract of guarantee being merely ancillary to the principal contract, of which in practice it is usually a precondition.

19 Furthermore, nothing in the wording of the directive requires that the person concluding the contract under which goods or services are to be supplied be the person to whom they are supplied. Directive 85/577 is designed to protect consumers by enabling them to withdraw from a contract concluded on the initiative of the trader rather than of the customer, where the customer may have been unable to see all the implications of his act. Consequently, a contract benefiting a third party cannot be excluded from the scope of the directive on the sole ground that the goods or services purchased were intended for the use of the third party standing outside the contractual relationship in question.

20 In view of the close link between a credit agreement and a guarantee securing its performance and the fact that the person guaranteeing repayment of a debt may either assume joint and several liability for payment of the debt or be the guarantor of its repayment, it cannot be excluded that the furnishing of a guarantee falls within the scope of the directive.

21 Moreover, the possible termination of a contract of guarantee concluded in the context of `doorstep selling' within the meaning of Directive 85/577 is merely one particular situation where the question may arise as to the effect of the possible invalidity of an ancillary contract upon the principal contract. In those circumstances, the mere fact that the directive contains no provision governing the fate of the principal contract where the guarantor exercises the right of renunciation conferred by Article 5 cannot be taken to mean that the directive does not apply to guarantees.

22 However, it is apparent from the wording of Article 1 of Directive 85/577 and from the ancillary nature of guarantees that the directive covers only a guarantee ancillary to a contract whereby, in the context of `doorstep selling', a consumer assumes obligations towards the trader with a view to obtaining goods or services from him. Furthermore, since the directive is designed to protect only consumers, a guarantee comes within the scope of the directive only where, in accordance with

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the first indent of Article 2, the guarantor has entered into a commitment for a purpose which can be regarded as unconnected with his trade or profession.

23 The answer to the question referred to the Court must therefore be that, on a proper construction of the first indent of Article 2 of Directive 85/577, a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession.

Costs

24 The costs incurred by the German, Belgian, French and Finnish Governments and by 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

(Fifth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 11 January 1996, hereby rules:

On a proper construction of the first indent of Article 2 of Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession.

DOCNUM	61996J0045
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
PUBREF	European Court reports 1998 Page I-01199
DOC	1998/03/17
LODGED	1996/02/15
JURCIT	31985L0577-A01 : N 17 22 31985L0577-A01P1 : N 3 10 31985L0577-A02 : N 4 31985L0577-A02T1 : N 22 23

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31985L0577-A03P2 : N 18
31985L0577-A04 : N 5
31985L0577-A05 : N 5 21
31985L0577 : N 1 11 18 19 21 22

CONCERNS Interprets 31985L0577-A02T1

SUB Approximation of laws

AUTLANG German

OBSERV Federal Republic of Germany ; Belgium ; France ; Finland ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A7* Landgericht Landshut, Endurteil vom 24/02/1994 (41 O 2775/93)
A8 Oberlandesgericht München, Urteil vom 21/12/1994 (20 U 2858/94)
A9 Bundesgerichtshof, Vorlagebeschluß vom 11/01/1996 (IX ZR 56/95)
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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Sevon

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DATES of document: 17/03/1998
of application: 15/02/1996

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Judgment of the Court
of 8 October 1996
Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland.
Reference for a preliminary ruling: Landgericht Bonn - Germany.
Directive 90/314/EEC on package travel, package holidays and package tours - Non-transposition - Liability of the Member State and its obligation to make reparation.
Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94.

1. Community law ° Rights conferred on individuals ° Breach, by a Member State, of the obligation to transpose a directive ° Obligation to make good damage caused to individuals ° Conditions ° Sufficiently serious breach ° Concept ° Failure to transpose the directive within the prescribed period

(EC Treaty, Art. 189, third para.)

2. Approximation of laws ° Package travel, package holidays and package tours ° Directive 90/314 ° Article 7 ° Protection against the risk of the organizer' s insolvency ° Grant to the package traveller of rights whose content is sufficiently identifiable

(Council Directive 90/314, Art. 7)

3. Approximation of laws ° Package travel, package holidays and package tours ° Directive 90/314 ° Protection against the risk of the organizer' s insolvency ° Measures necessary to ensure correct transposition of the Directive

(Council Directive 90/314, Arts 7 and 9)

1. Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.

2. The result prescribed by Article 7 of Directive 90/314 on package travel, package holidays and package tours, which provides that the organizer and/or retailer party to the contract is to provide sufficient evidence of security for the refund of money paid over by the consumer and for his repatriation, entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable.

3. In order to comply with Article 9 of Directive 90/314 on package travel, package holidays and package tours, which provides that the Member States are to bring into force the measures necessary to comply with the directive before 31 December 1992, the Member States should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of the insolvency of the organizer.

In that connection, if a Member State allows a package travel organizer to require payment of a deposit of up to 10% towards the travel price, but subject to a certain maximum amount, the protective purpose pursued by Article 7 of Directive 90/314 is not satisfied unless a refund of that deposit is also guaranteed in the event of the insolvency of the package travel organizer.

Article 7 of Directive 90/314 is, furthermore, to be interpreted as meaning, first, that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value which, although guaranteeing a direct right against the actual provider of services, do not necessarily require that party, who is himself

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likewise exposed to the risks consequent on insolvency, to honour them and, secondly, that a Member State may not omit to transpose a directive on the basis of a judgment of a domestic supreme court, according to which package travel purchasers are no longer required to pay more than 10% of the travel price before they obtain such documents of value.

Neither the objective of Directive 90/314 nor its specific provisions require the Member States to adopt particular provisions in relation to Article 7 to protect package travellers from their own negligence. Where a directive has not been transposed within the prescribed period, a national court may, in order to determine the damage which must be made good, always inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it. However, a package traveller who has paid the whole travel price cannot be regarded as acting negligently simply because he did not take advantage of the possibility, which a judgment of the kind referred to above afforded him, of paying no more than 10% of the total travel price before obtaining documents of value.

In Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht (Regional Court) Bonn for a preliminary ruling in the proceedings pending before that court between

Erich Dillenkofer

Christian Erdmann

Hans-Juergen Schulte

Anke Heuer

Werner, Ursula and Torsten Knor

and

Federal Republic of Germany

on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray and L. Sevon (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann (Rapporteur), D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° Anke Heuer, by Gert Meier, Rechtsanwalt, Cologne;

° the Federal Republic of Germany, by Karlheinz Stoehr, Ministerialrat at the Federal Ministry of Justice, Alfred Dittrich, Regierungsdirektor at the same Ministry, Ernst Roeder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agents, and Dieter Sellner, Rechtsanwalt, Bonn;

° the Netherlands Government, by Adriaan Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent;

° the United Kingdom Government, by John Collins, Assistant Treasury Solicitor, acting as Agent,

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Stephen Richards and Rhodri Thomson, Barristers;

° the Commission of the European Communities, by Rolf Waegenbaur, Principal Legal Adviser, acting as Agent, and Barbara Rapp, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Dillenkofer, represented by Roland Gappa, Rechtsanwalt, Dahn; Anke Heuer, represented by Gert Meier; Werner, Torsten and Ursula Knor, represented by Karin Schumacher-d' Hondt, Rechtsanwalt, Bonn; the Federal Republic of Germany, represented by Ernst Roeder and Dieter Sellner; the Netherlands Government, represented by Marc Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Stephen Richards; and the Commission, represented by Barbara Rapp, at the hearing on 17 October 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

Costs

75 The costs incurred by the German, Netherlands, French and United Kingdom Governments 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 actions pending 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 Landgericht Bonn, by orders of 6 June 1994, hereby rules:

1. Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.

2. The result prescribed by Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable.

3. In order to comply with Article 9 of Directive 90/314, the Member States should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of the insolvency of the organizer and/or retailer party to the contract.

4. If a Member State allows the package travel organizer and/or retailer party to a contract to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of Directive 90/314 is not satisfied unless a refund of that deposit is also guaranteed in the event of the insolvency of the package travel organizer and/or

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retailer party to the contract.

5. Article 7 of Directive 90/314 is to be interpreted as meaning that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose Directive 90/314 on the basis of the Bundesgerichtshof' s "advance payment" judgment of 12 March 1987.

6. Directive 90/314 does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.

1 By orders of 6 June 1994, received at the Court on 28 June 1994 in Cases C-178/94 and C-179/94 and on 1 July 1994 in Cases C-188/94, C-189/94 and C-190/94, the Landgericht Bonn referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 12 questions on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter "the Directive").

2 The questions have been raised in the course of actions for compensation which Erich Dillenkofer, Christian Erdmann, Hans-Juergen Schulte, Anke Heuer, and Werner, Torsten and Ursula Knor (hereinafter "the plaintiffs") have brought against the Federal Republic of Germany for damage they suffered because the Directive was not transposed within the prescribed period.

3 The purpose of the Directive, according to Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the Community.

4 Article 2 contains a number of definitions. It provides that:

"For the purposes of this Directive:

1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;

(b) accommodation;

(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

...

2. 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;

3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;

4. 'consumer' means the person who takes or agrees to take the package (' the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package (' the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package (' the transferee');

...".

5 Article 7 provides: "The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."

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6 Article 8 states that Member States may adopt or maintain more stringent provisions in the field covered by the Directive to protect the consumer.

7 Article 9 requires Member States to bring into force the measures necessary to comply with the Directive before 31 December 1992.

8 On 24 June 1994, the German legislature adopted a Law implementing the Directive (Bundesgesetzblatt I, p. 1322). That law introduced into the Buergerliches Gesetzbuch (German Civil Code, hereinafter "the BGB") a new provision, Paragraph 651k, in terms of which:

"1. The travel organizer shall ensure that the package traveller obtains a refund of:

(1) the travel price paid if the travel services are not provided as a result of the organizer' s insolvency; and

(2) necessary expenditure incurred by the traveller in respect of his repatriation following the organizer' s insolvency.

The travel organizer can fulfil the obligations set out in (1) only:

(1) by taking out insurance with a company authorized to operate within the scope of this Law; or

(2) through a promise of payment from a credit institution authorized to operate within the scope of this Law.

2. ...

3. In order to satisfy the requirement set out in (1), the organizer must provide for the traveller to have a direct remedy against the insurer or the credit institution and be responsible for furnishing evidence thereof by way of an attestation issued by the said company (security document).

4. Apart from a deposit of up to 10% of the travel price, subject, however, to a maximum of DM 500, the organizer may demand or accept payment towards the travel price before completion of the travel only if he has given the traveller a security document.

...".

9 That law entered into force on 1 July 1994. It applies to travel contracts which were concluded after that date and under whose terms the travel was to commence after 31 October 1994.

10 The plaintiffs in the main proceedings are purchasers of package travel who, following the insolvency in 1993 of the two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense. They have not succeeded in obtaining reimbursement of the sums they paid to the operators or of the expenses they incurred in returning home.

11 The plaintiffs have brought actions for compensation against the Federal Republic of Germany on the ground that if Article 7 of the Directive had been transposed into German law within the prescribed period, that is to say by 31 December 1992, they would have been protected against the insolvency of the operators from whom they had purchased their package travel.

12 They rely in particular on the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraphs 39 and 40, according to which, where a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation, provided that the result prescribed by the directive entails the grant

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of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties. According to the applicants, those conditions are satisfied in this case. They therefore claim refund of sums paid for travel never undertaken or expenses incurred in their repatriation.

13 The German Government contests the claims. It considers that the conditions laid down in Francovich are not satisfied in these cases and that in any event failure to transpose a directive within the prescribed period cannot render a Member State liable to pay damages unless there has been a serious, that is to say manifest and grave, breach of Community law, for which it can be held responsible.

14 The Landgericht Bonn found that German law did not afford any basis for upholding the claims for compensation but having doubts regarding the consequences of the Francovich judgment it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

"(1) Is the EC Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) intended to grant individual package travellers, via national transposing provisions, the individual right to security for money paid and repatriation costs in the event of the insolvency of the travel organizer (see paragraph 40 of the judgment in Joined Cases C-6/90 and C-9/90 Francovich)?

(2) Is the content of that right sufficiently identified on the basis of that Directive?

(3) What are the minimum requirements for the 'necessary measures' to be taken by the Member States within the meaning of Article 9 of the Directive?

(4) In particular, did it satisfy Article 9 of the Directive if the national legislature by 31 December 1992 provided the legislative framework for imposing a legal obligation on the travel organizer and/or retailer to take measures for security within the meaning of Article 7 of the Directive? Or did the necessary change in the law, taking into account the lead times involved in consultation of the travel, insurance and credit sectors, have to come into effect sufficiently in advance of 31 December 1992 for that security actually to function in the package travel market from 1 January 1993?

(5) Is the protective purpose, if any, of the Directive satisfied if the Member State allows the travel organizer only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500 before documents of value are handed over?

(6) To what extent are the Member States obliged under the Directive to act (by legislating) in order to protect package travellers against their own negligence?

(7) (a) Could the Federal Republic of Germany, in view of the 'advance payment' judgment (Vorkasse-Urteil) of the Bundesgerichtshof (BGH) of 12 March 1987 (BGHZ 100, 157; NJW 86, 1613), have omitted altogether to transpose Article 7 of the Directive by means of legislation?

(b) Is there no 'security' within the meaning of Article 7 of the Directive even where, on payment of the travel price, travellers were in possession of documents of value confirming a right to performance against those responsible for providing particular services (airline companies, hotel operators)?

(8) (a) Does the mere fact that the time-limit specified in Article 9 of the Directive has been exceeded suffice to confer a right to compensation involving State liability as defined in the Francovich judgment of the Court of Justice, or can the Member State put forward the objection that the period for transposition proved to be inadequate?

(b) If that objection fails, does the response to the previous question apply even where the Member

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State concerned cannot achieve the protective purpose of the Directive simply by a change in the law (as for instance with payments in lieu of wages to employees in the event of insolvency), the cooperation of private third parties (travel organizers, the insurance and credit sector) being essential?

(9) Does liability on the part of a Member State for an infringement of Community law presuppose a serious, that is to say a manifest and grave, breach of obligations?

(10) Is it a precondition of State liability that a judgment in infringement proceedings establishing a breach of Treaty obligations has been delivered before the event giving rise to damage?

(11) Does it follow from the Francovich judgment of the Court of Justice that the right to compensation on grounds of breach of Community law is not dependent on a finding of fault in general, or at any rate of wrongful non-adoption of legislative measures, on the part of the Member State?

(12) If that conclusion is not correct, could the 'advance payment' judgment of the Bundesgerichtshof have been an acceptable reason justifying or excusing the Federal Republic of Germany for transposing the Directive, as defined in the answers of the Court of Justice to Questions 4 and 7, only after expiry of the time-limit specified in Article 9?"

Conditions under which a Member State incurs liability (Questions 8, 9, 10, 11 and 12)

15 Questions 8, 9, 10, 11 and 12, concerning the conditions under which a State incurs liability towards individuals where a directive has not been transposed within the prescribed period, will be examined first.

16 The crux of these questions is whether a failure to transpose a directive within the prescribed period is sufficient per se to afford individuals who have suffered injury a right to reparation or whether other conditions must also be taken into consideration.

17 More specifically, the national court raises the question of the importance to be attached to the German Government' s contention that the period prescribed for transposition of the Directive proved inadequate (Question 8). It asks, further, whether State liability requires a serious, that is to say, a manifest and grave, breach of Community obligations (Question 9), whether the breach must have been established in infringement proceedings before the loss or damage occurred (Question 10), whether liability presupposes the existence of fault, of either commission or omission, in the adoption of legislative measures by the Member State (Question 11) and, lastly, in the event that Question 11 is answered in the affirmative, whether liability can be excluded by reason of a judgment such as the "advance payment" judgment of the Bundesgerichtshof referred to in Question 7 (Question 12).

18 The German, Netherlands and United Kingdom Governments have submitted in particular that a State can incur liability for late transposition of a directive only if there has been a serious, that is to say, a manifest and grave, breach of Community law for which it can be held responsible. According to those Governments, this depends on the circumstances which caused the period for transposition to be exceeded.

19 In order to reply to those questions, reference must first be made to the Court' s case-law on the individual' s right to reparation of damage caused by a breach of Community law for which a Member State can be held responsible.

20 The Court has held that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (Francovich, paragraph 35; Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31; Case C-392/93 British Telecommunications [1996] ECR I-0000, paragraph 38; and Case C-5/94 Hedley Lomas [1996] ECR I-0000, paragraph

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24). Furthermore, the Court has held that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (Francovich, paragraph 38; Brasserie du Pêcheur and Factortame, paragraph 38, and Hedley Lomas, paragraph 24).

21 In Brasserie du Pêcheur and Factortame, at paragraphs 50 and 51, British Telecommunications, at paragraphs 39 and 40, and Hedley Lomas, at paragraphs 25 and 26, the Court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

22 Moreover, it is clear from the Francovich case which, like these cases, concerned non-transposition of a directive within the prescribed period, that the full effectiveness of the third paragraph of Article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties.

23 In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in Francovich, was nevertheless evident from the circumstances of that case.

24 When the Court held that the conditions under which State liability gives rise to a right to reparation depended on the nature of the breach of Community law causing the damage, that meant that those conditions are to be applied according to each type of situation.

25 On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (see Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 6; Brasserie du Pêcheur and Factortame, paragraph 55; and British Telecommunications, paragraph 42). On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see Hedley Lomas, paragraph 28).

26 So where, as in Francovich, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.

27 Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

28 In particular, reparation of that loss and damage cannot depend on a prior finding by the Court of an infringement of Community law attributable to the State (see Brasserie du Pêcheur, paragraphs 94 to 96), nor on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable (see paragraphs 75 to 80 of the same judgment).

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29 The reply to Questions 8, 9, 10, 11 and 12 must therefore be that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.

Grant to individuals of rights whose content is sufficiently identifiable (Questions 1 and 2)

30 By its first two questions, the national court asks whether the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money paid over and repatriation in the event of the insolvency of the travel organizer and/or the retailer party to the contract (hereinafter "the organizer"), and whether the content of those rights can be sufficiently identified.

31 According to the plaintiffs and the Commission, these two questions must be answered in the affirmative. Article 7, they say, clearly and unequivocally recognizes the right of the package traveller, qua consumer, to obtain a refund of money paid over and of the costs of repatriation in the event of the organizer' s insolvency.

32 The German, Netherlands and United Kingdom Governments disagree with that point of view.

33 The question whether the result prescribed by Article 7 of the Directive entails the grant of rights to individuals must be examined first.

34 According to the actual wording of Article 7, this provision prescribes, as the result of its implementation, an obligation for the organizer to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

35 Since the purpose of such security is to protect consumers against the financial risks arising from the insolvency of package travel organizers, the Community legislature has placed operators under an obligation to offer sufficient evidence of such security in order to protect consumers against those risks.

36 The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.

37 That result is, moreover, confirmed by the penultimate recital in the preamble to the Directive, according to which both the consumer and the package travel industry would benefit if organizers were placed under an obligation to provide sufficient evidence of security in the event of insolvency.

38 In that connection, the German and United Kingdom Governments' argument that the Directive, which is based on Article 100a of the Treaty, is aimed essentially at ensuring freedom to provide services and, more generally, freedom of competition cannot be valid.

39 First, the recitals in the preamble to the Directive repeatedly refer to the purpose of protecting consumers. Secondly, the fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers. Indeed, according to Article 100a(3) of the Treaty, the Commission, in its proposals submitted pursuant to that article, concerning inter alia consumer protection, must take as a base a high level of protection.

40 Similarly, the German and United Kingdom Governments' argument that the actual wording of Article 7 shows that this provision simply requires package travel organizers to provide sufficient

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evidence of security and that its lack of reference to any right of consumers to such security indicates that such a right is only an indirect and derived right must be rejected.

