OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 14 November 1990 *

Mr President,
Members of the Court,

1. The Tribunal de commerce, Paris, has submitted a question to the Court for a preliminary ruling on the compatibility with certain provisions of the EEC Treaty of French case-law according to which a manufacturer or trader is not entitled to limit his liability as regards latent defects in goods which he has supplied.

The question is as follows:

'Are the provisions of Articles 2 and 3(f), read together with those of Articles 85(1) and 34, of the EEC Treaty to be interpreted as prohibiting the application of a Member State's case-law which, by not allowing persons selling goods by way of trade to prove that on the date on which the goods were delivered they were unaware of a defect in the goods, has the effect of preventing them from relying on Article 1643 of the French Civil Code, which allows them to limit their liability when unaware of the defect, in the same way as their competitors in the other Member States may do under the provisions of their own national law?'

Background

2. To ensure a proper understanding of the question raised, it is necessary, in my view, to begin with a brief outline of the facts of the case and the issues it raises.

In 1983 and 1984 the plaintiff in the main proceedings, Alsthom, supplied two cruise vessels to a Netherlands company. The engines for those two vessels were purchased by Alsthom from the company C. C. M. Sulzer, the first defendant in the main proceedings. On delivery of the vessels the Netherlands purchaser expressed certain reservations as regards a number of defects in the goods supplied, claiming *inter alia* that the engines (supplied by Sulzer) were not functioning properly. The reservation relied upon by the Netherlands purchaser gave rise to arbitration proceedings against Alsthom. It is clear from the documents before the Court that Alsthom opposed the Netherlands purchaser's claim on the basis of a number of contractual clauses limiting its liability. It is also apparent from those documents that the Netherlands purchaser's claim against Alsthom and the validity or applicability of the clauses limiting liability are to be assessed by an arbitration tribunal in accordance with French law, which is applicable to the contract of sale.

In the main proceedings Alsthom seeks from the Tribunal de commerce an order

* Original language: Dutch.

requiring Sulzer to reimburse, on the ground that it supplied defective goods, the whole of the cost of repairs advanced by Alsthom and any compensation which Alsthom may be obliged to pay to the Netherlands purchaser as a result of the decision of the arbitration tribunal. Sulzer served third-party notice on its insurer, the Union des assurances de Paris ('UAP'), seeking an indemnity in respect of any order made against it at Alsthom's request.

3. Let us now turn to the case-law forming the subject-matter of the questions raised. That case-law concerns Articles 1641 to 1643 of the French Civil Code, which deal with the vendor's obligation to provide a guarantee in respect of any latent defects in the goods sold by him. Article 1643 allows the vendor to escape liability for 'latent defects', [1] at least where he was unaware of them. According to well-established French case-law, that possibility of escaping liability is not available to manufacturers or persons selling goods *by way of trade*. The French case-law raises an irrebuttable presumption that such persons are aware of any defects in the goods supplied by them. For that reason any clauses limiting liability are considered null and void, unless they are incorporated in a contract between two undertakings operating in the same specialized field.

Since the contract between Alsthom and the Netherlands company which purchased the cruise vessels is governed by French law, Alsthom cannot rely on the clause limiting liability in the contract of sale. Hence there is a real possibility that Alsthom may be required to pay to the Netherlands company which purchased the vessels either the cost of repairs or compensation, or both. The legal relationship between Alsthom and Sulzer is less clear-cut since, according to the order for reference, Sulzer maintains that both it and Alsthom are two undertakings engaged in the same specialized field [2] with the result that any clauses limiting liability stipulated between them are valid.

In the proceedings before the national court Sulzer argued that there is no similar case-law in any other Member State of the European Community, which, in its view, is tantamount to the existence of *de facto* discrimination against companies subject to French law, with the result that freedom of competition is distorted contrary to the rules laid down in Articles 30 and 34 of the EEC Treaty. More particularly, that case-law has particularly serious consequences for the shipbuilding industry in France, since French shipbuilders and their subcontractors find themselves in a far less favourable position than foreign undertakings with which they have concluded contracts. The national court takes the view that this matter calls for further consideration and has accordingly sought a preliminary ruling from the Court.

4. Before answering the questions submitted, there is a further point I wish to make. The national court points out that its decision to refer a question to the court for a preliminary ruling also stems from the fact that since the dispute between Alsthom and the Netherlands purchaser has been submitted to arbitration, Alsthom cannot in its own defence ask the arbitration tribunal

1 — 'Latent defects' must be distinguished from 'visible defects', which are defects which are visible and which a normally prudent purchaser could have detected (see Article 1642 of the Civil Code).

2 — See page 14, third paragraph from the end of the order for reference.

to submit a reference for a preliminary ruling since an arbitration tribunal is not qualified to bring a matter before the Court of Justice. In that connection the national court considers that Sulzer, on the other hand, is able to make such a request in the proceedings pending before it.[3] The order for reference further states that Alsthom has expressly declared that it supports Sulzer's request.[4] In the same passage the national court also takes formal note of Sulzer's assertion that it and Alsthom are undertakings engaged in the same specialized field, in which case, as stated above, a clause limiting liability stipulated between them is valid.

It may be inferred from all those factors that the question submitted for a preliminary ruling is not relevant to the contractual relationship between Alsthom and Sulzer and that the national court has raised it only in support of Alsthom's position in the arbitration proceedings. Has the question submitted to the Court actually been raised *before the national court* seeking the ruling as required by Article 177 of the EEC Treaty? Recently the Court stated in its judgment in *Pardini*[5] that the power to seek a preliminary ruling from the Court is conferred on the national courts solely in order to enable them to resolve disputes before *them*,[6] and that it follows from both the wording and the scheme of Article 177 that only a national court or tribunal which considers that the preliminary ruling requested is necessary to enable it to give judgment is entitled to make a reference to the Court.[7]

3 — See page 15 of the order for reference, at the top.

4 — *Ibidem.*

5 — Judgment in Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041.

6 — See paragraph 9 of the judgment.

7 — See paragraph 10 of the judgment. In the judgment in *Pardini* doubts had arisen regarding the jurisdiction of the Court since the questions submitted had been raised by an Italian magistrate's court in interlocutory proceedings, although there was evidence that the answer to those questions could only be useful for the purposes of the main proceedings which would have to be instituted before another court (see paragraphs 7, 12 and 13 of the decision).

At the hearing, Sulzer's representative expressed the view that since Sulzer was in fact an undertaking engaged in a *different* specialized field from Alsthom, it could not rely on a clause limiting liability against Alsthom and it was therefore also adversely affected by the case-law called in question in the reference for a ruling. Furthermore, still according to the view taken by Sulzer at the hearing, Alsthom and the Netherlands purchaser terminated the arbitration proceedings by means of a settlement which stipulates, *inter alia*, that all the claims which the Netherlands purchaser was able to rely upon against Alsthom had been assigned to Alsthom, with the result that the latter may assert them against Sulzer. In those circumstances there are no grounds for calling in question the jurisdiction of the Court to answer the question referred to it for a preliminary ruling.

5. In its observations on the question submitted, the Commission deals with the interpretation of Article 2 of the Treaty separately. I do not propose to follow that approach since it is apparent from the wording of the question that the national court does not seek a ruling on Articles 2 and 3 read separately, but in conjunction with Articles 34 and 85 of the Treaty. It is apparent from the Court's case-law, moreover, that Articles 2 and 3 of the Treaty contain a number of objectives — couched in general terms — which are set out in concrete terms in the other provisions of the Treaty. The objectives referred to in Articles 2 and 3 may contain important pointers relevant to the interpretation of those other Treaty provisions[8] and are therefore best discussed together with those provisions.

8 — See, for instance, the judgment in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215 (concerning the interpretation of Article 86 of the Treaty), and the judgments in Case 15/81 *Schul* [1982] ECR 1409 and Case 299/86 *Drexl* [1988] ECR 1213 (concerning the interpretation of Article 95 of the Treaty).

Interpretation of Article 34 of the EEC Treaty

6. Article 34 of the EEC Treaty prohibits quantitative restrictions on exports and all measures having equivalent effect. Article 34 must, like all the rules in the Treaty, be observed by all the authorities of the Member States, including their judicial authorities.[9] Hence a rule laid down by the courts may also fall within the prohibition contained in Article 34.

In the Court's 1979 judgment in *Groenveld*[10] the Court made it clear that Article 34 concerns

'national measures which have as their specific object or effect the restriction of patterns of export and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition . . . which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export' (paragraph 7).[11]

7. It is worth noting that the national court as well as Alsthom and Sulzer seem to start from the premise that the permissibility of clauses limiting liability is restricted only in France to the detriment of manufacturers or traders. That is far from certain: a similar presumption has long since been applied by the Belgian and Luxembourg courts in their case-law (although in Belgium it may be rebutted in exceptional cases),[12] and it is not unlikely that comparable restrictions may exist in other Member States as well, based on considerations relating to the protection of consumers.[13]

According to the order for reference the national court also starts from the premise that the French legislation described above leads to discrimination against French undertakings in relation to their foreign competitors. As is apparent from the aforesaid judgment in *Groenveld*, however, Article 34 of the Treaty concerns national measures which have as their *specific* object or effect the restriction of patterns of exports in such a way as to favour domestic production or the domestic market. Accordingly, national rules which impose general obligations on traders come within the prohibition laid down in Article 34 only in so far as such rules establish a difference in treatment between the domestic trade and the export trade of a Member State and

9 — See the judgment in Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181, in which that principle was upheld in connection with the application of Article 30 of the Treaty.

10 — Judgment in Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409.

