

JUDGMENT OF THE COURT (Sixth Chamber)
8 March 2001 *

In Case C-405/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Stockholms Tingsrätt, Sweden, for a preliminary ruling in the proceedings pending before that court between

Konsumentombudsmannen (KO)

and

Gourmet International Products AB (GIP),

on the interpretation of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC),

* Language of the case: Swedish.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

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

after considering the written observations submitted on behalf of:

- Konsumentombudsmannen (KO), by M. Åbyhammar, Ställföreträdande Konsumentombudsman,
- Gourmet International Products AB (GIP), by U. Djurberg, Advokat,
- the Swedish Government, by A. Kruse, acting as Agent,
- the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,
- the Finnish Government, by T. Pyynä, acting as Agent,
- the Norwegian Government, by H. Seland, acting as Agent,

- the Commission of the European Communities, by L. Ström and K. Banks, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Gourmet International Products AB (GIP), of the Swedish, French and Finnish Governments and of the Commission at the hearing on 19 October 2000,

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

gives the following

Judgment

- 1 By order of 18 September 1998, received at the Court on 16 November 1998, the Stockholms Tingsrätt (Stockholm District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 30, 36, 56 and 59 of the EC treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC).

- 2 The two questions have been raised in the context of an application made by the Konsumentombudsman (the Swedish ombudsman responsible for consumer protection, hereinafter ‘the Consumer Ombudsman’) for an injunction restraining Gourmet International Products AB (hereinafter ‘GIP’) from placing advertisements for alcoholic beverages in magazines.

National legislation

- 3 Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law 1978:763 laying down provisions on the Marketing of Alcoholic Beverages, as amended, hereinafter ‘the Alkoholreklamlagen’), which entered into force on 1 July 1979, is, according to Article 1, applicable to the promotion of alcoholic beverages to consumers by manufacturers and retailers. Pursuant to the Alkohollagen 1994:1738 (Swedish Law on Alcohol), alcoholic beverages are beverages containing more than 2.25% of alcohol by volume. Those beverages comprise spirits, wines, ‘strong beer’ (containing more than 3.5% of alcohol by volume) and ‘beer’ (containing between 2.25% and 3.5% of alcohol by volume).
- 4 Article 2 of the Alkoholreklamlagen provides:

‘In view of the health risks involved in alcohol consumption, alcoholic beverages should be marketed with particular moderation. In particular, advertisements or other marketing measures must not be insistent, involve unsolicited approaches or encourage alcohol consumption.

Advertising may not be used to market alcoholic beverages on radio or television. The same prohibition applies to satellite broadcasts subject to Law 1996:844 on Radio and Television.

Advertising may not be used to market spirits, wines or strong beers either in periodicals or in other publications subject to the Regulation on Press Freedom and comparable to periodicals by reason of their publication schedule. That prohibition does not however apply to publications distributed solely at the point of sale of such beverages. Law 1996:851.'

- 5 It is apparent from the order for reference that, owing to the object of the Alkoholreklamlagen, which is to restrict the possibilities of marketing alcoholic beverages to consumers, the prohibition on advertisements in periodicals does not apply to advertisements in the specialist press, meaning the press aimed essentially at traders, that is to say, in particular, at manufacturers and restaurateurs.
- 6 It is also apparent from the order for reference that advertising on the public highway and the direct mailing of advertising material to individuals, in particular, are regarded as contrary to the obligation to exercise moderation laid down by the Alkoholreklamlagen.

Main proceedings

- 7 GIP publishes a magazine entitled *Gourmet*. Issue No 4 (August-October 1997) of the edition intended for subscribers contained three pages of advertisements for alcoholic beverages, one for red wine and two for whisky. Those pages did not appear in the edition sold in shops. According to the order for reference, 90% of the magazine's 9 300 subscribers are traders, manufacturers or retailers, and 10% are private individuals.

