JUDGMENT OF THE COURT (Sixth Chamber)
12 December 1990 *

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 Édouard 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,

* Language of the case: French.

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 Édouard 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 Édouard 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

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?'

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 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 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 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 für 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.

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 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.

Mancini O'Higgins

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 12 December 1990.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber