

OPINION OF ADVOCATE GENERAL
VAN GERVEN

delivered on 18 November 1992 *

*Mr President,
Members of the Court,*

1. The central question in these cases concerns the compatibility with Community law of national legislation prohibiting resale at a loss. This question was raised in criminal proceedings brought against Mr Keck and Mr Mithouard, in charge of supermarkets situated at Mundelsheim and Geispolsheim respectively, for selling certain products at a loss. Before the Seventh Criminal Chamber of the Tribunal de Grande Instance (Regional Court), Strasbourg (hereinafter 'the national court') they claim that the statutory prohibition in question, laid down in Article 1 of Finance Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986,¹ is incompatible with Community law and, in particular, with the provisions of the Treaty on the free movement of goods, persons, services and capital, free competition and non-discrimination. That submission led the national court to submit the following question to the Court in both cases:

'Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition

in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Article 3 and 7 thereof, since the French legislation is liable to distort competition:

- (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;
- (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?

2. First of all, I will clarify the question of the relevant provisions of the Treaty with reference to which the French legislation concerned must be examined. Like the Commission, I consider that the provisions and principles of the Treaty relating to the free movement of workers, freedom of establishment and freedom to provide services do not apply in the present case. The link between those rules and the situation being considered is too indirect and too hypothetical: the

* Original language: Dutch.

1 — For the text of this provision, I can refer to the Report for the Hearing.

cases involve two supermarkets established in France (very close to the German border, it is true) and neither the case-file nor the observations submitted by the parties to the main proceedings indicate any real factors from which it must be deduced that the aforementioned provisions are applicable.

I can also be brief with regard to Article 7 of the Treaty, which is also expressly referred to by the national court: that provision only prohibits discrimination based on the nationality of traders.² Since the French legislation in question does not make any direct or indirect distinction according to nationality or place of establishment of the undertakings to which it is applicable, Article 7 does not apply. It should be added that the Court has repeatedly held that Article 7 is not contravened merely because other Member States apply less strict rules and that the competitiveness of other traders established in the Member State concerned is affected in relation to that of traders established in other Member States.³

As regards the applicability of rules of Community competition law, and in particular Articles 3(f), 85 and 86 of the Treaty, I would also merely refer to the settled case-law of the Court, according to which those provisions only concern the conduct of undertakings and not legislative or regulatory mea-

asures of the Member States.⁴ It is true that the Court has also held that the Member States may not adopt or maintain in force measures which might render ineffective the competition rules applicable to undertakings, the situation which it has in view here being one in which a Member State, by legislation or regulation, imposes or promotes the conclusion of agreements contrary to Article 85 or reinforces their effects, or deprives its own rules of the character of State rules by transferring decision-making powers to private companies.⁵ However, in the present case, such a situation does not arise.

The only aspect of Community law with reference to which the French legislation in question must be examined would appear to be that of the free movement of goods: the case here concerns national rules relating to the sale of *products*. Although Article 30 of the Treaty is not actually mentioned by the national court, it would follow from the questions submitted that the Court must take that provision into consideration in order to enable the national court to assess the compatibility of the French legislation with Community law.

3. The first question which therefore arises is whether a statutory prohibition of resale at a loss must be regarded as a measure having equivalent effect within the meaning of

2 — See the judgment in Case 31/78 *Bussone* [1978] ECR 2429, paragraphs 38 to 40, and the judgment in Case 155/80 *Oebel* [1981] ECR 1993, paragraph 7.

3 — See the judgment in Joined Cases 185/78 to 204/78 *Van Dam* [1979] ECR 2345, paragraph 10, the judgment in *Oebel*, paragraphs 9 and 10, and the judgment in Case 126/82 *Smit* [1983] ECR 73, paragraph 27.

4 — The fact that sale at a loss may, in certain specific circumstances, be classified as an abuse of a dominant position for the purpose of Article 86 of the Treaty is clear from the judgment of Court in Case C-62/86 *Akzo v Commission* [1991] ECR I-3454, in which the Court, in paragraphs 69 to 72, laid down the relevant criteria.

5 — See the judgment in Case 311/85 *Vereniging van Vlaamse Reishureaus* [1987] ECR 3801, paragraphs 23 and 24, the judgment in Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16, and the judgment in Case 332/89 *Marchandise* [1991] ECR I-1027, paragraph 22.

Article 30 of the Treaty. The French Government maintains that this is not the case, since the prohibition applies without distinction to national products and imported products. The French Government further maintains that the prohibition does not deprive a foreign product of the competitive advantage of having a lower cost price than a national product and does not lay down maximum prices making it impossible to market in France an imported product (the price of which is higher in any case, if only because of the costs of transport and packaging). The French Government considers that this view is confirmed by the judgment delivered in 1978 in *van Tiggele*, in which the Court held that:

‘... a national provision which prohibits without distinction the retail sale of domestic products and imported products at prices below the purchase price paid by the retailer cannot produce effects detrimental to the marketing of imported goods alone and consequently cannot constitute a measure having an effect equivalent to a quantitative restriction.’⁶

4. I cannot accept that line of argument. In my view, the possibility cannot be excluded that a statutory prohibition of resale at a loss might impede ‘directly or indirectly, actually or potentially’ intra-Community trade within the meaning of the *Dassonville* judgment. This becomes particularly clear when one takes account of the fact that sale at a

loss is a *sales promotional method* and that, since the judgment in *Oosthoek* (a case concerning a national measure prohibiting the offering of certain gifts in kind when a purchase is made) the Court has consistently held that:

‘Legislation which restricts or prohibits certain forms of advertising and 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. The possibility cannot be ruled out that to compel a producer 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.’⁷

The judgment in *van Tiggele* most surely cannot be invoked against that case-law, since that judgment antedated the Court’s judgments in *Cassis de Dijon* and *Oosthoek*, which greatly reduces, or even negates, its value as a precedent.⁸

7 — Judgment in Case 286/81 *Oosthoek* [1982] ECR 4575, paragraph 15; for recent applications, see *inter alia* the judgments in Case 382/87 *Buet* [1989] ECR 1235, paragraphs 7 and 8, Case C-362/88 *GB-Inno-BM* [1990] ECR I-667, paragraph 7, Case C-369/88 *Delatre* [1991] ECR I-1487, paragraph 50, Case C-239/90 *Boscher* [1991] ECR I-2023, paragraph 14, and Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151, paragraph 10.

8 — In any event, the judgment in *van Tiggele* concerned a different issue, which was whether the laying down of minimum prices *by way of regulation* was compatible with Article 30.

6 — Judgment in Case 82/77 — *van Tiggele* [1978] ECR 25, paragraph 16.

5. In order for Article 30, as interpreted in the case-law of the Court, to be applicable to national legislation, it must certainly have a definite link with intra-Community trade. I do not think that this can be denied in the present case. It is true that the legislation in question does not contain any prohibition of sale at a loss at producer level. That means that a producer from another Member State still has the possibility — if he wishes to launch his product on the French market — to sell his product at a loss to a retailer in France or elsewhere, whereupon the retailer can resell the product in France at a greatly reduced price (but above his own cost price). Nevertheless, even such a limited prohibition of sale at a loss may still have an impeding effect on intra-Community trade if the retailer himself, without support from the foreign producer (in the form of a much reduced price or even a loss price) wishes to conduct a campaign to launch the product on the French market at a loss. A similar (potential) impeding effect exists where an importer of a product originating from another Member State must compete in France with a national producer who is able to sell his product at a loss whilst this is not possible for the importer/retailer.

Those examples show that, even though it is not applicable at producer level, the national prohibition in question may nevertheless

‘directly or indirectly, actually or potentially’ impede intra-Community trade.⁹

6. Since it is to be assumed that the rules in question are in principle covered by Article 30, the question which must now be examined is whether the obstacles (actual or potential) to intra-Community trade which they entail must nevertheless be accepted upon application of the ‘Cassis de Dijon’ test: for the practice of sale at a loss is not regulated by the Community and is regulated differently in the Member States; furthermore, the French legislation applies without distinction to national products and foreign products.

According to the ‘Cassis de Dijon’ test, obstacles to free movement are to be accepted only in so far as the aim of the national legislation concerned is to satisfy mandatory requirements justified in Community law and is also necessary to attain, and is proportionate to, the aim in view.¹⁰ It is primarily for the national court (and, before this Court, for the government of the Member State concerned) to make clear the aims which the national legislation

9 — There is certainly a tendency in the case-law of the Court not to regard national rules whose scope of application is limited to the sale of products *at retail trade level* as measures having equivalent effect, within the meaning of Article 30 of the Treaty: for an illustration, see *inter alia* the judgment of the Court in *Oebel* (regulation of the times of delivery of bread to individual buyers and retailers), the judgment in *Case 75/81 Blesgen* [1982] ECR 1211 (statutory prohibition on offering for sale for consumption on the premises of alcoholic beverages of a certain strength) and the judgment in *Case C-23/89 Quielynn* [1990] ECR I-3509 (prohibition on retailing sex articles without a licence). In the present case, however, the national rules also take effect *at the level of resale*, that is to say of importation and wholesale.

10 — This has been settled case-law since the judgment in *Case 120/78 Rewe* [1979] ECR 649, paragraph 8.

concerned is designed to achieve and whether, having regard to the case-law of this Court, they are justified in Community law. In case of doubt, it can obtain guidance from this Court on the last point.