- 8 The Consumer Ombudsman applied to the Stockholms Tingsrätt for an injunction, and imposition of a fine in the event of failure to comply therewith, restraining GIP from contributing to the marketing of alcoholic beverages to consumers by means of such advertisements, which were contrary to Article 2 of the Alkoholreklamlagen.
- 9 GIP contended that the application should be dismissed. It argued, in particular, that the proceedings brought against it were based on legislation that was contrary to Community law.
- 10 When examining the application, the Tingsrätt was unsure, in particular, whether national rules imposing an absolute prohibition on certain advertisements might be regarded as having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty and, if so, whether, in view of their object, they might be regarded as lawful under Article 36 of the Treaty. It was also unsure whether such national rules were compatible with the freedom to provide services.
- 11 The Stockholms Tingsrätt considered that an interpretation of the relevant provisions of the Treaty seemed necessary. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
 - '1. Is Article 30 or Article 59 of the EC Treaty to be interpreted as precluding national legislation entailing a general prohibition of alcohol advertising, such as the prohibition laid down in Article 2 of Alkoholreklamlagen?

2. If so, can such a prohibition be regarded as justified and proportionate for the protection of life and health of humans?’

¹² The Consumer Ombudsman lodged an appeal against the order for reference before the Marknadsdomstolen, Sweden, which dismissed the appeal by decision of 11 March 1999.

Free movement of goods

¹³ By the questions referred to the Court, which can be considered together, the national court is asking essentially, first, whether the provisions of the Treaty on the free movement of goods preclude a prohibition on advertisements for alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.

¹⁴ The Consumer Ombudsman and the intervening Governments accept that the prohibition on advertising in Sweden affects sales of alcoholic beverages there, including those imported from other Member States, since the specific purpose of the Swedish legislation is to reduce the consumption of alcohol.

¹⁵ However, observing that the Court held in paragraph 16 of its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, the Consumer Ombudsman and the intervening Governments contend that the prohibition on advertising in issue in the main

proceedings does not constitute an obstacle to trade between Member States, since it satisfies the criteria laid down by the Court in that judgment.

- 16 GIP contends that an outright prohibition such as that at issue in the main proceedings does not satisfy those criteria. It argues that such a prohibition is, in particular, liable to have a greater effect on imported goods than on those produced in the Member State concerned.
- 17 Although the Commission takes the view that the decision as to whether, on the facts of the case, the prohibition does or does not constitute an obstacle to intra-Community trade is a matter for the national court, the Commission expresses similar doubts as to the application in the present case of the criteria referred to in paragraph 15 above.
- 18 It should be pointed out that, according to paragraph 17 of its judgment in *Keck and Mithouard*, if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article 30 of the Treaty, they must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products.
- 19 The Court has also held, in paragraph 42 of its judgment in Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, that it cannot be excluded that an outright prohibition, 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.
- 20 It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality

prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

- 21 Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.
- 22 The information provided by the Consumer Ombudsman and the Swedish Government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported, in comparison with other products such as vodka, which is mainly of Swedish origin, does not alter that conclusion. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have been greater; second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption.
- 23 Furthermore, although publications containing advertisements may be distributed at points of sale, Systembolaget AB, the company wholly owned by the Swedish State which has a monopoly of retail sales in Sweden, in fact only distributes its own magazine at those points of sale.

- 24 Last, Swedish legislation does not prohibit ‘editorial advertising’, that is to say, the promotion, in articles forming part of the editorial content of the publication, of products in relation to which the insertion of direct advertisements is prohibited. The Commission correctly observes that, for various, principally cultural, reasons, domestic producers have easier access to that means of advertising than their competitors established in other Member States. That circumstance is liable to increase the imbalance inherent in the absolute prohibition on direct advertising.
- 25 A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 30 of the Treaty.
- 26 However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by Article 36 of the Treaty.
- 27 In that regard, it is accepted that rules restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflects public health concerns (Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 17, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 15).
- 28 In order for public health concerns to be capable of justifying an obstacle to trade such as that inherent in the prohibition on advertising at issue in the main proceedings, the measure concerned must also be proportionate to the objective

to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.