41 In this regard, it suffices to point out that the obligation to offer sufficient evidence of security necessarily implies that those having that obligation must actually take out such security. Indeed, the obligation laid down in Article 7 would be pointless in the absence of security actually enabling money paid over to be refunded or the consumer to be repatriated, should occasion arise.

42 Consequently, it must be concluded that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organizer' s insolvency.

43 The next point to be examined is whether the content of the rights in question are identifiable on the basis of the provisions of the Directive alone.

44 The persons having rights under Article 7 are sufficiently identified as consumers, as defined by Article 2 of the Directive. The same holds true of the content of those rights. As explained above, those rights consist in a guarantee that money paid over by purchasers of package travel will be refunded and a guarantee that they will be repatriated in the event of the insolvency of the organizer. In those circumstances, the purpose of Article 7 of the Directive must be to grant to individuals rights whose content is determinable with sufficient precision.

45 That conclusion is not affected by the fact that, as the German Government points out, the Directive leaves the Member States considerable latitude as regards the choice of means for achieving the result it seeks. The fact that States may choose between a wide variety of means for achieving the result prescribed by a directive is of no importance if the purpose of the directive is to grant to individuals rights whose content is determinable with sufficient precision.

46 The reply to the first two questions must therefore be that the result prescribed by Article 7 of the Directive entails the grant to package travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer' s insolvency; the content of those rights is sufficiently identifiable.

The measures necessary for proper transposition of the Directive (Questions 3, 4, 5, 6 and 7)

Questions 3 and 4

47 By Questions 3 and 4, the national court is essentially asking the Court to specify what "necessary measures" the Member States should have adopted in order to comply with Article 9 of the Directive.

48 First of all, according to settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty (Case C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 24).

49 Secondly, in providing that the Member States were to bring into force the measures necessary to comply with the Directive before 31 December 1992, Article 9 required the Member States to adopt all the measures necessary to ensure that the provisions of the Directive were fully effective and so guarantee achievement of the prescribed result.

50 In view of the reply given to the first two questions, it must therefore be held that, in order to ensure full implementation of Article 7 of the Directive, the Member States should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from 1 January 1993, they would be refunded money paid over and be repatriated in the event of the organizer' s insolvency.

51 It follows that Article 7 would not have been fully implemented if, within the prescribed period,

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the national legislature had done no more than adopt the necessary legal framework for requiring organizers by law to provide sufficient evidence of security.

52 According to the order for reference, the German Government claimed that the period prescribed for transposition of the Directive was too short, in particular because of the considerable difficulties which introduction of a system of security conforming with the Directive would create in Germany for the economic sector concerned. In that connection, the German Government pointed out that the Directive could not be implemented simply by enacting legislative amendments: it had to rely on the collaboration of third parties (travel organizers, insurers and credit institutions).

53 That kind of circumstance cannot justify a failure to transpose a directive within the prescribed period. It is settled case-law that a Member State may not rely on provisions, practices or situations prevailing in its own internal legal system to justify its failure to observe the obligations and time-limits laid down by a directive (see, for instance, Case 283/86 Commission v Belgium [1988] ECR 3271, paragraph 7).

54 If the period allowed for the implementation of a directive does, indeed, prove to be too short, the only step compatible with Community law available to the Member State concerned is to take the appropriate initiatives within the Community in order to have the competent Community institution grant the necessary extension of the period (see Case 52/75 Commission v Italy [1976] ECR 277, paragraph 12).

55 The reply to Questions 3 and 4 must therefore be that, in order to comply with Article 9 of the Directive, the Member State should have adopted, within the period prescribed, all the measures necessary to ensure that, as from 1 January 1993, individuals would have effective protection against the risk of organizers' insolvency.

Question 5

56 By its fifth question, the national court asks whether the objective of consumer protection pursued by Article 7 of the Directive is satisfied if the Member State allows the travel organizer to require a deposit of up to 10% towards the travel price, with a maximum of DM 500, before handing over to his customer documents which the national court describes as "documents of value", namely documents evidencing the consumer' s right to the provision of the various services included in the travel package (by airlines or hotel companies).

57 It appears from the order for reference that this question refers to Paragraph 651k(4) of the BGB, reproduced at paragraph 8 above, and to the "advance payment" judgment of the Bundesgerichtshof of 12 March 1987, referred to in Question 7, which annulled travel organizers' general business conditions in so far as they required travellers to pay a deposit equivalent to 10% of the travel price without receipt of documents of value.

58 It is also clear from the order for reference that by this question the national court is seeking to ascertain in substance whether it is in conformity with Article 7 for the national legislature to make the consumer bear the risk relating to such a deposit so that the deposit is left uncovered by the security mentioned in that provision.

59 As was found in relation to Questions 1 and 2, the purpose of Article 7 of the Directive is to protect the consumer against the risks defined by that provision arising from the insolvency of the organizer. It would be contrary to that purpose to limit that protection by leaving any deposit payment uncovered by the security for a refund or repatriation. The Directive contains no basis for any such limitation of the rights guaranteed by Article 7.

60 So a national rule allowing organizers to require travellers to pay a deposit will be in conformity with Article 7 of the Directive only if, in the event of the organizer' s insolvency, refund of

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the deposit is also guaranteed.

61 The reply to Question 5 must therefore be that, if a Member State allows the travel organizer to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of the Directive is not satisfied unless a refund of that deposit is also guaranteed in the event of the organizer' s insolvency.

Question 7

62 By Question 7(b) the national court asks whether the security of which organizers must "provide sufficient evidence", in accordance with Article 7 of the Directive, is lacking even if, on payment of the travel price, travellers have documents of value.

63 According to the German Government, the protection guaranteed by Article 7 is not lacking if the traveller has documents guaranteeing a direct right against the actual provider of services (the airline company or the hotelier). In such a situation, the traveller is in fact in a position to require performance of the services, so that there is no risk that he will not receive the services because of the organizer' s insolvency.

64 That argument cannot be accepted. The protection which Article 7 guarantees to consumers could be impaired if they were made to enforce credit vouchers against third parties who are not, in any event, required to honour them and who are likewise themselves exposed to the risks consequent on insolvency.

65 The reply to Question 7(b) must therefore be that Article 7 of the Directive is to be interpreted as meaning that the security of which organizers must "provide sufficient evidence" is lacking even if, on payment of the travel price, travellers are in possession of documents of value.

66 In Question 7(a) the national court asks whether the Federal Republic of Germany could have omitted altogether to transpose Article 7 of the Directive in view of the Bundesgerichtshof' s "advance payment" judgment.

67 Quite apart from the question whether a judgment of a court of law could ensure proper transposition of the Directive, the reply to this question follows in any case from the replies given to Questions 5 and 7(b). Since the aim of Article 7 is to protect the consumer against the risks, set out in that provision, arising from the organizer' s insolvency, a judgment such as the Bundesgerichtshof' s "advance payment" judgment cannot satisfy the requirements of the Directive if it requires the consumer to bear the risk of the organizer' s insolvency as regards the deposit required and also the risk that, when the consumer has received documents of value, the actual provider of the services might not honour them or might become insolvent.

68 The reply to Question 7 must therefore be that Article 7 of the Directive is to be interpreted as meaning that the "security" of which organizers must offer sufficient evidence is lacking even if, on payment of the travel price, travellers are in possession of documents of value and that the Federal Republic of Germany could not have omitted altogether to transpose the Directive on the basis of the Bundesgerichtshof' s "advance payment" judgment.

Question 6

69 By Question 6 the national court asks whether the Directive requires Member States to adopt specific measures to protect package travellers against their own negligence.

70 So framed, that question prompts the following three observations.

71 First, neither the objective of the Directive nor its specific provisions require the Member States to adopt specific provisions in relation to Article 7 to protect package travellers from their own negligence.

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72 Secondly, according to the Court' s case-law, in determining the loss or damage for which reparation may be granted, the national court may always inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it (see, in particular, Brasserie du Pêcheur and Factortame, at paragraph 84).

73 Lastly, although that principle also applies in actions for damages based on non-transposition of a directive, such as those brought in this case, it follows from the replies given to Questions 5 and 7 that a package traveller who has paid the whole travel price cannot be regarded as acting negligently simply because he has not taken advantage of the possibility, which the "advance payment" judgment affords him, of not paying more than 10% of the total travel price before obtaining documents of value.

74 The reply to Question 6 must therefore be that the Directive does not require Member States to adopt specific measures in relation to Article 7 in order to protect package travellers against their own negligence.

DOCNUM	61994J0178
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; J ; judgment
PUBREF	European Court reports 1996 Page I-04845
DOC	1996/10/08
LODGED	1994/06/28
JURCIT	61976J0083-N06 : N 25 61989J0059-N24 : N 48 31990L0314-A07 : N 30 46 56 74 31990L0314-A09 : N 47 - 55 11992E100A-P3 : N 38 39 11992E189-L3 : N 22 26 61993J0046-N55 : N 25 61993J0046-N75 : N 28 61993J0046-N76 : N 28 61993J0046-N77 : N 28 61993J0046-N78 : N 28 61993J0046-N79 : N 28 61993J0046-N80 : N 28 61993J0046-N84 : N 72 61993J0046-N94 : N 28 61993J0046-N95 : N 28

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61993J0046-N96 : N 28
61993J0392-N42 : N 25
61994J0005-N28 : N 25

CONCERNS Interprets 31990L0314-A07
Interprets 31990L0314-A09

SUB Freedom of establishment and services ; Right of establishment ; Free movement of services ; Consumer protection

AUTLANG German

MISCINF Joined cases : 694J0179 694J0188 694J0189 694J0190

OBSERV Federal Republic of Germany ; Netherlands ; France ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR ** AFFAIRE 179/1994 **
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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Gulmann

DATES of document: 08/10/1996
of application: 28/06/1994

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**Judgment of the Court
of 27 June 2000
Océano Grupo Editorial SA v Rocio Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sanchez Alcon Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliu (C-244/98).
Reference for a preliminary ruling: Juzgado de Primera Instancia no 35 de Barcelona - Spain.
Directive 93/13/EEC - Unfair terms in consumer contracts - Jurisdiction clause - Power of the national court to examine of its own motion whether that clause is unfair.
Joined cases C-240/98 to C-244/98.**

1. Approximation of laws - Unfair terms in consumer contracts - Directive 93/13 - Unfair term within the meaning of Article 3 - Meaning - Jurisdiction clause - Inclusion - Criteria

(Council Directive 93/13, Article 3)

2. Approximation of laws - Unfair terms in consumer contracts - Directive 93/13 - Power of the national court to determine of its own motion whether a term of a contract is unfair when making its assessment of the contract - Obligation to ensure the effectiveness of the directive when national law is applied

(Council Directive 93/13, Arts. 6 and 7)

1. Where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of Directive 93/13 on unfair terms in consumer contracts in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(see para. 24)

2. The protection provided for consumers by Directive 93/13 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.

The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

(see paras. 29, 32, operative part 1-2)

In Joined Cases C-240/98 to C-244/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Juzgado de Primera Instancia No 35 de Barcelona, Spain, for a preliminary ruling in the proceedings pending before that court between

Océano Grupo Editorial SA

and

Rocío Murciano Quintero (C-240/98)

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and between

Salvat Editores SA

and

José M. Sanchez Alcon Prades (C-241/98),

José Luis Copano Badillo (C-242/98),

Mohammed Berroane (C-243/98),

Emilio Viñas Feliu (C-244/98),

on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, L. Sevon (President of Chamber), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet, V. Skouris and F. Macken, Judges,

Advocate General: A. Saggio,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Océano Grupo Editorial SA and Salvat Editores SA, by A. Estany Segalas, of the Barcelona Bar,

- the Spanish Government, by S. Ortíz Vaamonde, Abogado del Estado, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in that Directorate, acting as Agents,

- Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and M. Desantes Real, a national civil servant on secondment to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Océano Grupo Editorial SA, Salvat Editores SA, the Spanish Government, the French Government and the Commission at the hearing on 26 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By orders of 31 March 1998 (C-240/98 and C-241/98) and 1 April 1998 (C-242/98, C-243/98 and C244/98) received at the Court on 8 July 1998, the Juzgado de Primera Instancia (Court of First Instance) No 35, Barcelona, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, the Directive).

2 The question was raised in two sets of proceedings, between (i) Océano Grupo Editorial SA and Ms Murciana Quintero and (ii) Salvat Editores SA and Mr Sanchez Alcon Prades, Mr Copano Badillo, Mr Berroane and Mr Viñas Feliu. The proceedings concerned the payment of sums due under contracts

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concluded between the companies and the defendants in the main proceedings for the sale on deferred payment terms of encyclopaedias.

The legal framework

Community law

3 The purpose of the Directive is, according to Article 1(1), to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

4 Article 2 of the Directive provides:

For the purposes of this Directive:

...

(b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) "seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

5 Article 3(1) of the Directive provides:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

6 Article 3(3) of the Directive refers to the Annex to the Directive which is to contain an indicative and non-exhaustive list of the terms which may be regarded as unfair. Paragraph 1 of the Annex refers to Terms which have the object or effect of:

...

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy...

7 Under Article 6(1) of the Directive:

Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

8 Article 7 of the Directive provides:

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

9 Article 10(1) of the Directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than

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31 December 1994.

National law

10 Under Spanish law consumers were initially protected against unfair terms inserted in contracts by sellers and suppliers by the Ley General 26/1984, de 19 de julio, para la Defensa de los Consumidores y Usuarios (General Law No 26/1984 of 19 July 1984 for the Protection of Consumers and Users, Boletín Oficial del Estado No 176, of 24 July 1984, Law No 26/1984).

11 Article 10(1)(c) of Law No 26/1984 provides that terms, conditions or clauses which apply generally in relation to the sale or promotion of products or services must be consistent with the requirement of good faith and must maintain a proper balance between the rights and obligations of the parties, which in any event precludes the use of unfair terms. By virtue of Article 10(4) of Law No 26/1984, unfair terms, which are defined as terms adversely affecting the consumer in a disproportionate or inequitable manner or causing an imbalance in the parties' rights and obligations to the detriment of the consumer, are automatically void.

12 The Directive was fully transposed by Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratacion (Law No 7/1998 of 13 April 1998 on General Contractual Conditions, Boletín Oficial del Estado No 89 of 14 April 1998, Law No 7/1998).

13 Article 8 of Law No 7/1998 provides that general conditions which, to the detriment of a party to the contract, infringe the provisions of the Law and, in particular, unfair general conditions in consumer contracts within the meaning of Law No 26/1984 are automatically void.

14 Law No 7/1998 supplements Law No 26/1984 by adding, in particular, Article 10a, paragraph 1 of which substantially reproduces Article 3(1) of the Directive, and an additional provision which essentially sets out the list in the Annex to the Directive of terms which may be regarded as unfair, while indicating that the provision is minimal in character. Under paragraph 27 of the additional provision, a term of a contract expressly conferring jurisdiction on a court or tribunal other than that corresponding to the consumer's domicile or the place of performance of the contract is regarded as unfair.

The main proceedings and the question submitted for a preliminary ruling

15 Between 4 May 1995 and 16 October 1996, each of the defendants in the main proceedings, all of whom are resident in Spain, entered into a contract for the purchase by instalments of an encyclopaedia for personal use. The plaintiffs in the main proceedings are the sellers of the encyclopaedias.

16 The contracts contained a term conferring jurisdiction on the courts in Barcelona (Spain), a city in which none of the defendants in the main proceedings is domiciled but where the plaintiffs in those proceedings have their principal place of business.

17 The purchasers of the encyclopaedias did not pay the sums due on the agreed dates, and, between 25 July and 19 December 1997, the sellers brought actions (juicio de cognicion - a summary procedure available only for actions involving limited amounts of money) in the Juzgado de Primera Instancia No 35 de Barcelona to obtain an order that the defendants in the main proceedings should pay the sums due.

18 Notice of the claims was not served on the defendants since the national court had doubts as to whether it had jurisdiction over the actions in question. The national court points out that on several occasions the Tribunal Supremo (Supreme Court) has held jurisdiction clauses of the kind at issue in these proceedings to be unfair. However, according to the court making the reference, the decisions of the national courts are inconsistent on the question of whether the court may, in proceedings concerning consumer protection, determine of its own motion whether an unfair term is void.

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19 In those circumstances the Juzgado de Primera Instancia No 35 de Barcelona took the view that an interpretation of the Directive was necessary to enable it to reach a decision in the proceedings before it. It decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following question, which is identically worded in the five orders for reference:

Is the scope of the consumer protection provided by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts such that the national court may determine of its own motion whether a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the ordinary courts?

20 By order of the President of the Court of Justice of 20 July 1998, the five cases C-240/98 to C-244/98 were joined for the purposes of the written and oral procedure and the judgment.

21 First, it should be noted that, where a term of the kind at issue in the main proceedings has been included in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive without being individually negotiated, it satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive.

22 A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

23 By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.

24 It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

25 As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.

26 The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the

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consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

27 Moreover, as the Advocate General pointed out in paragraph 24 of his Opinion, the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts.

28 As the French Government has pointed out, it is hardly conceivable that, in a system requiring the implementation of specific group actions of a preventive nature intended to put a stop to unfair terms detrimental to consumers' interests, a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair. On the contrary, the court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.

29 It follows from the above that the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.

30 As regards the position where a directive has not been transposed, it must be noted that it is settled case-law (Case C-106/89 Marleasing v La Comercial Internacional de Alimentacion [1990] ECR I-4135, paragraph 8, Case C-334/92 Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911, paragraph 20, and Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 26) that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

31 Since the court making the reference is seised of a case falling within the scope of the Directive and the facts giving rise to the case postdate the expiry of the period allowed for transposing the Directive, it therefore falls to that court, when it applies the provisions of national law outlined in paragraphs 10 and 11 above which were in force at the material time, to interpret them, as far as possible, in accordance with the Directive and in such a way that they are applied of the court's own motion.

32 It is apparent from the above considerations that the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred

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on it by virtue of an unfair term.

Costs

33 The costs incurred by the Spanish and French Governments and by the Commission, 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,

in answer to the questions referred to it by the Juzgado de Primera Instancia No 35 de Barcelona by orders of 31 March and 1 April 1998, hereby rules:

1. The protection provided for consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.

2. The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

DOCNUM	61998J0240
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 2000 Page I-04941
DOC	2000/06/27
LODGED	1998/07/08
JURCIT	61989J0106-N08 : N 30 11992E189 : N 31 61992J0091-N26 : N 30 61992J0334-N20 : N 30 31993L0013-A01P1 : N 3 31993L0013-A02 : N 4 31993L0013-A03 : N 24

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31993L0013-A03P1 : N 5 14
31993L0013-A03P3 : N 6
31993L0013-A06 : N 26 28
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31993L0013-A07P1 : N 8 27
31993L0013-A07P2 : N 8 27
31993L0013-A10P1 : N 9
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CONCERNS Interprets 31993L0013-A03
Interprets 31993L0013-A06
Interprets 31993L0013-A07

SUB Approximation of laws

AUTLANG Spanish

MISCINF Joined cases : 698J0241 698J0242 698J0243 698J0244

OBSERV Spain ; France ; Commission ; Member States ; Institutions

NATIONA Spain

NATCOUR ** AFFAIRE 241/1998 **
A9 Juzgado de Primera Instancia no 35 de Barcelona, auto de 31/03/1998
P1 Juzgado de Primera Instancia no 35 de Barcelona, auto de 14/07/2000
** AFFAIRE 242/1998 **
A9 Juzgado de Primera Instancia no 35 de Barcelona, auto de 01/04/1998
P1 Juzgado de Primera Instancia no 35 de Barcelona, auto de 14/07/2000
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P1 Juzgado de Primera Instancia no 35 de Barcelona, auto de 14/07/2000
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PROCEDU Reference for a preliminary ruling

ADVGEN Saggio

JUDGRAP Jann

DATES of document: 27/06/2000
of application: 08/07/1998

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Judgment of the Court (Fifth Chamber)
of 7 May 2002
Commission of the European Communities v Kingdom of Sweden.
Failure by a Member State to fulfil its obligations - Directive 93/13/EEC - Unfair terms in consumer contracts - Obligation to reproduce in national legislation the list of terms which may be regarded as unfair contained in the annex to Directive 93/13.
Case C-478/99.

Acts of the institutions - Directives - Implementation by the Member States - Need for full transposition - List contained in the annex to the Directive reproduced in its entirety in the preparatory work for the implementing law - Whether permissible

(Council Directive 93/13, Art. 3(3))

$$Each of the Member States to which a directive is addressed is obliged to adopt, within its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues. It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts.

The latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other Member States, as is the case for Directive 93/13 on unfair terms in consumer contracts. As regards the annex referred to in Article 3(3) of the Directive, the annex in question is, according to the terms of Article 3(3), to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair. In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive. It in no way alters the result sought by the Directive which, as such, is binding on Member States.

It follows that the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list contained in the annex to the Directive forming an integral part of the provisions implementing the Directive. Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures. Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.

(see paras 15, 18, 20-22)

In Case C-478/99,

Commission of the European Communities, represented by L. Parpala and P. Stancanelli, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by L. Nordling and A. Kruse, acting as Agents, with an address for service in Luxembourg,

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defendant,

supported by

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

and by

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement in its national legal system the annex referred to in Article 3(3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), the Kingdom of Sweden has failed to fulfil its obligations under that directive,

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, D.A.O. Edward and M. Wathelet, Judges,

Advocate General: L.A. Geelhoed,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 December 1999, the Commission of the European Communities brought an action under Article 226 EC seeking a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement in its national legal system the annex referred to in Article 3(3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, hereinafter the Directive), the Kingdom of Sweden has failed to fulfil its obligations under that Directive.

The Directive

2 Under Article 1 thereof, the purpose of the Directive is to approximate the laws, regulations and adminstrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer. Article 8, however, provides that Member States may adopt or retain more stringent provisions to ensure a higher degree of protection for the consumer.

3 Article 3 of the Directive reads as follows:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. ...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded

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as unfair.

4 The Directive includes an annex entitled Terms referred to in Article 3(3), which sets out 17 types of contractual term. The 17th recital of the Directive specifies that, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of... the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws.

5 According to Article 10 of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1994.

National legislation

6 The Directive has been implemented into Swedish law by the lagen (1994:1512) om avtalsvillkor i konsumentförhallanden (Law on terms of contract in relations with consumers) and by the lagen (1994:1513) om ändring i lagen (1915:218) om avtal och andra rättshandlingar pa förmögenhetsrättens omrade (Law amending the Law on contracts and other legal transactions in property law).

7 The annex to the Directive has not been reproduced in the text of those laws. It appears, with a commentary, in the statement of reasons for the draft of lagen (1994:1512).

The procedure

8 Taking the view that the Directive had not been fully implemented in Swedish law within the time-limit, the Commission initiated the infringement procedure. Having given the Kingdom of Sweden formal notice to submit its observations, on 6 April 1998 the Commission sent a reasoned opinion calling upon that Member State to take the measures necessary to comply with it within a period of two months from notification. Since the Kingdom of Sweden did not respond to that opinion, the Commission has brought the present action.

9 By orders of the President of the Court of 26 May and 4 July 2000, the Republic of Finland and the Kingdom of Denmark were granted leave to intervene in support of form of order sought by the Kingdom of Sweden.

Substance

10 The Commission points out that the Directive has a twofold objective: on the one hand, as evidenced by its Article 1 and the second recital in its preamble, to approximate the provisions in force in the Member States relating to unfair terms in contracts concluded with consumers; and on the other hand, as indicated by its fifth and eighth recitals, to improve consumer information on the applicable rules of law.

11 The fact that the list of unfair terms set out in the annex to the Directive is, as noted in Article 3(3), non-exhaustive means that, in accordance with Article 8 of the Directive, it may be subject to amplification or more restrictive formulations by the Member States in their national laws. Similarly, the fact that this list is, as specified in Article 3(3), indicative, merely means that the terms listed therein should not automatically be considered unfair but that the competent national authority must be free to assess their character in light of the general criteria defined in Articles 3(1) and Article 4 of the Directive.

12 In any event, in order to achieve the twofold objective pursued and to satisfy the requirements of legal certainty, it is essential for this list to be published as an integral part of the provisions of the Directive. A mere mention in the preparatory work for a law cannot suffice, as is clear from Case 143/83 Commission v Denmark [1985] ECR 427, paragraph 11. It is doubtful whether the members of the public concerned - not only consumers but also Swedish and foreign traders, and

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the national authorities responsible for applying the measures for implementing the Directive - have easy access to that preparatory work or are aware of its existence and importance.

13 The Swedish Government, supported in all its pleas and arguments by the Danish and Finnish Governments, points out that, under Article 249 EC, Member States enjoy considerable latitude as regards the form and methods of implementing a directive. This case differs from Commission v Denmark cited above in that the list contained in the annex to the Directive, which serves only as an aid to interpreting the general criteria defined by Articles 3(1) and 4 of the Directive, is not in itself intended to create rights and obligations for individuals.

14 When the Directive was being implemented, the question of the annex was the subject of extensive discussion. According to a legal tradition well established in Sweden and common to the Nordic countries, the preparatory work is an important aid to interpreting legislation. The incorporation of the annex to the Directive in the preparatory work thus seemed the most suitable solution. Swedish courts have already held most of the terms set out in the annex to be unfair, where necessary by referring to the list in question, and the members of the concerned public are informed of its existence in various ways.

15 In that respect, it should be recalled that, according to settled case-law, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (see in particular Case C-336/97 Commission v Italy [1999] ECR I-3771, paragraph 19, and Case C-97/00 Commission v France [2001] ECR I-2053, paragraph 9).

16 In this case, Article 6 of the Directive requires Member States to take the necessary measures to ensure that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer. Article 7 also requires them to put in place adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

17 Article 3 of the Directive generally defines the factors that make a term unfair. Article 4 specifies that this unfairness is to be assessed taking into account the circumstances attending the conclusion of the contract. Article 5 lays down a requirement for clarity in the drafting of the terms offered to the consumer.

18 Those provisions, which are intended to grant rights to consumers, define the result sought by the Directive. According to settled case-law, it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts (see, in particular, Case C-365/93 Commission v Greece [1995] ECR I-499, paragraph 9, and Case C-144/99 Commission v Netherlands [2001] ECR I-3541, paragraph 17). As the Court has already made clear, the latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other Member States as is the case here (Commission v Netherlands, paragraph 18).

19 The Commission is not claiming that the Kingdom of Sweden has failed to meet its obligations under those provisions of the Directive.

20 As regards the annex referred to in Article 3(3) of the Directive, implementation of which is the subject of this action, the annex in question is, according to the terms of Article 3(3), to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair.

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21 In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive. It in no way alters the result sought by the Directive which, as such, is binding on Member States. It follows that, contrary to the argument put forward by the Commission, the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list contained in the annex to the Directive forming an integral part of the provisions implementing the Directive.

22 Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures. As noted by the Advocate General in paragraph 48 of his Opinion, Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.

23 In the present case, the Annex to the Directive has been reproduced in its entirety in the preparatory work for the law implementing the Directive. The Swedish Government has claimed that, according to a legal tradition that is well established in Sweden and common to the Nordic countries, preparatory work constitutes an important aid to interpreting legislation. It has also stated that such preparatory work may easily be consulted and that, in addition, information concerning terms that are considered or may be considered to be unfair is provided to the public by various means. The Commission has not disputed those statements but has confined itself to maintaining that those factors cannot compensate for the fact that the list in the annex to the Directive is not an integral part of the provisions implementing the Directive.

24 The Commission has therefore failed to establish that the measures taken by the Kingdom of Sweden do not offer a sufficient guarantee that the public can obtain knowledge of the list contained in the annex to the Directive.

25 It follows from the foregoing that the Commission has not shown that the Kingdom of Sweden has failed to adopt the measures necessary to implement in its national law the annex referred to in Article 3(3) of the Directive.

26 The application must therefore be dismissed.

Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Sweden has applied for costs against the Commission and the latter has been unsuccessful in its action, it must be ordered to pay the costs. Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Denmark and the Republic of Finland will bear their own costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Kingdom of Denmark and the Republic of Finland to bear their own costs.

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DOCNUM	61999J0478
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1999 ; J ; judgment
PUBREF	European Court reports 2002 Page I-04147
DOC	2002/05/07
LODGED	1999/12/16
JURCIT	31993L0013-A01 : N 2 31993L0013-A03 : N 3 17 21 31993L0013-A03P3 : N 1 20 25 31993L0013-A04 : N 17 21 31993L0013-A05 : N 17 21 31993L0013-A06 : N 16 21 31993L0013-A07 : N 16 21 31993L0013-A08 : N 2 31993L0013-A10 : N 5 31993L0013-N : N 4 20 23 61993J0365 : N 18 61997J0336 : N 15 61999J0144 : N 18 62000J0097 : N 15
CONCERNS	Failure concerning 31993L0013
SUB	Approximation of laws
AUTLANG	Swedish
APPLICA	Commission ; Institutions
DEFENDA	Sweden ; Member States
NATIONA	Sweden
NOTES	Wittwer, Alexander ; Seeger, Daniel: European Law Reporter 2002 p.245-246 Palmieri, A.: Il Foro italiano 2002 IV Col.289-290 Pfeiffer, Thomas: Europäische Zeitschrift für Wirtschaftsrecht 2002 p.467-468 Raitio, Juha: Defensor Legis 2002 no 5 p.901-903 Graziuso, Emilio: Diritto comunitario e degli scambi internazionali 2002 p.737-747 Bernitz, Ulf: Europarättslig tidskrift 2003 p.155-159 Vandamme, T.: S.E.W. ; Sociaal-economische wetgeving 2003 p.105-106
PROCEDU	Proceedings concerning failure by Member State - unfounded
ADVGEN	Geelhoed

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JUDGRAP Jann

DATES of document: 07/05/2002
of application: 16/12/1999

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Judgment of the Court (Sixth Chamber)
of 7 March 1996
El Corte Inglés SA v Cristina Blazquez Rivero.
Reference for a preliminary ruling: Juzgado de Primera Instancia n. 10 de Sevilla - Spain.
Direct effect of unimplemented directive - Council Directive 87/102/EEC concerning consumer credit.
Case C-192/94.

++++

1. Acts of the institutions ° Directives ° Direct effect ° Limits ° Possibility of relying on a directive against an individual ° Precluded

(EC Treaty, Art. 189, third para.)

2. Approximation of laws ° Consumer protection in respect of consumer credit ° Directive 87/102 ° Possibility, in the absence of implementing measures, of relying on the directive in order to claim a right of action against a lender who is a private person ° Precluded ° Community competence under Article 129a ° No effect

(EC Treaty, Arts 129a and 189, third para.; Council Directive 87/102, Art. 11)

3. Community law ° Rights conferred on individuals ° Infringement by a Member State of the obligation to transpose a directive ° Obligation to make good damage caused to individuals ° Conditions

(EC Treaty, Art. 189, third para.)

1. The ability to rely on directives against State entities is based on the binding nature of directives ° which applies only with regard to the Member States to which they are addressed ° and seeks to prevent a State from taking advantage of its failure to comply with Community law. The effect of extending that principle to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations or decisions.

It follows that a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a person.

2. In the absence of measures implementing Directive 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit within the period prescribed by that directive, a consumer may not, even in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit, and assert that right before a national court.

Article 129a is limited in scope. On the one hand, it provides that the Community is under a duty to contribute to the attainment of a high level of consumer protection. On the other, it creates Community competence with a view to specific action relating to consumer protection policy apart from measures taken in connection with the internal market. In so far as it merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals, Article 129a cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly relied on as between individuals.

3. If the result prescribed by the directive cannot be achieved by way of interpretation, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of

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those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered.

In Case C-192/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Juzgado de Primera Instancia No 10 de Sevilla (Spain) for a preliminary ruling in the proceedings pending before that court between

El Corte Inglés SA

and

Cristina Blazquez Rivero

on the interpretation of Article 129a of the EC Treaty and Article 11 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48),

THE COURT (Sixth Chamber),

composed of: C.N. Kakouris, President of the Chamber, G. Hirsch (Rapporteur), P.J.G. Kapteyn, J.L. Murray and H. Ragnemalm, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° El Corte Inglés SA, by S. Martínez Lage and J. Pérez-Bustamente Koester, of the Madrid Bar,

° the Spanish Government, by A.J. Navarro Gonzalez, Director-General for Community Legal and Institutional Affairs, and R. Silva de Lapuerta, Abogado del Estado, acting as Agents,

° the French Government, by I. Latournarie, Civil Administrator in the Legal Affairs Department of the Ministry of Foreign Affairs, and E. Belliard, Deputy Director for Legal Affairs in that ministry, acting as Agents,

° the Commission of the European Communities, by A. Alcover, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 December 1995,

gives the following

Judgment

1 By order of 30 June 1994, received at the Court on 4 July 1994, the Juzgado de Primera Instancia No 10 (Court of First Instance No 10), Seville, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 129a of the EC Treaty and Article 11 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48, hereinafter "the directive").

2 The question was raised in proceedings brought by a finance company, El Corte Inglés (hereinafter "the finance company"), against Mrs Blazquez Rivero after she suspended payments to the finance company.

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3 Mrs Blazquez Rivero entered into a contract for holiday travel with the travel agency Viajes El Corte Inglés SA (hereinafter "the travel agency") which she financed in part by a loan obtained from the finance company. The finance company had the exclusive right to grant loans to the travel agency' s customers under an agreement between the two companies.

4 Mrs Blazquez Rivero accused the travel agency of shortcomings in performing its obligations and made several complaints against it. When those complaints proved unsuccessful, she ceased to pay instalments on the loan, whereupon the finance company brought proceedings in the Juzgado de Primera Instancia, Seville, for payment of the outstanding balance.

5 Before the national court, Mrs Blazquez Rivero entered the defence against the finance company that the travel contract had not been performed, without drawing any distinction between the finance company and the travel agent in view of the close bond between them.

6 The national court took the view that Article 11(2) of the directive enabled the consumer to bring an action against the finance company. Article 11(2) provides as follows:

"Where:

(a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them;

and

(b) the grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier;

and

(c) the consumer referred to in subparagraph (a) obtains his credit pursuant to that pre-existing agreement;

and

(d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for supply of them; and

(e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,

the consumer shall have the right to pursue remedies against the grantor of credit. Member States shall determine to what extent and under what conditions these remedies shall be exercisable."

7 In the national court' s view, it is irrelevant that the action was brought, as in this case by the finance company and not by the consumer, since rights may be relied on in any event whether by way of action or by way of defence.

8 It found, however, that Article 11(2) of the directive had not been transposed into Spanish law even though the period prescribed for implementation had run out at the material time and that the result intended by that provision could not be attained by interpreting national law in conformity with the directive. Indeed, Article 1257 of the Spanish Civil Code, under which "contracts shall have effects only between the parties which concluded them and their heirs", prevents the consumer from pleading the shortcomings of the travel agency as against the finance company.

9 Although it considered that Article 11(2) was sufficiently clear, precise and unconditional to be relied on before it, it suspended the proceedings and asked the Court to give a preliminary ruling on the following question:

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"Is Article 11 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, which has not been implemented in national law by the Spanish State, directly applicable in a case where a consumer seeks to rely, against a claim by the grantor of credit, on the defects in the service supplied by the supplier with whom the said grantor of credit has concluded an exclusive agreement for granting credit to his customers?"

10 Shortly after this question was referred, the Court gave judgment in Case C-91/92 Faccini Dori [1994] ECR I-3325, in which it reaffirmed its case-law according to which directives do not have any horizontal direct effect. The Court forwarded a copy of that judgment to the national court and asked it whether, in the light of that judgment, it wished to maintain its question.

11 The national court considered that the judgment in Faccini Dori provided a clear answer to the question of the horizontal direct effect of unimplemented directives, but observed that, unlike in the case of the dispute before it, Faccini Dori was concerned with facts antedating the entry into force of the Treaty on European Union. That Treaty introduced a new consumer protection provision, Article 129a.

12 Article 129a provides as follows:

"1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them."

13 The national court maintained its question on the ground that it wondered whether that rule establishing the principle of a high degree of consumer protection might have any bearing on the direct effect as between individuals of Article 11 of the directive.

14 By its question, the national court essentially seeks to establish whether, in the absence of measures implementing the directive within the prescribed period, a consumer may, in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

Whether the provisions of the directive relating to the consumer' s right of action may be relied on in proceedings between the consumer and a lender

15 As the Court has consistently held (see, in particular, Case 152/84 Marshall I [1986] ECR 723, paragraph 48), a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a person.

16 As for the case-law on when directives may be relied upon against State entities, it is based

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on the binding nature of directives, which applies only with regard to the Member States to which they are addressed, and seeks to prevent a State from taking advantage of its own failure to comply with Community law (see Marshall I, paragraphs 48 and 49).

17 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations or decisions (see Faccini Dori, paragraph 24).

18 Article 129a of the Treaty cannot alter that case-law, even if only in relation to directives on consumer protection.

19 Suffice it to say in this connection that the scope of Article 129a is limited. On the one hand, it provides that the Community is under a duty to contribute to the attainment of a high level of consumer protection. On the other, it creates Community competence with a view to specific action relating to consumer protection policy apart from measures taken in connection with the internal market.

20 In so far as it merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals, Article 129a cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly relied on as between individuals.

21 Consequently, a consumer cannot base on the directive itself a right of action against a lender who is a private person following shortcomings in the supply of goods or the provision of services and assert that right before a national court.

22 Moreover, if the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered (Faccini Dori, paragraph 27).

23 In the light of the foregoing, it should be stated in reply to the national court' s question that, in the absence of measures implementing the directive within the prescribed period, a consumer may not, even in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

Costs

24 The costs incurred by the Spanish and French Governments 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 action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

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in answer to the question referred to it by the Juzgado de Primera Instancia No 10, Seville, by order of 30 June 1994, hereby rules:

In the absence of measures implementing Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit within the prescribed period, a consumer may not, even in view of Article 129a of the EC Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

DOCNUM	61994J0192
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1994 ; J ; judgment
PUBREF	European Court reports 1996 Page I-01281
DOC	1996/03/07
LODGED	1994/07/04
JURCIT	61984J0152-N48 : N 15 16 61984J0152-N49 : N 16 31987L0102-A11P2 : N 6 8 9 13 31987L0102 : N 1 61990J0006-N39 : N 22 11992E129A : N 1 11 - 20 23 61992J0091-N24 : N 17 61992J0091-N27 : N 22 61992J0091 : N 10 11
CONCERNS	Interprets 31987L0102 Interprets 11992E129A
SUB	Approximation of laws ; Consumer protection
AUTLANG	Spanish
OBSERV	Spain ; France ; Commission ; Member States ; Institutions
NATIONA	Spain

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NATCOUR
A9 Juzgado de Primera Instancia no 10 de Sevilla, auto de 30/06/1994
I1 Juzgado de Primera Instancia no 10 de Sevilla, auto de 27/09/1994
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PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Hirsch

DATES
of document: 07/03/1996
of application: 04/07/1994

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Judgment of the Court (Fifth Chamber)
of 23 March 2000
Berliner Kindl Brauerei AG v Andreas Siepert.
Reference for a preliminary ruling: Landgericht Potsdam - Germany.
Approximation of laws - Consumer credit - Directive 87/102 - Scope - Contracts of guarantee - Not covered.
Case C-208/98.

Approximation of laws - Consumer protection in respect of consumer credit - Directive 87/102 - Scope - Contract of guarantee for repayment of credit - Excluded

(Council Directive 87/102)

$$On a proper construction of Directive 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, it does not cover a contract of guarantee for repayment of credit where neither the guarantor nor the borrower was acting in the course of his trade or profession.

Thus, the fact that the Directive both refers to guarantees when listing the terms regarded as essential to a credit agreement from the point of view of the borrower and is silent as to the legal implications of guarantees or other forms of surety shows that, in contemplating guarantees for the repayment of credit solely in terms of consumer protection, the Directive intentionally excluded agreements to act as guarantor from its scope.

Furthermore, the scope of the Directive cannot be widened to cover contracts of guarantee solely on the ground that such agreements are ancillary to the principal agreement whose performance they underwrite, since there is no support for such an interpretation in the wording of the Directive, or in its scheme and aims.

(see paras 22, 26-27 and operative part)

In Case C-208/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landgericht Potsdam, Germany, for a preliminary ruling in the proceedings pending before that court between

Berliner Kindl Brauerei AG

and

Andreas Siepert,

on the interpretation of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting for the President of the Fifth Chamber, L. Sevon (Rapporteur), C. Gulmann, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Berliner Kindl Brauerei AG, by K. Großkopf, Rechtsanwalt, Warnemünde,

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- Andreas Siepert, by O. Zänker, Rechtsanwalt, Rostock,

- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and A. Dittrich, Ministerialrat in the Federal Ministry of Justice, acting as Agents,

- the Belgian Government, by J. Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, and R. Foucart, Director-General of the same Service, acting as Agents,

- the Spanish Government, by S. Ortíz Vaamonde, Abogado del Estado, acting as Agent,

- the French Government, by Kareen Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and Régine Loosli-Surrans, Chargé de Mission in the same Directorate, acting as Agents,

- the Finnish Government, by Tuula Pynnä, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Berliner Kindl Brauerei AG, represented by T. Lübbig, Rechtsanwalt, Berlin; of Andreas Siepert, represented by O. Zänker; of the German Government, represented by A. Dittrich; of the Spanish Government, represented by S. Ortíz Vaamonde; of the French Government, represented by R. Loosli-Surrans; and of the Commission, represented by U. Wölker, at the hearing on 10 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 October 1999,

gives the following

Judgment

1 By order of 27 April 1998, which was received at the Court on 2 June 1998, the Landgericht (Regional Court), Potsdam, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48; hereinafter the Directive).

2 The question arose during proceedings between Berliner Kindl Brauerei AG (hereinafter the Brewery) and Andreas Siepert concerning the performance of a contract of guarantee enforceable by that company.

The applicable legislation

3 Article 1(1) and (2)(a) and (c), first subparagraph, of the Directive provide:

1. This Directive applies to credit agreements.

2. For the purpose of this Directive:

(a) "consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;

...

(c) "credit agreement" means an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

4 Article 2(1(f) of the Directive provides that credit agreements involving amounts less than ECU

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200 or more than ECU 20 000 are not covered.

5 Under Article 4(1), (2)(a), (b), first subparagraph, (c), and (3) of the Directive, as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14):

1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended.

...

(c) a statement of the amount, number and frequency or dates of the payments which the consumer must make to repay the credit, as well as of the payments for interest and other charges; the total amount of these payments should also be indicated where possible;

...

3. The written agreement shall further include the other essential terms of the contract.

By way of illustration, the Annex to this Directive contains a list of terms which Member States may require to be included in the written agreement as being essential.

6 According to Point 1 of the Annex referred to, terms which, in credit agreements for financing the supply of goods or services, may be required in addition to a description of the goods or services covered by the agreement and the financing terms proper include, in particular, a description of the security required, if any (Point 1(vi)) and the cooling-off period, if any (Point 1(vii)).

7 Article 15 of the Directive provides:

This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.

8 In Germany the Directive was transposed into national law by the Verbraucherkreditgesetz of 17 December 1990 (Consumer Credit Law, Bundesgesetzblatt I, p. 2840; hereinafter the 1990 Law). In implementation of Article 15 of the Directive, Paragraphs 1 and 3(1)(2) of that Law state that, subject to a ceiling of DEM 100 000, it covers credit granted to a natural person, including credit for the purpose of commencing a trade or professional activity. In addition, Paragraph 7 of the 1990 Law provides that the document by which the consumer enters into a credit agreement becomes effective only if the consumer does not cancel it within one week of receiving from the creditor a notice informing him of his right of cancellation and the relevant procedure.

Facts and the question referred for a preliminary ruling

9 It appears from the order for reference that Mr Siepert gave a guarantee to the Brewery, to the value of DEM 90 000, for the repayment of loans granted by the Brewery to a third party for opening a restaurant. In so doing, Mr Siepert was not acting in the course of a trade or profession. The Landgericht also points out that Mr Siepert had not been informed of his right of cancellation under Paragraph 7 of the 1990 Law but, at a meeting in June 1994, he had told a representative of the Brewery that he was going to withdraw his consent to act as guarantor.

10 Since the principal debtor failed to meet his obligations, the Brewery called in the loans and obtained, by judgment of the Landgericht Rostock of 25 July 1997, an order directing him to pay the sum of DEM 28 952.43 together with interest. In his capacity as guarantor, Mr Siepert was ordered to pay the same amount, by judgment in default given on 8 December 1997.

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11 On Mr Siepert's application to have that judgment set aside, the Landegericht Potsdam decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Does a contract of guarantee concluded by a natural person not acting in the course of a trade or profession fall within the scope of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) if it serves to secure the repayment of a debt which the principal debtor did not incur in the course of a trade or profession already being pursued by him?

12 By that question, the national court is essentially asking whether, on a proper construction of the Directive, it covers a contract of guarantee for repayment of credit where neither the guarantor nor the borrower was acting in the course of his trade or profession.

13 In the submission of the Brewery, and of the German, Belgian and Finnish Governments, the Directive cannot apply to contracts of guarantee, primarily because they are not credit agreements within the meaning of Article 1(2)(c) thereof, but rather unilateral undertakings guaranteeing the repayment of credit. According to the Brewery, and the German and Finnish Governments, it is clear from the Commission Report of 11 May 1995 on the operation of Directive 87/102 (COM(95) 117 final; hereinafter the Report) - paragraph 345 of which states that the Directive does not cover guarantees - that a contract of guarantee does not fall within the scope of the Directive.

14 The German and Finnish Governments further argue that the Directive seeks to ensure that borrowers have to hand, on the date when the credit agreement is concluded, relevant information concerning the obligations entailed and, in so providing, to save them from assuming commitments which are unfair. On the other hand, the Directive contains no provisions for the protection of guarantors, whose primary concern is the solvency of the principal debtor. Moreover, those Governments refuse to accept that a contract of guarantee falls within the scope of the Directive in consequence merely of the ancillary character of the guarantee.

15 On the other hand, Mr Siepert, the Spanish and French Governments, and the Commission maintain - primarily because of the close link between a contract of guarantee and the credit agreement thereby underwritten - that the former may well be covered by the Directive. The Commission attributes to an unintentional oversight the fact that the Directive is silent as to the position of a person who, in furnishing a guarantee or in assuming the liability of a co-debtor, is bound under the credit agreement alongside the debtor.

16 On that point, the French Government and the Commission argue that in order to fall within the scope of the Directive, both the principal agreement and the contract of guarantee must be entered into by natural persons who are not acting in pursuance of a trade or profession. Since the contract of guarantee is ancillary to the credit agreement, guarantees covering credit which is not for the use of a consumer within the meaning of the Directive cannot fall within its scope.

17 The first point to note is that, under Article 1(2)(c) of the Directive, the only agreements covered are those whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

18 It is common ground that a contract of guarantee is not a credit agreement within the meaning of Article 1(2)(c). Since the wording of that provision does not accommodate the interpretation that guarantees are covered by the Directive, it must be determined whether they fall within its scope by implication, in the light of its scheme and aims.

19 First, as regards the scheme of the Directive, Article 4(3) provides that credit agreements, which are concluded in writing, are to set out the essential terms of the contract. Point 1(vi)

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of the Annex to the Directive lists examples of these, one of which is a description of the security required, if any. Thus, the mention of such security in the body of the credit agreement is designed to ensure that the contracting parties - the borrower and the creditor, themselves - have full knowledge of the guarantees upon which conclusion of the agreement depends. However, it cannot be inferred from that provision, in the absence of express provision to that effect in the Directive, that it also governs the legal situation created by the contract of guarantee vis-à-vis the parties to the credit agreement.

20 As regards the aims of the Directive, it is clear from the recitals in the preamble thereto that it was adopted with the dual aim of ensuring both the creation of a common consumer credit market (recitals 3 to 5) and the protection of consumers who avail themselves of such credit (recitals 6, 7 and 9).

21 In fact, it is with a view to protecting the consumer against unfair credit terms and to enabling him to have full knowledge of the terms of the future performance of the agreement entered into that Article 4 provides that, at the time of concluding such an agreement, the borrower must have to hand all information which could have a bearing on the implications of his undertaking, one such element being the security required.

22 Thus, the fact that the Directive both refers to guarantees when listing the terms regarded as essential to a credit agreement from the point of view of the borrower and is silent as to the legal implications of guarantees or other forms of surety shows that, in contemplating guarantees for the repayment of credit solely in terms of consumer protection, the Directive intentionally excluded agreements to act as guarantor from its scope.

23 That interpretation is supported by the statement at paragraph 345 of the Report that the Directive does not cover guarantees and by the fact that, at paragraph 16 of the Resolution of the European Parliament of 11 March 1997, concerning the Report (OJ 1997 C 115, p. 27), [the Parliament] points out that account needs to be taken of factual differences in comparison with the first-term borrower when extending certain commitments laid down in Directive 87/102/EEC to guarantors and sureties.

24 By virtue of its scheme and aims, therefore, the Directive is to be distinguished from Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31). The sole restriction which the latter directive places on the types of contract falling within its scope ratione materiae is that they must concern the supply of goods or services, provided that the purposes pursued by the consumers can be regarded as outside their trade or profession. It seeks to protect such consumers by conferring upon them a general right to terminate a contract which has been entered into, not on the initiative of the customer but of the trader, when the customer may not have been able to appreciate all the implications. It was specifically on the basis of the aim of that directive that the Court held that a contract for the benefit of a third party - more specifically, a contract of guarantee concluded in consequence of a doorstep sale - cannot be excluded a priori from its scope (see Case C-45/96 Dietzinger [1998] ECR I-1199, paragraph 19).

25 Given the objectives of Directive 87/102, on the other hand, which almost entirely concern the information to be given to the principal debtor regarding the implications of his commitment, and bearing in mind the fact that it is almost devoid of provisions that might afford an effective safeguard to the guarantor - whose primary concern is to have knowledge concerning the solvency of the principal debtor in order to assess the likelihood of being called upon to repay the credit granted - that directive must be regarded as not being designed to apply to contracts of guarantee.

26 Furthermore, the scope of the Directive cannot be widened to cover contracts of guarantee solely

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on the ground that such agreements are ancillary to the principal agreement whose performance they underwrite, since there is no support for such an interpretation in the wording of the Directive, as was pointed out in paragraph 18 above, or in its scheme and aims.

27 In the light of the foregoing, the answer to the question referred for a preliminary ruling must be that, on a proper construction of the Directive, it does not cover a contract of guarantee for the repayment of credit where neither the guarantor nor the borrower was acting in the course of his trade or profession.

Costs

28 The costs incurred by the German, Belgian, Spanish, French and Finnish Governments and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Landgericht Potsdam by order of 27 April 1998, hereby rules:

On a proper construction of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, it does not cover a contract of guarantee for repayment of credit where neither the guarantor nor the borrower was acting in the course of his trade or profession.

DOCNUM	61998J0208
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1998 ; J ; judgment
PUBREF	European Court reports 2000 Page I-01741
DOC	2000/03/23
LODGED	1998/06/02
JURCIT	31985L0577 : N 24 31987L0102-A01 : N 3 31987L0102-A02P2LC : N 17 - 18 31987L0102-A04 : N 5 21 31987L0102-A04P3 : N 19 31987L0102-A15 : N 7

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31987L0102-C03 : N 20
31987L0102-C04 : N 20
31987L0102-C05 : N 20
31987L0102-C06 : N 20
31987L0102-C07 : N 20
31987L0102-C08 : N 20
31987L0102-C09 : N 20
31987L0102-NPT1 : N 19
31987L0102 : N 1
61995J0045-N19 : N24
51997IP0010-PT16 : N 23

CONCERNS Interprets 31987L0102

SUB Approximation of laws ; Consumer protection

AUTLANG German

OBSERV Federal Republic of Germany ; Belgium ; Spain ; France ; Finland ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Landgericht Potsdam, Vorlagebeschluß vom 27/04/1998 (12 O 20/97)
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Sevon
DATES	of document: 23/03/2000 of application: 02/06/1998

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Judgment of the Court (Fifth Chamber)
of 4 March 2004
Cofinoga Mérignac SA v Sylvain Sachithanathan.
Reference for a preliminary ruling: Tribunal d'instance de Vienne - France.
Directives 87/102/EEC and 90/88/EEC - Consumer credit - Consumer information - Annual percentage rate of charge - Variable interest rate - Renewal of an agreement.
Case C-264/02.

In Case C-264/02,

REFERENCE to the Court under Article 234 EC by the Tribunal d'instance de Vienne (France) for a preliminary ruling in the proceedings pending before that court between

Cofinoga Mérignac SA

and

Sylvain Sachithanathan,

on the interpretation of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14),

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, C.W.A. Timmermans and S. von Bahr, Judges,

Advocate General: A. Tizzano,

Registrar: M. Mugica Arzamendi, Principal Administrator,

after considering the written observations submitted on behalf of:

- Cofinoga Mérignac SA, by J.-J. Gatineau, avocat,

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

- the Belgian Government, by A. Snoecx, acting as Agent,

- the United Kingdom Government, by P. Ormond and J. Turner, acting as Agents,

- the Commission of the European Communities, by M.-J. Jonczy and M. França, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Cofinoga Mérignac SA, represented by J.-J. Gatineau, the French Government, represented by C. Lemaire, acting as Agent, and the Commission, represented by M.-J. Jonczy, at the hearing on 3 July 2003,

after hearing the Opinion of the Advocate General at the sitting on

25 September 2003,

gives the following

Judgment

Costs

41. The costs incurred by the French, Belgian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are,

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for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal d'instance de Vienne by judgment of 5 July 2002, hereby rules:

Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Council Directive 90/88/EEC of 22 February 1990, does not require, before each renewal, on the existing terms and conditions, of a credit agreement for a specified period entered into in the form of a credit facility that may be drawn down in instalments and is linked to a credit card, that is repayable in monthly instalments and bears an interest rate that is expressed to be variable, that the lender inform the borrower in writing of the current annual percentage rate of charge and of the conditions under which the latter may be amended.

1. By judgment of 5 July 2002, received at the Court on 18 July 2002, the Tribunal d'instance de Vienne (Vienne District Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), as amended by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14) (hereinafter the Directive').

2. These questions have been raised in proceedings between Cofinoga Mérignac SA (hereinafter Cofinoga'), a company incorporated under French law, and Mr Sachithanathan concerning the payment of sums due under an agreement entered into by the latter with that company.

Legal background

Community legislation

3. Article 1(2)(c) of the Directive provides that it applies to credit agreements, which are defined as agreements whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation'.

4. Article 2(1) of the Directive states that:

This Directive shall not apply to:

...

(e) credit in the form of advances on a current account granted by a credit institution or financial institution other than on credit card accounts.

Nevertheless, the provisions of Article 6 shall apply to such credits;

... .'

5. Article 3 of the Directive provides that any advertisement in which a person offers credit or offers to arrange a credit agreement, and in which any figures relating to the cost of the credit are indicated, must also include a statement of the annual percentage rate of charge (hereinafter the APR').

6. Article 4(1) and (2) of the Directive states that:

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1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the [APR];

(b) a statement of the conditions under which the [APR] may be amended.

In cases where it is not possible to state the [APR], the consumer shall be provided with adequate information in the written agreement. This information shall at least include the information provided for in the second indent of Article 6(1).'

7. Article 1a(1)(a) of the Directive provides that the APR is to be calculated in accordance with the mathematical formula set out in an annex. Article 1a(4)(a) states that the APR is to be calculated at the time the credit contract is concluded'.

8. Article 6(1) and (2) of the Directive states that:

1. Notwithstanding the exclusion provided for in Article 2(1)(e), where there is an agreement between a credit institution or financial institution and a consumer for the granting of credit in the form of an advance on a current account, other than on credit card accounts, the consumer shall be informed at the time or before the agreement is concluded:

- of the credit limit, if any,

- of the annual rate of interest and the charges applicable from the time the agreement is concluded and the conditions under which these may be amended,

- of the procedure for terminating the agreement.

This information shall be confirmed in writing.

2. Furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs....

...'

National law

9. The principal provisions relating to consumer credit are to be found in Articles L. 311-1 to L. 311-37 of the Code de la consommation (Consumer Code). The provisions that are relevant to the main proceedings are as follows:

Article L. 311-8:

Credit transactions... shall be concluded in accordance with the terms set out in a preliminary offer which shall be provided to the borrower in duplicate...'

Article L. 311-9:

Where credit is granted, whether or not linked to the use of a credit card, which allows the borrower to draw down the amount of the loan in instalments on dates of his choosing, the preliminary offer is only required for the initial agreement.

It shall state that the duration of the agreement is limited to one year, with the possibility of renewal, and that the lender must notify the conditions for renewal of the agreement three months before its expiry. ...'

Article L. 311-10:

The preliminary offer:

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...

(2) Shall specify the amount of the credit... and, if applicable, the percentage rate of charge and total sums payable in addition to interest. ...

...'

Article L. 311-37:

The Tribunal d'instance shall have jurisdiction to hear disputes arising from the application of this chapter. Actions brought before it must be raised within two years of the event which gave rise to them and shall otherwise be time-barred...'

10. According to the information provided by the national court, the renewal of a credit agreement is treated in French law not as the extension of the original agreement, but as the entering into of a new agreement.

The main proceedings and the questions referred

11. Under an agreement dated 1 July 1993, Cofinoga granted a loan to Mr Sachithanathan in the form of a credit facility for a period of one year, with the possibility of renewal, available for drawdown in instalments and linked to a credit card, repayable in monthly instalments at an APR that was expressed to be variable.

12. As sums owing remained unpaid, Cofinoga brought proceedings against Mr Sachithanathan before the Tribunal d'instance de Vienne on 19 November 2001 for payment of the amounts due, together with interest and penalties. Mr Sachithanathan did not enter an appearance.

13. The Tribunal d'instance de Vienne asked Cofinoga to provide evidence that the agreement had been properly renewed following the expiry of the initial term of one year, as required by Article L. 311-9 of the Consumer Code.

14. Having considered Cofinoga's observations, the Tribunal d'instance de Vienne decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. On a proper construction of [Council Directives 87/102 and 90/88], must a national court uphold the interpretation of its law which requires institutions which lend consumer credit to inform a borrower-consumer in writing of the current [APR] before each extension of a renewable agreement for credit that is drawable in instalments and bears interest at a rate that is expressed to be variable?

2. On a proper construction of those directives, must the national court uphold the interpretation of its law which requires lending institutions to inform that consumer of the clause concerning the variation of that [APR] before each extension of such an agreement?

3. On a proper construction of those directives, is the national court to uphold the interpretation of its law which permits it to allow, without any time-limit, a plea of illegality vitiating the formation or extension of a consumer credit agreement, such as that arising from a failure to state the [APR], raised by the consumer or by the court of its own motion, in a dispute arising from an action for payment brought by the lending institution?

4. If not, must the national court, on a proper construction of those directives, uphold the interpretation of its law which permits it to set aside a provision of its national law which prohibits the consumer or the court of its own motion from raising a plea of illegality vitiating the formation or extension of a consumer credit agreement after a time-limit which derogates from the general law, on the grounds that this would constitute an exceptional restriction on the right of action of the consumer and undermine the effectiveness of consumer protection?'

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The questions referred

The first and second questions

15. By these two questions, the national court is essentially asking whether the Directive should be interpreted as meaning that before each renewal, on the existing terms and conditions, of a credit agreement for a specified period entered into in the form of a credit facility that may be drawn down in instalments and is linked to a credit card, that is repayable in monthly instalments and bears an interest rate that is expressed to be variable, the lender is obliged to inform the borrower in writing of the current APR and the conditions under which it may be amended.

Observations submitted to the Court

16. Cofinoga and the French Government are of the opinion that the reply to these questions should be in the negative. The United Kingdom Government shares this view, at least where the renewal of the agreement falls to be treated as an extension of the original agreement.

17. In their view, in a case such as that of the disputed agreement, the lender's obligations to provide information under Article 4 of the Directive do not apply to the renewal of the agreement. They rely in that regard both on the wording of Article 4 of the Directive, which makes it clear that it refers to the time when the agreement is entered into, and on the purpose of that article, which is to enable the consumer to assess the cost of the credit and compare it with other offers before committing himself.

18. Cofinoga and the French and United Kingdom Governments take the view, though for different reasons, that the lender's obligations to provide information under Article 6 of the Directive are also inapplicable in the circumstances of the main proceedings. According to Cofinoga and the United Kingdom Government, that article does not apply because its scope is restricted to advances on a current account, except for advances linked to credit cards, which is not the case under the disputed agreement. In the opinion of the French Government, Article 6 of the Directive lays down a general rule, applicable to all agreements covered by the Directive, but which is relevant only where the agreement is amended. This does not apply to the renewal of the disputed agreement.

19. For their part, the Belgian Government and the Commission propose that the reply to the first two questions should be in the affirmative.

20. The Belgian Government, amplifying the concerns expressed by the United Kingdom Government, observes that in French law the renewal of a credit agreement is treated as the entering into of a new agreement. It follows, in its view, that the lender must provide the information required by Article 4 of the Directive on each renewal of the agreement.

21. The Commission is of the opinion that Articles 4 and 6 of the Directive lay down two sets of general rules and should for that reason be interpreted cumulatively. Noting that Article 4 provides that the agreement must be made in writing and include a statement of the APR, and that Article 6 provides that the consumer is to be informed, during the period of the agreement, of any change in the annual rate of interest or in the relevant charges at the time when it occurs, the Commission concludes that the consumer should be informed before each extension of the agreement of any change in the rate of interest.

Reply by the Court

22. In the light of the observations submitted to the Court, the first issue to be considered is whether Article 4 of the Directive should be interpreted as meaning that, where a credit agreement is renewed on the existing terms and conditions, the lender is required to inform the consumer of the APR.

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23. The wording of Article 4 of the Directive does not indicate expressly when the information required under it is to be provided to the consumer. Nevertheless, the broad logic of this provision leaves the matter in no doubt. In providing that the credit agreement must be made in writing and that the written agreement must include a statement of the APR and the conditions under which it may be amended, Article 4(1) and (2) of the Directive clearly refers to the time when the agreement is entered into. This interpretation is supported by Article 1a of the Directive, which lays down rules for calculating the APR, and which states at paragraph (4)(a) that this is to be calculated at the time the credit contract is concluded'.

24. As neither the wording of Article 4 of the Directive nor the broad logic of the scheme established by that provision support an interpretation according to which the consumer must be informed of the APR on the renewal of a credit agreement on the existing terms and conditions, the issue arises whether the ends pursued by the Directive require that the consumer be informed at this time.

25. It should be noted in that regard that it is clear from the recitals in the preamble thereto that the Directive was adopted with the dual aim of ensuring both the creation of a common market in consumer credit (third to fifth recitals) and the protection of consumers who avail themselves of such credit (sixth, seventh and ninth recitals) (Case C-208/98 Berliner Kindl Brauerei [2000] ECR I-1741, paragraph 20).

26. Informing the consumer of the total cost of credit, in the form of an interest rate calculated according to a single mathematical formula, is of critical importance in this regard. First, this information, which, under Article 3 of the Directive, must be stated in any advertising, contributes to the transparency of the market, as it enables the consumer to compare offers of credit. Secondly, it enables the consumer to assess the extent of his liability.

27. In the light of these aims, and as the Advocate General has noted in point 53 of his Opinion, it appears that the information in question will be particularly useful if it is provided to the consumer at the decisive phase which precedes the entering into of the agreement. Thereafter, for example when the agreement is renewed on its existing terms and conditions, this information, which has already been provided, would appear to be of less importance.

28. It follows that, in the absence of express provision to that effect, and in the absence of factors which, on the basis of the broad logic or the aims of the Directive, might lead to the inference that Article 4 of the Directive should be broadly construed, that provision cannot be interpreted as meaning that it requires the lender to inform the consumer of the APR prior to the renewal of a credit agreement on the existing terms and conditions.

29. The fact that, according to the information provided by the national court, the renewal of a credit agreement is treated in French law not as the extension of the original agreement, but as the entering into of a new agreement, does not affect this analysis. As the Advocate General points out in point 43 of his Opinion, the objective of harmonisation underlying the Directive would be frustrated if the interpretation of the rules laid down under it were to depend on the specific provisions of the national law of a particular Member State.

30. In the light of the interpretation to be given to Article 4 of the Directive, it is then appropriate to consider whether Article 6 of the Directive should be interpreted as meaning that, where a credit agreement is renewed on the existing terms and conditions, the lender is required to inform the consumer of the APR.

31. Having regard to the observations submitted to the Court, the scope of that provision must first be determined.

32. Article 6(1) of the Directive states that: notwithstanding the exclusion provided for in Article

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2(1)(e), where there is an agreement between a credit institution or financial institution and a consumer for the granting of credit in the form of an advance on a current account, other than on credit card accounts', the consumer must be informed at the time or before the agreement is concluded' of those terms and conditions of the agreement specified in the remainder of the provision. Article 6(2) adds that: furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs'. It is thus clear from the wording of Article 6 that Article 6(2) refers to the same agreements as those covered by Article 6(1).

33. It is also equally clear from the wording of Articles 2, 4 and 6 of the Directive that the broad logic of the scheme which they establish means that Article 6 lays down a special rule applicable to a type of agreement which is otherwise excluded from the scope of the general rules laid down under the Directive.

34. Article 2(1)(e) of the Directive excludes from its scope credit granted in the form of advances on a current account other than on credit card accounts. For credit granted in the form of advances on a current account, Article 6(2) of the Directive obliges the lender to provide the consumer with information which is not required under Article 4 of the same directive, while Article 6(1) obliges the lender to provide to the consumer the information specified in it, which does not include the APR.

35. Furthermore, the second subparagraph of Article 4(2) of the Directive provides that in cases where it is not possible to state the APR at the time at which the agreement is entered into, the consumer should none the less be provided with adequate information' in the written agreement, including at least... the information provided for in the second indent of Article 6(1)'. As the Advocate General has noted in point 73 of his Opinion, there would be no need whatever for an express reference of this kind if Article 6 applied in its own right to all agreements subject to the Directive.

36. It follows that Article 6 applies only to those agreements expressly referred to in it, that is to say, credits in the form of an advance on a current account, other than on credit card accounts.

37. It is common ground that the disputed agreement does not fall within that category.

38. That being so, the rules laid down under Article 6 of the Directive cannot be relevant for determining the obligations to provide information imposed on the lender in a case such as that which is the subject of the main proceedings.

39. In the light of the foregoing, the answer to the first and second questions must be that the Directive does not require, before each renewal, on the existing terms and conditions, of a credit agreement for a specified period entered into in the form of a credit facility that may be drawn down in instalments and is linked to a credit card, that is repayable in monthly instalments and bears an interest rate that is expressed to be variable, that the lender inform the borrower in writing of the current APR and of the conditions under which the latter may be amended.

The third and fourth questions

40. In light of the answer to the first and second questions, there is no need to reply to the third and fourth questions.

DOCNUM 62002J0264

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2002 ; J ; judgment
PUBREF	European Court reports 2004 Page 00000
DOC	2004/03/04
LODGED	2002/07/18
JURCIT	31987L0102-A01 : N 4 31987L0102-A02 : N 4 34 35 31987L0102-A03 : N 5 26 31987L0102-A04 : N 6 8 22 - 24 28 30 34 31987L0102-A06 : N 30 32 - 34 36 38 31987L0102 : N 1 3 14 61998J0208 : N 25
CONCERNS	Interprets 31987L0102
SUB	Consumer protection
AUTLANG	French
OBSERV	France ; Belgium ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	France
NATCOUR	*A9* Tribunal d'instance de Vienne, jugement du 05/07/2002 (RG nAo 11-01-001394)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tizzano
JUDGRAP	Jann
DATES	of document: 04/03/2004 of application: 18/07/2002

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Judgment of the Court
of 21 June 1978
Bertrand v Paul Ott KG.
Reference for a preliminary ruling: Cour de cassation - France.
Sale of goods on instalment credit terms.
Case 150/77.

CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMMERCIAL MATTERS - JURISDICTION IN THE CASE OF SALES AND LOANS ON INSTALMENTS - CONCEPT OF ' ' SALE OF GOODS ON INSTALMENT CREDIT TERMS ' ' - INDEPENDENT CLASSIFICATION WITHIN THE CONTEXT OF THE CONVENTION - DESCRIPTION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 13 AND 14)

SINCE THE CONCEPT OF A CONTRACT OF SALE ON INSTALMENT CREDIT TERMS VARIES FROM ONE MEMBER STATE TO ANOTHER , IN ACCORDANCE WITH THE OBJECTIVES PURSUED BY THEIR RESPECTIVE LAWS , IT IS NECESSARY , IN THE CONTEXT OF THE CONVENTION , TO CONSIDER THAT CONCEPT AS BEING INDEPENDENT AND THEREFORE TO GIVE IT A UNIFORM SUBSTANTIVE CONTENT ALLIED TO THE COMMUNITY ORDER.

ACCORDING TO THE PRINCIPLES COMMON TO THE LAWS OF THE MEMBER STATES , THE SALE OF GOODS ON INSTALMENT CREDIT TERMS IS TO BE UNDERSTOOD AS A TRANSACTION IN WHICH THE PRICE IS DISCHARGED BY WAY OF SEVERAL PAYMENTS OR WHICH IS LINKED TO A FINANCING CONTRACT. HOWEVER , A RESTRICTIVE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION , IN CONFORMITY WITH THE OBJECTIVES PURSUED BY SECTION 4 , ENTAILS THE RESTRICTION OF THE JURISDICTIONAL ADVANTAGE FOR WHICH PROVISION IS MADE BY THAT ARTICLE TO BUYERS WHO ARE IN NEED OF PROTECTION , THEIR ECONOMIC POSITION BEING ONE OF WEAKNESS IN COMPARISON WITH SELLERS BY REASON OF THE FACT THAT THEY ARE PRIVATE FINAL CONSUMERS AND ARE NOT ENGAGED , WHEN BUYING THE PRODUCT ACQUIRED ON INSTALMENT CREDIT TERMS , IN TRADE OR PROFESSIONAL ACTIVITIES.

IN CASE 150/77

REFERENCE TO THE COURT PURSUANT TO ARTICLES 1 TO 3 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE FRENCH COUR DE CASSATION (FIRST CIVIL CHAMBER) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

SOCIETE BERTRAND , HAVING ITS REGISTERED OFFICE AT ARNAGE (FRANCE)

AND

PAUL OTT KG , HAVING ITS REGISTERED OFFICE AT NEUSTADT/STUTTGART (FEDERAL REPUBLIC OF GERMANY)

ON THE INTERPRETATION OF THE CONCEPT ' ' SALE OF GOODS ON INSTALMENT CREDIT TERMS ' ' WITHIN THE MEANING OF ARTICLE 13 OF THE SAID CONVENTION OF 27 SEPTEMBER 1968 ,

1BY JUDGMENT OF 8 NOVEMBER 1977 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 15 DECEMBER 1977 , THE FRENCH COUR DE CASSATION REFERRED TO THE COURT OF JUSTICE A QUESTION , PURSUANT TO ARTICLES 1 TO 3 OF THE PROTOCOL OF

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3 JUNE 1971 (JOURNAL OFFICIEL L 204 , P. 28) ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (JOURNAL OFFICIEL L 299 OF 31 DECEMBER 1972 , P . 32), HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ' , FOR A PRELIMINARY RULING CONCERNING THE INTERPRETATION OF ARTICLES 13 , 14 AND 28 OF THE SAID CONVENTION.

2THAT QUESTION HAS BEEN RAISED IN THE CONTEXT OF A DISPUTE BETWEEN TWO COMMERCIAL UNDERTAKINGS , ONE HAVING ITS REGISTERED OFFICE IN GERMANY , THE OTHER IN FRANCE , CONCERNING A CONTRACT , DATED 12 FEBRUARY 1972 , FOR THE SALE OF A MACHINE TOOL , THE PRICE OF WHICH , FIXED AT DM 74 205 , WAS TO BE PAID BY THE FRENCH COMPANY BY WAY OF TWO EQUAL BILLS OF EXCHANGE PAYABLE AT 60 AND 90 DAYS , WHICH WERE ONLY PARTIALLY DISCHARGED.

3BY JUDGMENT OF 10 MAY 1974 THE LANDGERICHT STUTTGART ORDERED THE FRENCH COMPANY , IN ITS ABSENCE , TO PAY THE SUM OF DM 7 139 , PLUS INTEREST .

4THAT DECISION WAS DECLARED TO BE ENFORCEABLE IN FRANCE , FIRST BY ORDER OF THE TRIBUNAL DE GRANDE INSTANCE , LE MANS , OF 30 JUNE 1975 , AND THEN BY CONFORMATORY JUDGMENT OF THE COUR D ' APPEL , ANGERS , OF 20 MAY 1976 .

5AN APPEAL WAS MADE AGAINST THAT JUDGMENT ON A POINT OF LAW.

6THE COUR DE CASSATION HELD THAT THE JUDGMENT OF THE COUR D ' APPEL , ANGERS , ' ' WOULD BE VALID UNDER THE THIRD PARAGRAPH OF ARTICLE 28 OF THE BRUSSELS CONVENTION , BY VIRTUE OF WHICH THE JURISDICTION OF THE COURTS OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN MAY NOT BE REVIEWED BY THE COURT BEFORE WHICH ENFORCEMENT IS SOUGHT UNLESS THE SALE CAN BE HELD TO BE A SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE CONVENTION , IN WHICH CASE , UNDER THE SECOND PARAGRAPH OF ARTICLE 14 AND THE FIRST PARAGRAPH OF ARTICLE 28 , PROCEEDINGS MAY BE BROUGHT ONLY IN THE COURTS OF THE STATE IN WHICH THE RESPONDENT COMPANY IS DOMICILED , NAMELY , THE COURTS OF FRANCE , AND EXECUTION MUST BE WITHHELD FROM THE DECISION OF A GERMAN COURT ' '.

7THE COUR DE CASSATION DEDUCED FROM THIS THAT THE SOLUTION TO THE PROBLEM DEPENDED UPON THE STATUS TO BE ACCORDED TO THE CONTRACT AND IT THEREFORE REFERRED THE CASE TO THE COURT OF JUSTICE IN ORDER TO ASCERTAIN BY WAY OF A PRELIMINARY RULING ' ' WHETHER THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY WAY OF TWO EQUAL BILLS OF EXCHANGE PAYABLE AT 60 AND 90 DAYS CAN BE HELD TO BE A SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION ' '.

8IN RELATION TO THE SALE OF GOODS ON INSTALMENT CREDIT TERMS , THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION PROVIDES THAT ' ' PROCEEDINGS MAY BE BROUGHT BY A SELLER AGAINST A BUYER... ONLY IN THE COURTS OF THE STATE IN WHICH THE DEFENDANT IS DOMICILED ' '.

9IN CONSEQUENCE OF THAT IMPERATIVE RULE OF JURIDICTION THE LANDGERICHT STUTTGART , THE COURT IN WHICH THE ORIGINAL JUDGMENT WAS GIVEN , THE TRIBUNAL DE GRANDE INSTANCE , LE MANS , AND THE COUR D ' APPEL , ANGERS , THE COURTS IN WHICH ENFORCEMENT WAS SOUGHT , REFUSED , WHETHER BY IMPLICATION OR EXPRESSLY , IN DEFINING THEIR JURISDICTION , TO CLASSIFY THE CONTRACT

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OF SALE IN QUESTION AS A CONTRACT FOR THE SALE OF GOODS ON INSTALMENT CREDIT TERMS.

10THE RESERVATIONS OF THE COUR DE CASSATION REGARDING THE PRECISE STATUS OF THE SAID CONTRACT PERSUADED IT TO REFER THE ABOVE-MENTIONED QUESTION TO THE COURT OF JUSTICE.

11BY THAT QUESTION THE COURT IS ASKED WHETHER A CONTRACT OF SALE SUCH AS THAT DESCRIBED IS ENTITLED TO THE PRIVILEGED POSITION WITH REGARD TO JURISDICTION CREATED BY THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION.

12THE CONCEPT OF A CONTRACT OF SALE ON INSTALMENT CREDIT TERMS VARIES FROM ONE MEMBER STATE TO ANOTHER , IN ACCORDANCE WITH THE OBJECTIVES PURSUED BY THEIR RESPECTIVE LAWS.

13ALTHOUGH ALL OF THOSE LAWS INCORPORATE THE IDEA OF PROTECTION FOR THE BUYER ' ' ON INSTALMENTS ' ' BECAUSE , IN GENERAL , HE IS THE WEAKER PARTY IN ECONOMIC TERMS IN COMPARISON WITH THE SELLER , CERTAIN OF THEM ARE ALSO BASED ON CONSIDERATIONS OF ECONOMIC , MONETARY AND SAVINGS POLICY , WHICH ARE INTENDED TO CONTROL THE PRACTICE OF SALES ON INSTALMENT CREDIT TERMS , IN PARTICULAR IN RELATION TO CONSUMER DURABLE GOODS (CARS , HOUSEHOLD ELECTRICAL AND AUDIO-VISUAL EQUIPMENT , ETC .), MOST OFTEN BY THE INDIRECT EXPEDIENT OF PROVISIONS RELATING TO MINIMUM DEPOSITS OR TO THE MAXIMUM DURATION OF CREDIT OR BY LAYING DOWN MINIMUM OR MAXIMUM VALUES FOR THE TOTAL SALE PRICE.

14SINCE THESE VARIOUS OBJECTIVES HAVE LED TO THE CREATION OF DIFFERENT RULES IN THE VARIOUS MEMBER STATES IT IS NECESSARY , FOR THE PURPOSE OF ELIMINATING OBSTACLES TO LEGAL RELATIONS AND TO THE SETTLEMENT OF DISPUTES IN THE CONTEXT OF INTRA-COMMUNITY RELATIONS IN MATTERS OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS , TO CONSIDER THAT CONCEPT AS BEING INDEPENDENT AND THEREFORE COMMON TO ALL THE MEMBER STATES.

15IN FACT , IT WOULD NOT BE POSSIBLE TO GUARANTEE THE HARMONIOUS OPERATION OF ARTICLE 13 ET SEQ. OF THE CONVENTION IF THE EXPRESSION IN QUESTION WERE GIVEN DIFFERENT MEANINGS IN THE VARIOUS MEMBER STATES ACCORDING TO THE COURT FIRST SEISED OF A DISPUTE CONCERNING A CONTRACT FOR THE SALE OF GOODS ON INSTALMENT CREDIT TERMS OR THE COURT HAVING JURISDICTION TO ORDER ENFORCEMENT.

16IT IS THEREFORE INDISPENSABLE , FOR THE COHERENCE OF THE PROVISIONS OF SECTION 4 OF THE CONVENTION , TO GIVE THAT EXPRESSION A UNIFORM SUBSTANTIVE CONTENT ALLIED TO THE COMMUNITY ORDER.

17TO THIS FINDING MUST BE ADDED THE FACT THAT THE COMPULSORY JURISDICTION PROVIDED FOR IN THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION MUST , BECAUSE IT DEROGATES FROM THE GENERAL PRINCIPLES OF THE SYSTEM LAID DOWN BY THE CONVENTION IN MATTERS OF CONTRACT , SUCH AS MAY BE DERIVED IN PARTICULAR FROM ARTICLES 2 AND 5 (1), BE STRICTLY LIMITED TO THE OBJECTIVES PROPER TO SECTION 4 OF THE SAID CONVENTION .

18THOSE OBJECTIVES , AS ENSHRINED IN ARTICLES 13 AND 14 OF THE CONVENTION , WERE INSPIRED SOLELY BY A DESIRE TO PROTECT CERTAIN CATEGORIES OF BUYERS WHO , HAVING BEEN PARTIES TO CONTRACTS FOR THE ' ' SALE OF GOODS ON INSTALMENT

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CREDIT TERMS ' ' , MAY BE SUED BY THE SELLER ONLY IN THE COURTS OF THE STATE ON THE TERRITORY OF WHICH THE SAID BUYERS ARE DOMICILED , WHEREAS SELLERS DOMICILED ON THE TERRITORY OF A CONTRACTING STATE MAY BE SUED EITHER IN THE COURTS OF THAT STATE OR IN THE COURTS OF THE CONTRACTING STATE IN WHICH THE BUYER IS DOMICILED .

19IN ORDER TO REPLY TO THE QUESTION REFERRED TO THE COURT AN ATTEMPT MUST BE MADE TO ELABORATE AN INDEPENDENT CONCEPT OF THE CONTRACT OF SALE ON INSTALMENT CREDIT TERMS IN VIEW OF THE GENERAL PRINCIPLES WHICH ARE APPARENT IN THIS FIELD FROM THE BODY OF LAWS OF THE MEMBER STATES AND BEARING IN MIND THE OBJECTIVE OF THE PROTECTION OF A CERTAIN CATEGORY OF BUYERS.

20IT IS CLEAR FROM THE RULES COMMON TO THE LAWS OF THE MEMBER STATES THAT THE SALE OF GOODS ON INSTALMENT CREDIT TERMS IS TO BE UNDERSTOOD AS A TRANSACTION IN WHICH THE PRICE IS DISCHARGED BY WAY OF SEVERAL PAYMENTS OR WHICH IS LINKED TO A FINANCING CONTRACT.

21A RESTRICTIVE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 14 , IN CONFORMITY WITH THE OBJECTIVES PURSUED BY SECTION 4 , ENTAILS THE RESTRICTION OF THE JURISDICTIONAL ADVANTAGE DESCRIBED ABOVE TO BUYERS WHO ARE IN NEED OF PROTECTION , THEIR ECONOMIC POSITION BEING ONE OF WEAKNESS IN COMPARISON WITH SELLERS BY REASON OF THE FACT THAT THEY ARE PRIVATE FINAL CONSUMERS AND ARE NOT ENGAGED , WHEN BUYING THE PRODUCT ACQUIRED ON INSTALMENT CREDIT TERMS , IN TRADE OR PROFESSIONAL ACTIVITIES .

22THE ANSWER TO BE GIVEN TO THE NATIONAL COURT SHOULD THEREFORE BE THAT THE CONCEPT OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 IS NOT TO BE UNDERSTOOD TO EXTEND TO THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY WAY OF BILLS OF EXCHANGE SPREAD OVER A PERIOD .

COSTS

23THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES AND BY THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY , THE ITALIAN REPUBLIC AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE .

24SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE FRENCH COUR DE CASSATION BY JUDGMENT OF 8 NOVEMBER 1977 , HEREBY RULES :

THE CONCEPT OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 IS NOT TO BE UNDERSTOOD TO EXTEND TO THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY WAY OF BILLS OF EXCHANGE SPREAD OVER A PERIOD.

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DOCNUM	61977J0150
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1977 ; J ; judgment
PUBREF	European Court reports 1978 Page 01431 Greek special edition 1978 Page 00441 Portuguese special edition 1978 Page 00487 Spanish special edition 1978 Page 00421
DOC	1978/06/21
LODGED	1977/12/15
JURCIT	41968A0927(01)-A02 : N 17 41968A0927(01)-A05PT1 : N 17 41968A0927(01)-A13 : N 1 6 7 15 18 22 41968A0927(01)-A14 : N 1 18 41968A0927(01)-A14L2 : N 6 8 11 17 21 41968A0927(01)-A28 : N 1 41968A0927(01)-A28L1 : N 6 41968A0927(01)-A28L3 : N 6
CONCERNS	Interprets 41968A0927(01)-A13
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Commission ; Federal Republic of Germany ; United Kingdom ; Italy ; Member States ; Institutions
NATIONA	France
NATCOUR	*A8* Cour d'appel d'Angers, 1re chambre, arrêt du 20/05/76 (847/75) *A9* Cour de cassation (France), 1re chambre civile, arrêt du 08/11/77 (76-13.547 751) *P1* Cour de cassation (France), 1re chambre civile, arrêt du 23/01/79 (76-13.547 89) - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1979 I no 28 - Journal du droit international 1979 p.373-375 - La Semaine juridique - édition générale 1979 IV p.105 - Revue trimestrielle de droit européen 1979 p.181-182 ºNOTESº - Gulphe, Pierre: Revue trimestrielle de droit européen 1979 p.182-183 - Fadlallah, Ibrahim: Journal du droit international 1979 p.375-379 - Vasseur, Michel: Recueil Dalloz Sirey 1980 IR. p.16
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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Touffait

DATES of document: 21/06/1978
of application: 15/12/1977

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**Judgment of the Court
of 19 January 1993
Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - First and second paragraphs of Article 13 - Jurisdiction in proceedings concerning contracts concluded by consumers - Concept of consumer - Proceedings brought by a company, as assignee of the claims of a private individual.
Case C-89/91.**

++++

Convention on Jurisdiction and the Enforcement of Judgments ° Jurisdiction in proceedings concerning contracts concluded by consumers ° Concept of "consumer" ° Plaintiff acting in pursuance of his trade or professional activity, as the assignee of the rights of a private individual ° Excluded

(Convention of 27 September 1968, Art. 13, first para., and Art. 14, as amended by the 1978 Accession Convention)

The special system established by Article 13 et seq. of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is inspired by the concern to protect the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, so that the consumer must not be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled. Those provisions affect only a private final consumer, not engaged in trade or professional activities, who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14. It follows that Article 13 of the Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

In Case C-89/91,

REFERENCE to the Court under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Shearson Lehman Hutton Inc.

and

TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH

on the interpretation of the first and second paragraphs of Article 13 of the above-mentioned Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to that Convention (OJ 1978 L 304, p. 1),

THE COURT,

composed of: C.N. Kakouris, President of Chamber, acting for the President, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

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Advocate General: M. Darmon,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Shearson Lehman Hutton Inc., by G. Limberger, Rechtsanwalt, Frankfurt,

° TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH, by J. Kummer, Rechtsanwalt, Karlsruhe,

° the German Government, by C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent, assisted by A. Boehlke, Rechtsanwalt, Frankfurt,

having regard to the Report for the Hearing,

after hearing the oral observations of Shearson Lehman Hutton Inc., TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH and the Commission at the hearing on 7 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 October 1992,

gives the following

Judgment

1 By order of 29 January 1991, received at the Court on 11 March 1991, the Bundesgerichtshof referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, hereinafter "the Convention"), four questions on the interpretation of the first and second paragraphs of Article 13 of the Convention.

2 Those questions were raised in proceedings between TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH, a company established at Munich (Federal Republic of Germany) (hereinafter "TVB"), and E.F. Hutton & Co. Inc., a firm established in New York (United States of America), which has in the meantime been taken over by the company Shearson Lehman Hutton Inc., also established in New York (hereinafter "Hutton Inc.").

3 It is apparent from the documents forwarded to the Court that TVB brought an action before the German courts against Hutton Inc., in reliance on a right assigned to it. The assignor, a German judge, had instructed the brokers Hutton Inc. to carry out currency, security and commodity futures transactions under an agency contract. To that end, the assignor paid over considerable sums in 1986 and 1987, but lost nearly all of his investments in those transactions.

4 Hutton Inc. had offered its services through press advertisements in the Federal Republic of Germany. The business relationships with the assignor were arranged through E.F. Hutton & Co. GmbH (hereinafter "Hutton GmbH"), whose registered office is in Germany, which is dependent on Hutton Inc. and undertakes consultancy functions vis-à-vis its customers for the purposes of Hutton Inc.' s operations. Hutton GmbH had acted, at least in an intermediary capacity, in connection with all the orders to buy and sell given by the assignor. The shares in Hutton GmbH belong to E.F. Hutton International Inc., a wholly-owned subsidiary of Hutton Inc. whose registered office is in New York. In addition, many persons having managerial responsibilities within Hutton Inc. also have like responsibilities within Hutton GmbH.

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5 TVB claims from Hutton Inc. the return of the sums lost by the assignor. It bases its claims on unjust enrichment and on the right to damages for breach of contractual and pre-contractual obligations and for tortious conduct, on the ground that Hutton Inc. had not sufficiently informed the assignor of the risks involved in futures transactions.

6 The case was brought before the Landgericht Muenchen (Regional Court, Munich), which declined jurisdiction to hear TVB' s claim. On appeal, the Oberlandesgericht Muenchen (Higher Regional Court, Munich) overturned that decision and held that the Landgericht did have jurisdiction. Hutton Inc. appealed on a point of law against that decision to the Bundesgerichtshof.

7 Taking the view that the dispute raised issues relating to interpretation of the Convention, the Bundesgerichtshof decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

"Question 1

Does subparagraph 3 of the first paragraph of Article 13 of the Convention cover agency contracts concerning currency, security and commodity futures dealings?

Question 2

Is it sufficient, for subparagraph 3(a) of the first paragraph of Article 13 of the Convention to apply, that before conclusion of the contract the other party to the contract with the consumer advertised in newspapers in the State of the consumer' s domicile, or does the provision require a connection between the advertising and the conclusion of the contract?

Question 3

Does the other party to the contract with the consumer have a branch, agency or other establishment within the meaning of the second paragraph of Article 13 if, for the conclusion of and performance of the contract, it uses a company having its registered office in the State of the consumer' s domicile, which is effectively owned by it and has staff links with it but has no authority to contract on its behalf, acting only as intermediary and advising the consumer, and are disputes which arise in connection with the relations so arranged between the consumer and the other party to the contract disputes arising out of the operation of the branch, agency or other establishment?

Question 4

(a) In addition to claims for damages for breach of contractual obligations, does the phrase 'proceedings concerning a contract' in the first paragraph of Article 13 of the Convention also cover claims arising out of the breach of pre-contractual obligations (culpa in contrahendo) and unjust enrichment in connection with the unwinding of contractual transactions?

(b) In an action in which claims for damages for breach of contractual and pre-contractual obligations, claims relating to unjust enrichment and claims for damages for tort or delict are put forward, does the first paragraph of Article 13 of the Convention give ancillary jurisdiction to hear the non-contractual claims because of their relationship to the contractual claims?"

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

9 As a preliminary point, it should be noted that the questions submitted by the national court all relate to the interpretation of the first and second paragraphs of Article 13 of the Convention, which form part of Section 4, entitled "Jurisdiction over consumer contracts", of Title II of the Convention, concerning the rules governing jurisdiction.

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10 Consequently, it must first be ascertained whether the conditions for the application of that provision are satisfied in a situation such as that in point in the main proceedings, since the questions relating to the scope of application of the provisions of the Convention, which determine jurisdiction within the international legal order, must be regarded as being matters of public policy.

11 It is apparent from the order for reference that, in the case in the main proceedings, the action for the recovery of debts was brought against Hutton Inc., not by the private individual who was the other party to the contract with Hutton Inc., but by a company, the assignee of the rights of that individual.

12 It must therefore be considered whether a plaintiff, such as the plaintiff in the main proceedings, may be regarded as a consumer within the meaning of the Convention and must, therefore, benefit from the special rules governing jurisdiction laid down by the Convention with respect to consumer contracts.

13 For the purpose of answering that question, it is necessary to bear in mind the principle, established by case-law (see, in particular, the judgments in Case 150/77 Bertrand v Ott [1978] ECR 1431, paragraphs 14 to 16 and 19, and in Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, paragraph 10), according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This rule must apply, in particular, to the concept of "consumer" within the meaning of Article 13 et seq. of the Convention, in so far as that concept is the principal factor in the determination of rules governing jurisdiction.

14 In that connection, it must first be noted that under the system of the Convention the general principle, stated in the first paragraph of Article 2, is that the national courts of the Contracting State in which the defendant is domiciled are to have jurisdiction.

15 It is only by way of derogation from that general principle that the Convention provides for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation comes under a rule of special jurisdiction, or must, where the situation comes under a rule of exclusive jurisdiction or of prorogation of jurisdiction, be sued in the courts of another Contracting State.

16 Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see the judgments in Bertrand, paragraph 17, and Handte, paragraph 14, cited above).

17 Such an interpretation must apply a fortiori with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff' s domicile (see judgment in Case C-220/88 Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others [1990] ECR I-49, paragraphs 16 and 19).

18 Secondly, the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled.

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19 The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified.

20 In that regard, it is important to note, in the first place, that the first paragraph of Article 13 of the Convention defines the consumer as a person acting "for a purpose which can be regarded as being outside his trade or profession" and provides that the various types of contracts listed in that article, and to which the provisions of Section 4 of Title II of the Convention apply, must have been concluded by the consumer.

21 Secondly, the first paragraph of Article 14 of the Convention provides for the courts of the Contracting State in which the consumer is domiciled to have jurisdiction to hear and determine the "proceedings against the other party to a contract".

22 It follows from the wording and the function of those provisions that they affect only a private final consumer, not engaged in trade or professional activities (see also, to that effect, the judgment in Bertrand, cited above, paragraph 21, and the Expert Report drawn up when the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland acceded to the Convention, OJ 1979 C 59, p. 71, paragraph 153), who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14.

23 As the Advocate General pointed out in paragraph 26 of his Opinion, the Convention protects the consumer only in so far as he personally is the plaintiff or defendant in proceedings.

24 It follows that Article 13 of the Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

25 It follows from the foregoing considerations that it is not necessary to give a ruling on the specific questions put to the Court by the Bundesgerichtshof.

Costs

26 The costs incurred by the German 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 proceedings pending 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 Bundesgerichtshof by order of 29 January 1991, hereby rules:

Article 13 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

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DOCNUM	61991J0089
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; J ; judgment
PUBREF	European Court reports 1993 Page I-00139
DOC	1993/01/19
LODGED	1991/03/11
JURCIT	41968A0927(01)-A02L1 : N 14 41968A0927(01)-A13 : N 13 18 22 24 41968A0927(01)-A13L1 : N 1 20 41968A0927(01)-A13L1PT3LA : N 7 41968A0927(01)-A13L2 : N 1 7 41968A0927(01)-A14 : N 17 22 41968A0927(01)-A14L1 : N 21 61977J0150 : N 13 16 22 41978A1009(01) : N 1 61988J0220 : N 17 61991J0026 : N 13 16
CONCERNS	Interprets 41968A0927(01)-A13
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A5* Landgericht München I, Urteil vom 20/12/88 (32 O 4943/88) *A6* Oberlandesgericht München, Urteil vom 20/09/89 (15 U 1886/89) *A7* Bayerisches Oberstes Landesgericht, Beschluß vom 22/12/89 (1 Z 412/89) *A8* Bundesgerichtshof, Beschluß vom 23/10/90 (XI ZR 17/90) *A9* Bundesgerichtshof, Vorlagebeschluß vom 29/01/91 (XI ZR 17/90) - Europäische Zeitschrift für Wirtschaftsrecht 1991 p.544 - Neue Juristische Wochenschrift 1991 p.1632 - Wertpapier-Mitteilungen 1991 p.360-361 - Zeitschrift für Wirtschaftsrecht 1991 p.1209-1211 - International Litigation Procedure 1993 p.223-228 ºNOTESº - Geimer, Reinhold: Entscheidungen zum Wirtschaftsrecht 1991 p.369-370 *P1* Bundesgerichtshof, Urteil vom 20/04/93 (XI ZR 17/90) - Der Betrieb 1993 p.2020-2021 - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1993 no 138 - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.517-518

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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Schockweiler

DATES of document: 19/01/1993
of application: 11/03/1991

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Judgment of the Court (Sixth Chamber)
of 3 July 1997
Francesco Benincasa v Dentalkit Srl.
Reference for a preliminary ruling: Oberlandesgericht München - Germany.
Brussels Convention - Concept of consumer - Agreement conferring jurisdiction.
Case C-269/95.

1 Convention on jurisdiction and the enforcement of judgments - Jurisdiction in respect of contracts concluded by consumers - Concept of `consumer' - Plaintiff who has concluded a contract with a view to pursuing a trade or profession in the future - Excluded

(Convention of 27 September 1968, Arts 13, first para., and 14, first para., as amended by the Accession Convention of 1978)

2 Convention on jurisdiction and the enforcement of judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Scope of the exclusive jurisdiction of the court designated - Action to have the main agreement declared void - Included

(Convention of 27 September 1968, Art. 17, first para.)

3 In the context of the specific regime established by Article 13 et seq. of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. On the other hand, the specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character. It follows that the regime in question applies solely to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future, so that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time, but in the future may not be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention.

4 Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments and civil and commercial matters sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule simply by claiming that the whole of the contract which contained the clause was void on grounds derived from the applicable substantive law. It follows that the court of a Contracting State which is designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 also has exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void. Furthermore, it is for the national court to determine which disputes fall within the scope of the clause conferring jurisdiction invoked before it and, consequently, to determine whether that clause also covers any dispute relating to the validity of the contract containing it.

In Case C-269/95,

REFERENCE to the Court by the Oberlandesgericht München (Germany) under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, for a preliminary ruling in the proceedings pending before that court between

Francesco Benincasa

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and

Dentalkit Srl

on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 of the aforementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77),

THE COURT

(Sixth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Benincasa, by Reinhard Böhner, Rechtsanwalt, Munich,

- Dentalkit Srl, by Alexander von Kuhlberg, Rechtsanwalt, Munich,

- the German Government, by Jörg Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, and Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Benincasa, represented by Reinhard Böhner, and the Commission, represented by Marco Nuñez-Müller, Rechtsanwalt, Hamburg, at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

Costs

33 The costs incurred by the German Government and by 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 proceedings 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 questions referred to it by the Oberlandesgericht München by order of 5 May 1995, hereby rules:

1. The first paragraph of Article 13 and the first paragraph of Article 14 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland

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and the United Kingdom of Great Britain and Northern Ireland, must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

2. The courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention of 27 September 1968 also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

1 By order of 5 May 1995, received at the Court on 9 August 1995, the Oberlandesgericht (Higher Regional Court), Munich referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77; hereinafter `the Convention'), three questions on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 of the Convention.

2 Those questions were raised in proceedings between Dentalkit Srl (`Dentalkit'), having its seat in Florence, and Mr Benincasa, an Italian national, relating to the validity of a franchising contract concluded between them.

3 According to the case-file relating to the main proceedings, in 1987 Dentalkit developed a chain of franchised shops in Italy specializing in the sale of dental hygiene products. In 1992 Mr Benincasa concluded a franchising contract with Dentalkit with a view to setting up and operating a shop in Munich. In that contract Dentalkit authorized Mr Benincasa to exploit the exclusive right to use the Dentalkit trade mark within a particular geographical area. Dentalkit further undertook to supply goods bearing that trade mark, to support him in various spheres, to carry out the requisite training and promotion and advertising activities and not to open any shop within the geographical area covered by the exclusive right.

4 For his part, Mr Benincasa undertook to equip business premises at his own cost, to stock exclusively Dentalkit's products, not to disclose any information or documents concerning Dentalkit and to pay it a sum of LIT 8 million as payment for the cost of technical and commercial assistance provided when opening the shop and 3% of his annual turnover. By reference to Articles 1341 and 1342 of the Italian Civil Code, the parties specifically approved a clause of the contract reading `The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract' by separately signing it.

5 Mr Benincasa set up his shop, paid the initial sum of LIT 8 million and made several purchases, for which, however, he never paid. In the meantime, he has ceased trading altogether.

6 Mr Benincasa brought proceedings in the Landgericht (Regional Court), Munich I, where he sought to have the franchising contract declared void on the ground that the contract as a whole was void under German law. He also claimed that the sales contracts concluded subsequently pursuant to the basic franchising contract were void.

7 Mr Benincasa argued that the Landgericht München I had jurisdiction as the court for the place of performance of the obligation in question within the meaning of Article 5(1) of the Convention. He argued that the clause of the franchising contract conferring jurisdiction on the courts at Florence did not have the effect of derogating from Article 5(1) as regards his action to avoid the contract because that action sought to have the whole franchising agreement declared void and, therefore, also the jurisdiction clause. Mr Benincasa further argued that, since he had not yet

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started trading, he should be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention.

8 The relevant provisions of the Convention read as follows:

Article 13

`In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms,

...'

Article 14

`A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

...'

9 The Landgericht München I declined jurisdiction on the ground that the jurisdiction clause contained in the franchising contract was valid and that the contract was not a contract concluded by a consumer.

10 Mr Benincasa appealed against that decision to the Oberlandesgericht München, which stayed proceedings and referred the following questions to the Court for a preliminary ruling:

`(1) Is a plaintiff to be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention even if his action relates to a contract which he concluded not for the purpose of a trade which he was already pursuing but a trade to be taken up only at a future date (here: a franchising agreement concluded for the purpose of setting up a business)?

(2) If Question 1 is to be answered in the affirmative: Does point 1 of the first paragraph of Article 13 of the Convention (contract for the sale of goods on instalment credit terms) cover a franchising agreement which obliges the plaintiff to buy from the other party to the agreement, over a period of several (three) years, the articles and goods required to equip and operate a business (without instalment credit terms having been agreed) and to pay an initial fee and, as from the second year of the business, a licence fee of 3% of turnover?

(3) Does the court of a Member State specified in an agreement conferring jurisdiction have exclusive jurisdiction pursuant to the first paragraph of Article 17 of the Convention even when the action is inter alia for a declaration of the invalidity of a franchising agreement containing the jurisdiction clause itself, which is worded "The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract", that clause having been specifically approved within the meaning of Articles 1341 and 1342 of the Italian Civil Code?'

The first question

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11 The point sought to be clarified by the national court's first question is whether the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer.

12 In this connection, regard should be had to the principle laid down by the case-law (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13) according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This must apply in particular to the concept of `consumer' within the meaning of Article 13 et seq. of the Convention, in so far as it determines the rules governing jurisdiction.

13 It must next be observed that, as the Court has consistently held, under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (Shearson Lehman Hutton, paragraphs, 14, 15 and 16).

14 Such an interpretation must apply a fortiori with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraphs 16 and 19, and Shearson Lehman Hutton, paragraph 17).

15 As far as the concept of `consumer' is concerned, the first paragraph of Article 13 of the Convention defines a `consumer' as a person acting `for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).

16 It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.

17 Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.

18 Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded

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outside and independently of any trade or professional activity or purpose, whether present or future.

19 The answer to the national court's first question must therefore be that the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

The second question

20 In view of the answer given to the first question, there is no need to answer the second.

The third question

21 The point sought to be clarified by the national court's third question is whether the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

22 The national court also raises the question whether a jurisdiction clause validly concluded under the rules of the Convention and contained in the main contract must be considered on its own, independently of any allegation as to the validity of the remainder of the contract.

23 The first paragraph of Article 17 of the Convention provides as follows:

`If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing...'.

24 A distinction must first be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated.

25 A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the lex causae determined by the private international law of the State of the court having jurisdiction.

26 Next, as the Court has consistently held, the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States's courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Case 38/81 Effer v Kantner [1982] ECR 825, paragraph 6, and Case C-125/92 Mulox IBC [1993] ECR I-4075, paragraph 11).

27 It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.

28 The aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted in connection with Article 17 of the Convention, which accords with the intentions of the parties to the contract and provides for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated, by fixing strict conditions as to form (see, in this regard, Case C-106/95 MSG [1997] ECR I-0000, paragraph

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34).

29 Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law.

30 That solution is consistent not only with the approach taken by the Court in Effer v Kanter, cited above, in which it ruled that the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even when the existence of the contract on which the claim is based is in dispute between the parties, but also with the judgment in Case 73/77 Sanders v Van der Putte [1977] ECR 2383, paragraph 15, in which the Court held, in connection with Article 16(1) of the Convention, that, in the matter of tenancies of immovable property, the courts of the State in which the immovable property is situated continue to have jurisdiction even where the dispute is concerned with the existence of the lease.

31 It must be added that, as the Court has held, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 37). Consequently, in the instant case it is for the national court to determine whether the clause invoked before it, which refers to `any dispute' relating to the interpretation, performance or `other aspects' of the contract, also covers any dispute relating to the validity of the contract.

32 The answer to the national court's third question must therefore be that the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

DOCNUM	61995J0269
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1997 Page I-03767
DOC	1997/07/03
LODGED	1995/08/09
JURCIT	41968A0927(01)-A05PT1 : N 30 41968A0927(01)-A13L1 : N 1 8 10 - 19 41968A0927(01)-A14L1 : N 1 8 10 - 19

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41968A0927(01)-A16PT1 : N 30
41968A0927(01)-A17L1 : N 1 10 21 - 32
61977J0073-N15 : N 30
61977J0150-N14 : N 12
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61988J0220-N19 : N 14
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61995C0269-N38 : N 16
61995J0106-N34 : N 28

CONCERNS Interprets 41968A0927(01)-A13L1
Interprets 41968A0927(01)-A14L1
Interprets 41968A0927(01)-A17L1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A8* Landgericht München I, Urteil vom 19/07/94 (4 O 11855/93)
A9 Oberlandesgericht München, Vorlagebeschluß vom 05/05/95 (8 U 5387/94)
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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Kakouris

DATES of document: 03/07/1997
of application: 09/08/1995

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Judgment of the Court (Sixth Chamber)
of 11 July 2002
Rudolf Gabriel.
Reference for a preliminary ruling: Oberster Gerichtshof - Austria.
Brussels Convention - Request for interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3 - Entitlement of a consumer to whom misleading advertising has been sent to seek payment, in judicial proceedings, of the prize which he has apparently won - Classification - Action of a contractual nature covered by Article 13, first paragraph, point 3 - Conditions.
Case C-96/00.

Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction over consumer contracts - Contract for the supply of services or goods - Action brought by a consumer domiciled in a Member State for an order requiring a mail-order company established in another Member State to award him a prize apparently won in connection with an order for goods - Action in contract within the meaning of Article 13, first paragraph, point 3, of the Convention

(Brussels Convention of 27 September 1968, Art. 13, first para., (3))

$$The jurisdiction rules set out in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of that Convention.

(see para. 60, operative part)

In Case C-96/00,

REFERENCE to the Court pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings brought before that court by

Rudolf Gabriel,

on the interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3, of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),

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THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Gabriel, by A. Klauser, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, acting as Agent, assisted by B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gabriel, represented by A. Klauser, and the Commission, represented by A.-M. Rouchaud, acting as Agent, assisted by B. Wägenbaur, at the hearing on 11 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

Costs

61 The costs incurred by the Austrian and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. As 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 Oberster Gerichtshof by order of 15 February 2000, hereby rules:

The jurisdiction rules set out in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial

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benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of that Convention.

1 By order of 15 February 2000, received at the Court on 13 March 2000, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling, pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a question on the interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3, of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and - amended text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (the Brussels Convention).

2 That question has arisen in proceedings brought before the Oberster Gerichtshof by Mr Gabriel, an Austrian national domiciled in Vienna, for the purpose of determining the court having jurisdiction ratione loci to give judgment in the action which he proposes to bring in his State of domicile against a mail-order company established in Germany.

The legal framework

The Brussels Convention

3 The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof, which consists of Articles 2 to 24.

4 The first paragraph of Article 2 of the Brussels Convention, which forms part of Section 1, entitled General provisions, of Title II, sets out the basic rule in the following terms:

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

5 The first paragraph of Article 3 of the Brussels Convention, which features in the same section, provides:

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.

6 Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

7 Thus, under Article 5, which appears in Section 2, entitled Special jurisdiction, of Title II of the Brussels Convention:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

....

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8 Also under Title II of the Brussels Convention, Articles 13 and 14 form part of Section 4, entitled Jurisdiction over consumer contracts.

9 Article 13 of the Brussels Convention is worded as follows:

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

10 The first paragraph of Article 14 of the Brussels Convention provides:

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

11 That rule of jurisdiction may be departed from only if there is compliance with the conditions laid down in Article 15 of the Brussels Convention, which also features in Section 4 of Title II thereof.

The relevant provisions of national law

12 Under Paragraph 28.1.1 of the Austrian Law of 1 August 1895 on the exercise of jurisdiction and the competence of the ordinary courts in civil matters (Jurisdiktionsnorm (Law on Jurisdiction), RGBl. 111), the Oberster Gerichtshof must, when so requested by a party, designate, from among the courts having jurisdiction ratione materiae to deal with a civil matter, the court which will be territorially competent where the Austrian court having local jurisdiction is not designated by the rules laid down in that Law or by any other legal provision, but jurisdiction must none the less be exercised pursuant to an international convention.

13 It is common ground that the Brussels Convention is an international convention within the meaning of that provision.

14 Paragraph 5j of the Austrian Consumer Protection Law (BGBl. I, 1979, p. 140) reads:

Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer; it may also be claimed in legal proceedings.

15 That provision was added to the Consumer Protection Law by Paragraph 4 of the Austrian Law

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on Distance Contracts (BGBl. I, 1999, p. 185) when Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) was transposed into Austrian law.

16 That provision entered into force on 1 October 1999.

17 In its order for reference, the Oberster Gerichtshof points out that the purpose of Paragraph 5j is to grant consumers who have been misled by reason of the fact that a professional contacted them personally, creating within them the impression that they had won a prize, whereas the true nature of the transaction is explained only in small print or in an inconspicuous place in the correspondence and in terms difficult to understand, a right to bring legal proceedings to seek enforcement of such a promise of financial benefit.

The case in the main proceedings and the question submitted for preliminary ruling

18 According to the documents relating to the case in the main proceedings, Schlank & Schick GmbH (Schlank & Schick), a company established under German law and having its registered office in Lindau (Germany), sells goods by mail order in, inter alia, Germany, Austria, France, Belgium and Switzerland.

19 In October 1999 Mr Gabriel received at his private address and in a sealed envelope several personalised letters from Schlank & Schick which he claims were of such a kind as to lead him to believe that, following a draw, he was the lucky winner of ATS 49 700 and that he was entitled to receive that amount simply on demand, subject only to the condition that he ordered at the same time from that company goods to a minimum value of ATS 200, to be selected in a catalogue and entered on an order form attached to those letters.

20 Those letters stated inter alia as follows: Dear Mr Rudolf Gabriel, you have not yet claimed your cash credit.... Do you really want to forfeit your money?... You are still entitled to your cash credit, but now you really must act quickly. The attached letter from European Credit explains everything in greater detail... PS. By way of proof for you, Mr Gabriel, I have attached the payment receipt. You are entitled to 100% of your cash credit on condition that you also order goods without incurring any obligation.

21 A letter annexed to that mail, headed European Credit and entitled Official confirmation of payment, to which were annexed the copy of a receipt and the facsimile of a savings book, both of which bore Mr Gabriel's name and the amount of ATS 49 700, was worded as follows: Dear Mr Rudolf Gabriel, we hereby confirm to you once again the payment to our account of the cash credit amount totalling ATS 49 700. We have attached specially for you a copy of a receipt. In order to seize your opportunity and speed up payment of the sum of ATS 49 700, all you have to do is return the copy of the receipt together with your test order, which does not involve any obligation... There is now nothing further to prevent payment. In order that you can receive your money as quickly as possible, I shall simply send you a cheque after the receipt has been received. You will then be able to encash it as you please at the financial institution of your choice.

22 It appears, however, from various statements printed in relatively small characters and featuring in part on the reverse side of the documents sent to Mr Gabriel that the sum of ATS 49 700 did not constitute a firm promise on the part of Schlank & Schick to pay the prize.

23 Thus, on the reverse of the letter from European Credit, it was stated inter alia, under the heading Award Conditions, that participation in the winning game, governed by German law, was subject to the placing of a test order, which does not involve any obligation, that the expiry date for this action was 30 November 1999 and that all judicial proceedings were excluded. Reference was also made to the fact that the draw had been made by the mail-order company, that the cash prizes

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were divided into different lots being the subject of several payments split up according to the number of copies of receipts returned to the organiser with the properly filled-out order form, and that, on grounds of cost, the credits having a value lower than ATS 35 would not result in any payment but would be placed in the jackpot for a later draw.

24 Mr Gabriel duly filled out and returned to Schlank & Schick the relevant documents to claim payment of the financial benefit promised and placed an order for goods in that company's catalogue for an amount in excess of ATS 200.

25 Schlank & Schick subsequently delivered to him the goods which he had ordered but did not send him the sum of ATS 49 700 which he claimed to have won.

26 Mr Gabriel accordingly decided to institute legal proceedings for an order requiring Schlank & Schick to pay him that amount, together with interest and legal costs, pursuant to Paragraph 5j of the Austrian Consumer Protection Law.

27 As he wished to bring that action in Austria - the State in which he is domiciled - pursuant to the first paragraph of Article 14 of the Brussels Convention, but as he considered that Austrian law does not contain any provision determining the national court having territorial jurisdiction to hear and determine the case, Mr Gabriel, before lodging the application containing his substantive claim, referred the matter to the Oberster Gerichtshof in order that it might designate that court pursuant to Paragraph 28.1.1 of the Austrian Law of 1 August 1895.

28 The Oberster Gerichtshof takes the view that, while the action which Mr Gabriel proposes to bring appears to be covered by Paragraph 5j of the Austrian Consumer Protection Law, the question whether his application for designation of the national court having territorial jurisdiction should be granted depends on the nature of the action which Mr Gabriel intends to bring against Schlank & Schick.

29 If that action relates to a contract concluded by a consumer within the meaning of Article 13, first paragraph, point 3, of the Brussels Convention, such a designation will be indispensable because that Convention allows a consumer only to bring the dispute before the courts of the Contracting State in which he is domiciled but does not determine directly which court of that State has jurisdiction to give judgment in that regard.

30 In contrast, the application pending before the Oberster Gerichtshof would serve no purpose if Mr Gabriel's right of action were contractual in nature, within the meaning of Article 5(1) of the Brussels Convention, or relating to tort, delict or quasi-delict within the meaning of Article 5(3) thereof, on the ground that those provisions specifically designate the courts having territorial jurisdiction, that is to say, respectively, the courts for the place of performance of the contractual obligation in question or those for the place where the harmful event occurred.

31 As it formed the view that, in those circumstances, the reply to the request which Mr Gabriel had made to it depended on the interpretation of the Brussels Convention, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

For the purposes of the Brussels Convention..., does the provision in Paragraph 5j of the Austrian Consumer Protection Law..., in the version of Art I, para. 2, of the Austrian Law on Distance Contracts ..., which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute:

(1) a contractual claim under Article 13(3); or

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(2) a contractual claim under Article 5(1); or

(3) a claim in respect of a tort, delict or quasi-delict under Article 5(3)?

The question submitted for preliminary ruling

32 Having regard to the factual background to the case in the main proceedings, the question posed must be construed as asking essentially whether the jurisdiction rules set out in the Brussels Convention are to be interpreted as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Articles 5(1) or 13, first paragraph, point 3, of the Brussels Convention, or relating to tort, delict or quasi-delict within the meaning of Article 5(3) thereof.

33 In order to reply to the question as thus reformulated, it should be noted at the outset that, according to settled case-law, the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1) of that Convention (see, inter alia, Case 189/87 Kalfelis [1988] ECR 5565, paragraph 17; Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 16; and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22).

34 It is thus necessary in the first instance to examine whether an action such as that in point in the main proceedings is contractual in nature.

35 In that connection, it must be observed that Article 5(1) of the Brussels Convention relates to contractual matters in general, whereas Article 13 thereof specifically covers various types of contracts concluded by consumers.

36 As Article 13 of the Brussels Convention thus constitutes a lex specialis in relation to Article 5(1) thereof, it is first of all necessary to determine whether an action having the characteristics set out in the question referred for a preliminary ruling, as reformulated, can fall within the scope of the former of those two provisions.

37 According to settled case-law, the concepts used in Article 13 of the Brussels Convention must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that it is fully effective (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15 and 16; Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13; Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 12; and Case C-99/96 Mietz [1999] ECR I-2277, paragraph 26).

38 It follows from the actual wording of Article 13 that it is applicable only in so far as the action relates generally to a contract concluded by a consumer for a purpose outside his trade or profession.

39 It follows from that wording, and from the purpose of the special regime introduced by the provisions of Title II, Section 4, of the Brussels Convention, which is to ensure adequate protection for the consumer as the contracting party deemed to be economically weaker and less experienced in legal matters than his professional co-contractor, that those provisions cover only a private final consumer, not engaged in trade or professional activities, who is bound by one of the three types of contract listed in Article 13 of that Convention and who is also personally a party to the action, in accordance

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with Article 14 thereof (see Shearson Lehman Hutton, cited above, paragraphs 19, 20, 22 and 24).

40 With regard, more specifically, to a contract for the supply of services - other than a contract of transport, which is excluded from the scope of Section 4 of Title II of the Brussels Convention pursuant to the third paragraph of Article 13 thereof - or a contract for the supply of goods, as referred to in Article 13, first paragraph, point 3, that provision sets out two additional conditions of application, namely that the conclusion of the contract was preceded in the State of the consumer's domicile by a specific invitation addressed to him or by advertising, and that the consumer took in that State the steps necessary for the conclusion of that contract.

41 As is clear from the Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, at p. 118), those two concurrent conditions are designed to ensure that there are close connections between the contract in issue and the State in which the consumer is domiciled.

42 With regard to the scope of the concepts employed in those conditions, Professor Schlosser refers, at page 119 of his report, to the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p. 1), which was opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) (the Rome Convention), in view of the fact that Article 5(2), first indent, of that Convention, relating to consumer contracts, contains two conditions which use wording identical to that in Article 13, first paragraph, point 3(a) and (b), of the Brussels Convention.

43 According to the Giuliano and Lagarde Report, that provision of the Rome Convention is intended to cover situations in which the trader has taken steps to market his goods or services in the country where the consumer resides and, inter alia, situations of mail-order and doorstep selling (see the above Report, pages 23 and 24).

44 The concepts of advertising and specific invitation addressed featuring in the first of those conditions common to the Brussels and Rome Conventions cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.

45 With regard to the second of those conditions, the expression steps necessary for the conclusion of the contract refers to any document written or any other step whatever taken by the consumer in the State in which he is domiciled and which expresses his wish to take up the invitation made by the professional.

46 It must be concluded that all of those conditions are satisfied in a case such as that in the main proceedings.

47 First, it is common ground that Mr Gabriel has in this case the capacity of a private final consumer covered by the first paragraph of Article 13 of the Brussels Convention inasmuch as it is clear from the case-file that he ordered goods offered by Schlank & Schick for his personal use, without that transaction having any connection whatever with his trade or profession.

48 Second, in a situation such as that in point in the main proceedings, the consumer and the professional vendor were indubitably linked contractually once Mr Gabriel had ordered goods offered by Schlank & Schick, thereby demonstrating his acceptance of the offer - including all conditions attaching thereto - which that company had sent to him in person.

49 Furthermore, that concordance of intention between the two parties gave rise to reciprocal and

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interdependent obligations within the framework of a contract which has specifically one of the objects described in Article 13, first paragraph, point 3, of the Brussels Convention.

50 Thus, in regard to a case such as that in the main proceedings, that contract relates more specifically to the supply, through a mail-order sale, of goods ordered by a consumer on the basis of a proposal made and at a price specified by the vendor.

51 Third, the two conditions specifically set out in Article 13, first paragraph, point 3(a) and (b), of the Brussels Convention are also satisfied.

52 The vendor addressed the consumer in the Contracting State in which the latter was domiciled by sending him several personalised letters, to which were attached a sales catalogue and an order form, with a view to persuading him to contract on the basis of those proposals and the conditions relating thereto. Furthermore, as a result of those letters, the consumer took in that State the steps necessary to conclude the contract by placing an order for the amount stipulated by the vendor and by sending to the vendor the order form together with the copy of the receipt.

53 In those circumstances, where a consumer has been contacted at his home by one or more letters sent by a professional vendor for the purpose of bringing about the placement of an order for goods offered under the conditions determined by that vendor, and where the consumer has in fact placed such an order in the Contracting State in which he is domiciled, the action by which such a consumer seeks through judicial proceedings brought against the vendor to obtain a prize which he has apparently won is an action relating to a contract concluded by a consumer within the meaning of Article 13, first paragraph, point 3, of the Brussels Convention.

54 As is evident from the case-file placed before the Court, the right of a consumer to bring an action is intimately linked to the contract concluded between the parties inasmuch as, in a situation such as that in point in the main proceedings, the correspondence which the professional sent to that consumer establishes an indissociable relationship between the promise of financial benefit and the order for goods, that order being presented by the vendor as constituting the prerequisite for the grant of the promised financial benefit, specifically for the purpose of persuading the consumer to enter into a contract. Furthermore, the consumer concluded the contract for the purchase of goods essentially, if indeed not exclusively, by reason of the vendor's proposal involving a promise of financial benefit significantly greater than the minimum amount required for the order and the consumer otherwise met all of the conditions laid down by the professional, thereby accepting that professional's proposal in its entirety.

55 Consequently, judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled, requiring a mail-order company established in another Contracting State to send to him a prize which he has apparently won must be capable of being brought before the same court as that which has jurisdiction to deal with the contract concluded by that consumer.

56 An interpretation of Article 13, first paragraph, of the Brussels Convention which would have the result that certain claims under a contract concluded by a consumer fall within the jurisdiction rules of Articles 13 to 15 of that Convention, whereas other actions that are linked so closely to that contract as to be indissociable are subject to other rules cannot be accepted.

57 The Court has in this regard recently recalled the need to avoid, so far as possible, a situation in which several courts have jurisdiction in respect of one and the same contract (see, by way of analogy, with regard to Article 5(1) of the Brussels Convention, Case C-256/00 Besix [2002] ECR I-1699, paragraph 27).

58 That need is all the more compelling in the case of a contract such as that in issue in the main proceedings. In view of the fact that a multiplicity of courts having jurisdiction risks placing

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at a particular disadvantage a party deemed to be weak, such as a consumer, it is in the interest of the proper administration of justice that the latter should be able to bring before one and the same court - in casu that of his place of domicile - all of the difficulties that are likely to arise from a contract which the consumer has been induced to conclude by reason of the professional's use of forms of wording liable to mislead the other contracting party.

59 An action such as that which Mr Gabriel proposes to bring before the competent national court therefore falls within the scope of Article 13, first paragraph, point 3, of the Brussels Convention, and it is for that reason unnecessary to examine whether it is covered by Article 5(1) thereof.

60 In the light of all the foregoing considerations, the answer to the question submitted must be that the jurisdiction rules set out in the Brussels Convention are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of the Brussels Convention.

DOCNUM	62000J0096
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; J ; judgment
PUBREF	European Court reports 2002 Page I-06367
DOC	2002/07/11
LODGED	2000/03/13
JURCIT	41968A0927(01)-A05PT1 : N 35 36 57 59 41968A0927(01)-A05PT3 : N 33 41968A0927(01)-A13 : N 37 41968A0927(01)-A13L1PT3 : N 40 - 60 41968A0927(01)-A14 : N 39 61977J0150 : N 37 61987J0189 : N 33 61989J0091 : N 37 39 61990J0261 : N 33 61995J0269 : N 37 61997J0051 : N 33

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61999J0099 : N 37
62000J0256 : N 57

CONCERNS Interprets 41968A0927(01)-A13L1PT3

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Austria ; Federal Republic of Germany ; Member States ; Commission ; Institutions

NATIONA Austria

NATCOUR *A9* Oberster Gerichtshof, BeschluÃƒ vom 15/02/2000
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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

DATES of document: 11/07/2002
of application: 13/03/2000

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Judgment of the Court (Sixth Chamber)
of 1 October 2002
Verein für Konsumenteninformation v Karl Heinz Henkel.
Reference for a preliminary ruling: Oberster Gerichtshof - Austria.
Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasidelict - Preventive action by associations - Consumer protection organisation seeking an injunction to prevent a trader from using unfair terms in consumer contracts.
Case C-167/00.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to tort, delict or quasi-delict' - Definition - Preventive action brought by a consumer protection organisation seeking an injunction to prevent a trader from using unfair terms in consumer contracts - Included

(Brussels Convention of 27 September 1968, Art. 5(3))

$$The rules on jurisdiction laid down in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

(see para. 50, operative part)

In Case C-167/00,

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Verein für Konsumenteninformation

and

Karl Heinz Henkel,

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and J.N. Cunha Rodrigues, Judges,

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Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

- the Verein für Konsumenteninformation, by H. Kosesnik-Wehrle, Rechtsanwalt,

- Mr Henkel, by L.J. Kempf and J. Maier, Rechtsanwälte,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the French Government, by R. Abraham and R. Loosli-Surrans, acting as Agents,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Robertson, barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues and C. Ladenburger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Verein für Konsumenteninformation, represented by S. Langer, Rechtsanwalt; of the French Government, represented by R. Loosli-Surrans; of the United Kingdom Government, represented by A. Robertson, and of the Commission, represented by C. Ladenburger, at the hearing on 11 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,

gives the following

Judgment

Costs

51 The costs incurred by the Austrian, German, French and United Kingdom Governments and by the Commission, 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 proceedings 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 Oberster Gerichtshof by order of 13 April 2000, hereby rules:

The rules on jurisdiction laid down in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

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1 By order of 13 April 2000, received at the Court on 8 May 2000, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a question on the interpretation of Article 5(3) of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the ccession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (the Brussels Convention').

2 That question was raised in proceedings between the Verein für Konsumenteninformation (the VKI'), an association constituted under Austrian law, established in Austria, and Mr Henkel, a German national domiciled in Germany, concerning Mr Henkel's use in contracts concluded with Austrian consumers of terms which the VKI considered to be unfair.

Legal background

The Brussels Convention

3 The first paragraph of Article 1 of the Brussels Convention, which comprises Title I, entitled Scope', states:

This convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

4 The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof, which consists of Articles 2 to 24.

5 The first paragraph of Article 2, which forms part of Section 1, entitled General provisions', of Title II of the Brussels Convention, sets out the basic rule in the following terms:

Subject to the provisions of this convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

6 The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, provides as follows:

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this title.'

7 Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

8 Under Article 5, which appears in Section 2, entitled Special jurisdiction', of Title II of the Brussels Convention:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'

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Directive 93/13/EEC

9 Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

The relevant provisions of national law

10 In Austria, the Konsumentenschutzgesetz (Consumer Protection Law) of 8 March 1979 (BGBl. 1979/140; the KSchG') came into force on 1 October 1979.

11 The KSchG has been amended on several occasions, inter alia by a law transposing Directive 93/13 (BGBl. 1997/6).

12 Paragraph 28 of the KSchG, as amended, provides, with effect from 1 January 1997:

(1) An injunction may be sought against anyone who in commercial dealings lays down, in general terms and conditions which he uses as a basis for contracts concluded by him or in forms used for contracts in that connection, conditions which are contrary to a statutory prohibition or are unconscionable, and against anyone who recommends such conditions for commercial dealings. This prohibition shall also include the prohibition on relying on such a condition in so far as it has been agreed to in an impermissible manner.

(2) There ceases to be any danger of the use and recommendation of such conditions where a trader gives, within a reasonable period, a declaration of discontinuance secured by an appropriate contractual penalty (Paragraph 1336 of the Allgemeines Bürgerliches Gesetzbuch) following a warning by a body entitled to bring an action under Paragraph 29.'

13 The VKI is one of the bodies referred to in Paragraph 29 of the KSchG which are entitled to bring such an action.

The main proceedings and the question referred for a preliminary ruling

14 It is clear from the documents relating to the case in the main proceedings that the VKI is a non-profit-making organisation whose object is the protection of consumers and their interests.

15 Mr Henkel is a trader, domiciled in Munich (Germany), who organises sales-promotion trips, inter alia in Austria.

16 In the context of his contractual dealings with consumers domiciled in Vienna (Austria), Mr Henkel used general terms and conditions that the VKI considers to be contrary to certain provisions of Austrian legislation.

17 As an association, the VKI brought an action pursuant to Paragraph 28 of the KSchG before the Handelsgericht Wien (Commercial Court, Vienna), seeking an injunction against Mr Henkel to prevent him from using the contested terms in contracts concluded with Austrian clients.

18 Mr Henkel claimed that the Austrian courts had no jurisdiction. In his submission, the action brought by the VKI cannot be regarded as relating to tort, delict or quasi-delict within the meaning

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of Article 5(3) of the Brussels Convention on the ground that there has been neither harmful behaviour nor damage suffered within the territorial jurisdiction of the court seized.

19 The Handelsgericht Wien found that the VKI was not pleading any damage arising out of a tort or delict and hence declared that it had no jurisdiction.

20 That decision was overturned on appeal by the Oberlandesgericht Wien (Higher Regional Court, Vienna) which considered that Article 5(3) of the Brussels Convention also covers preventive actions brought by an association such as the VKI without requiring it to have personally sustained any damage.

21 An appeal on a point of law was brought before the Oberster Gerichtshof which is uncertain whether the action at issue in the main proceedings falls within the scope of Article 5(3) of the Brussels Convention or whether it is a matter relating to a contract within the meaning of Article 5(1) of that convention.

22 According to that court it is not obvious that that action is a matter relating to tort or delict. The VKI does not plead any damage to its property. While it is true that its right to bring an action stems not from a contract, but from statute, and serves to avert future damage to consumers, such damage is none the less contractual in origin. The application of Article 5(1) of the Brussels Convention is therefore conceivable. However, it is also possible to consider that the unlawful act consists of the undermining of legal stability by a trader's use of unfair terms.

23 Moreover, the question arises whether a preventive action, which is by its very nature brought before any damage occurs, is capable of coming within the scope of Article 5(3) of the Brussels Convention, given that that provision, which refers to the place where the harmful event occurred, appears to presuppose the existence of damage.

24 The Oberster Gerichtshof took the view that, in those circumstances, the outcome of the case before it required an interpretation of the Brussels Convention and it therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Does the right to obtain an injunction to prohibit the use of unlawful or unconscionable general terms and conditions provided for in Paragraph 28 of the [KSchG], which is asserted by a consumer protection organisation pursuant to Paragraph 29 of the KSchG and in accordance with Article 7(2) of... Directive 93/13/EEC..., constitute a claim arising out of matters relating to tort, delict or quasi-delict which may be asserted in courts with the special jurisdiction provided for in Article 5(3) of the Brussels Convention ...?'

The national court's question

25 The first point to be noted is that the United Kingdom Government submits that an action such as that brought by the VKI does not fall within the scope of the Brussels Convention. Pursuant to the first paragraph of Article 1 thereof, that convention applies only in civil and commercial matters', whereas a consumer protection organisation such as the VKI must be regarded as a public authority and its right to obtain an injunction to prevent the use of unfair terms in contracts, which is exercised in the main proceedings, constitutes a public law power. An organisation of that kind takes on the task, in the public interest, of ensuring the protection of the entire class of consumers, and its right to bring proceedings to obtain an injunction preventing unlawful behaviour by traders stems from statute, independent of any private law relationship arising out of a contract between a professional and a private individual.

26 However, it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers (see, to that effect, Case 29/76 LTU v Eurocontrol

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[1976] ECR 1541, paragraph 4; Case 814/79 Rüffer [1980] ECR 3807, paragraph 8, and Case C-172/91 Sonntag [1993] ECR I-1963, paragraph 20).

27 That is the case in a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by pubic law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive (see LTU, cited above, paragraph 4).

28 Similarly, the Court has held that the concept of civil and commercial matters' within the meaning of the first paragraph of Article 1 of the Brussels Convention does not include actions brought by the State responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of that administering agent in the exercise of its public authority (Rüffer, cited above, paragraphs 9 and 16).

29 Although it thus follows from the case-law of the Court that certain types of dispute must be regarded as excluded from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see LTU, paragraph 4), the case-law arising from LTU and Rüffer cannot be applied to an action such as that at issue in the main proceedings.

30 Not only is a consumer protection organisation such as the VKI a private body, but in addition, as the German Government correctly observed, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts. Hence, an action of that kind is a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention.

31 In those circumstances, the objection raised by the United Kingdom Government cannot be accepted.

32 As to the question referred by the national court, it should be noted at the outset that Articles 13 to 15, which comprise Section 4, entitled Jurisdiction over consumer contracts', of Title II of the Brussels Convention, are not applicable in the main proceedings.

33 As the Court held in Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers.

34 It follows that, in order to answer the question referred by the national court, it need only be determined whether a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention, or in fact a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

35 In that regard, the Court has repeatedly held that the concepts of matters relating to a contract' and matters relating to tort, delict or quasi-delict' in paragraphs 1 and 3 respectively of Article 5 of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of that convention, in order to ensure that it is both given full

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effect and applied uniformly in all the Contracting States (see, in particular, Case 34/82 Peters [1983] ECR 987, paragraphs 9 and 10; Case 189/87 Kalfelis [1988] ECR 5565, paragraphs 15 and 16, and Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 15).

36 It is also settled case-law that the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and are not matters relating to a contract within the meaning of Article 5(1) of that convention (see, in particular, Kalfelis, cited above, paragraph 17; Reichert and Kockler, cited above, paragraph 16; Case C-51/97 Réunion européenne and Others [1998] ECR I-6511, paragraph 22, and Case C-96/00 Gabriel [2002] ECR I-6367, paragraph 33).

37 It is therefore necessary in the first instance to examine whether an action such as that at issue in the main proceedings is contractual in nature.

38 In a situation such as that in the main proceedings, the consumer protection organisation and the trader are in no way linked by any contractual relationship.

39 Admittedly, it is likely that the trader has already entered into contracts with a number of consumers. However, whether the court action is subsequent to a contract already concluded between the trader and a consumer or that action is purely preventive in nature and its sole aim is to prevent the occurrence of future damage, the consumer protection organisation which brought that action is never itself a party to the contract. The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer.

40 In those circumstances, an action such as that brought in the main proceedings cannot be regarded as a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention.

41 By contrast, such an action meets all the criteria established by the Court in the case-law referred to in paragraph 36 of this judgment inasmuch as, first, it does not concern matters relating to a contract within the meaning of Article 5(1) of the Brussels Convention and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature.

42 The concept of harmful event' within the meaning of Article 5(3) of the Brussels Convention is broad in scope (Case 21/76 Bier (Mines de Potasse d'Alsace') [1976] ECR 1735, paragraph 18) so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent.

43 Furthermore, that is the only interpretation consistent with the purpose of Article 7 of Directive 93/13. Accordingly, the efficacy of the actions under that provision to prevent the continued use of unlawful terms would be considerably diminished if those actions could be brought only in the State where the trader is domiciled.

44 Mr Henkel and the French Government have, however, submitted that Article 5(3) of the Brussels Convention refers to the place where the harmful event occurred and therefore presupposes, according to its actual terms, the existence of damage. They argue that the same conclusion is dictated by the Court's interpretation of that provision, according to which the expression place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to that damage, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places (see, in particular, Mines de Potasse d'Alsace, cited above, paragraphs 24 and 25; Case C-220/88 Dumez France and Tracoba

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[1990] ECR I-49, paragraph 10; Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 20, and Case C-364/93 Marinari [1995] ECR I-2719, paragraph 11). In their submission, it follows that Article 5(3) of the Brussels Convention cannot be applied to purely preventive actions which are brought before any actual damage has occurred and are intended to prevent the occurrence of a future harmful event.

45 That objection is not however well founded.

46 The rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between a dispute and the courts for the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, inter alia, Mines de Potasse d'Alsace, paragraphs 11 and 17; Dumez France and Tracoba, paragraph 17; Shevill and Others, paragraph 19, and Marinari, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. Those considerations are equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.

47 That interpretation is moreover supported by the Report by Professor Schlosser on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, pp. 71, 111), which states that Article 5(3) of the Brussels Convention also covers actions whose aim is to prevent the imminent commission of a tort (or delict).

48 It is therefore not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is conditional on the actual occurrence of damage. Furthermore, it would be inconsistent to require that an action to prevent behaviour considered to be unlawful, such as that brought in the main proceedings, whose principal aim is precisely to prevent damage, may be brought only after that damage has occurred.

49 Finally, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), while not applicable ratione temporis to the main proceedings, is such as to confirm the interpretation that Article 5(3) of the Brussels Convention does not presuppose the existence of damage. That regulation clarified the wording of Article 5(3) of the Brussels Convention that the new version of that provision resulting from that regulation refers to the place where the harmful event occurred or may occur'. In the absence of any reason for interpreting the two provisions in question differently, consistency requires that Article 5(3) of the Brussels Convention be given a scope identical to that of the equivalent provision of Regulation No 44/2001. This is all the more necessary given that that regulation is intended to replace the Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark, with that convention continuing to apply between the Kingdom of Denmark and the Member States bound by that regulation.

50 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that the rules on jurisdiction laid down in the Brussels Convention must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

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DOCNUM	62000J0167
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 2000 ; J ; judgment
PUBREF	European Court reports 2002 Page I-08111
DOC	2002/10/01
LODGED	2000/05/08
JURCIT	41968A0927(01)-A01 : N 30 41968A0927(01)-A05PT1 : N 35 - 41 41968A0927(01)-A05PT3 : N 35 - 50 61976J0021 : N 42 44 46 61976J0029 : N 26 27 29 61979J0814 : N 26 28 29 61981J0172 : N 26 61982J0034 : N 35 61987J0189 : N 35 36 61988J0220 : N 44 46 61989J0091 : N 33 61990J0261 : N 35 36 31993L0013-A07P2 : N 9 61993J0068 : N 44 46 61993J0364 : N 44 46 61997J0051 : N 36 32000R0044-A05PT3 : N 49 62000J0096 : N 36
CONCERNS	Interprets 41968A0927(01)-A05PT3
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	English
OBSERV	Austria ; Federal Republic of Germany ; France ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Oberster Gerichtshof, Beschluß vom 13/04/2000 - Juristische Blätter 2000 p.803 (résumé) - Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2000 p.231 (résumé) *P1* Oberster Gerichtshof, Beschluß vom 07/11/2002 - Osterreichische Juristenzeitung 2003 p.IV (résumé) - Osterreichisches Recht der Wirtschaft 2003 p.145 - Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2003 p.98-99 (résumé)

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Jacobs
JUDGRAP	Schintgen
DATES	of document: 01/10/2002 of application: 08/05/2000

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