7. As regards the aim pursued by the national legislation concerned, the national court points out in both cases that 'at first sight the prohibition of resale at a loss laid down by the national legislation may appear quite justified by the double aim of protecting consumers and regulating healthy and fair competition'. In written submissions submitted to the Court the French Government further explains this point. It associates the ban on resale at a loss primarily with fair trading and only indirectly — via the safeguarding of fair competition — with protection of the consumer.¹¹ According to the French Government, the national rules are meant to combat unfair trading. In its view, resale at a loss may allow a trader to corner a market as well as artificially capture customers, and, once this purpose is achieved, the trader may then sell the products in question at the normal price or even at a higher price. The French Government maintains that such a practice is also detrimental to the interests of consumers, since the losses incurred by the trader on individual products are necessarily made up by higher profit margins on other products.

8. It would appear from the foregoing that the national rules under consideration rely

on two of the mandatory requirements recognized by the Court, namely fair trading and protection of consumers.¹² The question is, then, whether the national rules at issue are necessary in order to achieve the aim sought after and whether, having regard to the obstacles to intra-Community trade which they entail, there is no alternative solution involving less restriction of that trade.

As regards the aim of ensuring fair trading, the French Government mainly has in view the case of a trader who, whether or not pursuant to a collusive agreement with another trader, tries to eliminate a competitor by pursuing the practice of selling goods at a loss. At the hearing, that view led Counsel for the French Government to distinguish resale at a loss, as a technique, from other sales promotion methods or sales methods considered in other judgments of the Court, such as joint offer (*Oosthoek*), doorstep selling (*Buet*), publicising in a special offer the offer's duration and the price previously charged (*GB-Inno-BM*) and sale by mail order (*Delattre*). In so far as national rules governing sale at a loss are aimed at such practices, I consider that they are appropriate and necessary to achieve the aim in view, which is to ensure fair trading. They may also be apt to prevent competition from being distorted, which is

11 — See point 8 of the observations of the French Government, which deals with the compatibility of the ban with the competition rules of the Treaty.

12 — Those grounds have already been mentioned by the Court in the '*Cassis de Dijon*' judgment: see the judgment in *Rewe*, paragraph 8.

an aim which is also in accord with the Treaty. However, where these two aims are concerned, the legislation concerned must pursue them in a sufficiently precise way.

So, as far as the second abovementioned aim is concerned — protection of consumers, I can equally well imagine that in applying a ban on sale at a loss a Member State would wish to curb certain 'decoy methods', such as the technique of attracting customers with products which are sold at a loss or at an exceptionally low profit margin so as then to induce them, once they have entered the sales premises, to buy other products which, in order to compensate for the losses on the decoy products, are marked at higher prices. In such a case, a ban on sale at a loss, but this time at the retail level, may also be appropriate and necessary in order to achieve an aim allowed by Community law.

Here, too, the ban must however be sufficiently precise so as to affect only those practices.

9. It cannot therefore be excluded that a ban on sale at a loss, where it is framed in a *sufficiently precise* way, may be necessary in order to achieve the objectives, justified under Community law, of ensuring fair trading and, in combination with that objective, of maintaining undistorted competition and/or protecting consumers.

The problem with a ban framed in *general* terms, such as that laid down in the national legislation concerned — even though it does not apply at producer level — is, however, that use of the sales promotion method which it prohibits is also banned in trading situations which cannot be regarded as unfair, anti-competitive or detrimental to the consumer. In my view, such situations are indeed likely to occur. Like the Commission, I have in mind the case where the method of selling at a loss is used in order to launch a new product or to penetrate a new market. However, there may well be other situations; I would merely mention the case where goods are sold at a loss in order to dispose of excessive stocks.¹³ In so far as it also covers those situations, a prohibition of sale at a loss framed in general terms therefore goes further than is necessary to achieve the aims allowed by Community law.

10. Consequently, my conclusion is that a general prohibition of resale at a loss does not satisfy the necessity test and that a less restrictive alternative is available, which is to define the prohibition in such a way that it better accords with the aforementioned mandatory requirements accepted in Community law.

¹³ — It is not certain that this case is completely covered by the exceptions provided for by the French prohibition, in particular, paragraph II of Article 1 of the Law of 2 July 1963, such as sales of perishable products, sales carried out on cessation or change of a business, and sales of products which are out of season, out of fashion or technically obsolete.

Conclusion

11. In view of the foregoing, I propose that the Court should reply as follows to the questions submitted by the national court:

A statutory prohibition of resale at a loss also embracing in its generality situations which do not fall within the scope of one (or more) of the mandatory requirements recognized in Community law is not compatible with Article 30 of the EEC Treaty.