11 — This passage in *Groenveld* has been repeatedly upheld by the Court. See, for instance, the judgment in Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483, at paragraph 22. Contrary to the view expressed by Sulzer and UAP at the hearing, the rule in *Groenveld* was also upheld by the Court in its judgment in Case 173/83 *Commission* v *France* [1985] ECR 491. That case was concerned with a prohibition on the export of waste oil implicitly (but indisputably) laid down in the French legislation.

12 — See, in the case of Belgium, the judgment of the Belgian Court of Cassation of 13 November 1959, *Pasicrisie 1960*, I, p. 313 and the judgment of 6 May 1977, *Pasicrisie 1977*, I, p. 907; and in the case of Luxembourg, P. Hammelman and G. Ravarani, 'La responsabilité civile du fait des produits défectueux', in *Mélanges dédiés à Michel Delvaux*, Luxembourg, 1990, p. 51, at pp. 83-88.

13 — For more details in that connection the following may be consulted: C. J. Miller, 'Comparative product liability', in *UK Comparative Law Series*, Vol. 6, London 1986; J. Schmidt-Salzer and H. Hollmann, *Kommentar EG-Produkthaftung*, Vol. 2, Heidelberg 1990; F. F. Stone, 'Liability for damage caused by things', in *International Encyclopedia of Comparative Law*, Vol. XI, Torts, Tübingen 1983; and C. Joerges et al., *Die Sicherheit von Konsumgütern und die Entwicklung der Europaischen Gemeinschaft*, Baden-Baden 1988.

thus provide a particular advantage for its domestic production or domestic market. I agree with the Commission that the French case-law in question does not have as its object or effect the provision of such an advantage.

8. The *object* of the case-law is not in any way to establish a difference of treatment between a State's export trade and its domestic trade. Rather, that case-law seems to be based, as the Commission rightly points out, on the concern to afford greater protection to consumers in connection with the purchase of defective products, by precluding the stipulation of clauses limiting liability for the benefit of manufacturers or traders. [14]

Nor can it be seriously argued that the aforesaid case-law has the specific *effect* of restricting patterns of exports and thereby favouring domestic production or domestic trade. That is quite apparent from the scope of that case-law: it is meant to apply to all contractual relations — both purely internal and international — which are governed by French law; the implications with regard to the liability of traders for latent defects are thus equally valid in relation to both export trade and domestic trade.

At the hearing Sulzer and UAP dwelt on the difficulties to which the case-law in question gives rise with regard to the sale of French products: in their view, French traders are placed at a serious disadvantage in relation to their foreign rivals who are not subject to such a system of liability. The only answer to that is that the prohibition in Article 34 applies to restrictions on intra-Community trade which place the export trade at a specific disadvantage for the benefit of domestic trade. The mere fact that all traders subject to French law are placed at a disadvantage as a result of a generally applicable rule, [15] without there being any advantage for domestic production or the domestic market, does not, according to the case-law as it stands at present, lead to the application of Article 34.

The interpretation of Articles 3(f), 5 and 85 of the Treaty

9. As stated above, the national court wishes to ascertain whether the case-law in question leads to a distortion of competition between French undertakings and other Community undertakings. However, Articles 3(f) and 85 are not concerned with such a distortion of competition. Although they relate to the maintenance of competition within the Common Market, those provisions impose a prohibition on agreements and concerted practices which distort competition *between undertakings.* There is no question of any such agreements or concerted practices in the situation before the national court.

14 — The Commission thus detects a convergence between the aims of that case-law and those 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). However, that directive had not yet entered into force at the time of the events which gave rise to this case.

15 — In that regard it makes no difference whether the legal rule in question has to be applied to the legal relationship in question or, in the case of international contracts, is selected by the contracting parties as the rule applicable to the legal relationship between them.

Admittedly, the Court has held that it follows from Articles 3(f), 5 and 85 read together that the principles enshrined in Article 85 must also be observed by the Member States. More particularly, the Court has laid down the rule that all Member States are under an obligation not to introduce or maintain in force measures which may detract from the effectiveness of Article 85 of the EEC Treaty. [16] That would be the case, in particular, if a Member State were to favour the introduction of competitive arrangements contrary to Article 85 or reinforce their effects. [17] The Court's case-law does not rule out the possibility that Articles 3(f), 5 and 85 of the EEC Treaty read together may be infringed by the judicial authorities of a Member State, but only on condition that they favour, pave the way for or reinforce agreements or concerted practices *between undertakings*. That would not appear to be the case in the proceedings before the national court.

Conclusion

10. On the basis of the foregoing considerations, I propose that the Court answer the question submitted for a preliminary ruling as follows:

Articles 2 and 3(f) read in conjunction with Articles 85(1) and 34 of the EEC Treaty do not preclude the application of a Member State's case-law which prevents traders from demonstrating that they were unaware of a defect in a product supplied by them with the result that they cannot limit their liability for that defect.

16 — See the judgment in Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305, at paragraphs 15 and 16.

17 — See, for instance, the judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, in particular at paragraphs 9 and 10.