- 29 The Consumer Ombudsman and the intervening Governments claim that the derogation provided for in Article 36 of the Treaty can cover the prohibition on advertising at issue in the main proceedings. The Consumer Ombudsman and the Swedish Government emphasise in particular that the prohibition is not absolute and does not prevent members of the public from obtaining information, if they wish, in particular in restaurants, on the Internet, in an ‘editorial context’ or by asking the producer or importer to send advertising material. Furthermore, the Swedish Government observes that the Court of Justice has acknowledged that, in the present state of Community law, Member States are at liberty, within the limits set by the Treaty, to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved (*Aragonesa de Publicidad Exterior and Publivía*, cited above, paragraph 16). The Swedish Government maintains that the legislation at issue in the main proceedings constitutes an essential component of its alcohol policy.
- 30 GIP claims that the outright prohibition on advertising laid down by the legislation at issue in the main proceedings is disproportionate, since the protection sought could be obtained by prohibitions of a more limited nature, concerning, for example, certain public places or the press aimed at children and adolescents. It must be borne in mind that the Swedish policy on alcoholism is already catered for by the existence of the monopoly on retail sales, by the prohibition on sales to persons under the age of 20 years and by information campaigns.
- 31 The Commission submits that the decision as to whether the prohibition on advertising at issue in the main proceedings is or is not proportionate is a matter for the national court. However, it also states that the prohibition does not appear to be particularly effective, owing in particular to the existence of ‘editorial’ publicity and the abundance of indirect advertising on the Internet, and that requirements as to the form of advertising, such as the obligation to exercise moderation already found in the Alkoholreklamlagen, may suffice to protect the interest in question.

- 32 It should be pointed out, first, that there is no evidence before the Court to suggest that the public health grounds on which the Swedish authorities rely have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or to protect certain national products indirectly (Case 34/79 *Regina v Henn and Darby* [1979] ECR 3795, paragraph 21, and *Aragonesa de Publicidad Exterior and Publivía*, cited above, paragraph 20).
- 33 Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.
- 34 The answer to the question must therefore be that, as regards the free movement of goods, Articles 30 and 36 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

Freedom to provide services

- 35 By the questions it has referred to the Court, the national court is essentially asking, second, whether the Treaty provisions on freedom to provide services

preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.

- ³⁶ The Consumer Ombudsman, GIP, the Swedish Government and the Commission agree that provision of advertising space may constitute a provision of cross-border services falling within the scope of Article 59 of the Treaty. The other intervening Governments, on the other hand, contend that Article 59 does not apply in the main proceedings.
- ³⁷ In that regard, as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 30, and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 30).
- ³⁸ That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States.
- ³⁹ A measure such as the prohibition on advertising at issue in the proceedings before that court, even if it is non-discriminatory, has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see, in that regard, *Alpine Investments*, cited above, paragraph 35).

- 40 However, such a restriction may be justified by the protection of public health, which is a ground of general interest recognised by Article 56 of the EC Treaty, which is applicable to the provision of services in accordance with Article 66 of the EC Treaty (now Article 55 EC).
- 41 As observed in paragraph 33 above, in relation to obstacles to the free movement of goods, it is for the national court to determine whether, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the prohibition on advertising at issue in the main proceedings meets the condition of proportionality required in order for the derogation from the freedom to provide services to be justified.
- 42 The answer to be given must therefore be that, as regards freedom to provide services, Articles 56 and 59 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

Costs

- 43 The costs incurred by the Swedish, French, 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 (Sixth Chamber),

in answer to the questions referred to it by the Stockholms Tingsrätt by order of 18 September 1998, hereby rules:

Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC) do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law laying down provisions on the Marketing of Alcoholic Beverages), as amended, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

Gulmann

Skouris

Puissochet

Schintgen

Macken

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber