OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 15 July 1993 *

Mr President,
Members of the Court,

1. In this case, the Arrondissementsrechtbank (District Court), Leeuwarden, has referred to the Court for a preliminary ruling a question concerning the compatibility of a national measure with the so-called 'labelling directive', that is to say 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 (hereinafter 'the labelling directive' or 'the directive'). [1]

The main criminal proceedings were brought against Coöperatieve Zuivelindustrie 'Twee Provinciën' WA (hereinafter 'Twee Provinciën'), a producer of, *inter alia*, Gouda cheese. It was charged with failing to place the national cheese mark on cheeses of its manufacture in accordance with the Netherlands legislation. Before the Arrondissementsrechtbank, Leeuwarden, Twee Provinciën argued that, in so far as the Netherlands legislation required not only the cheese mark to be affixed but also letters differing according to the region, it was contrary to the labelling directive. This prompted the national court to refer the following question for a preliminary ruling:

'Is a national measure requiring cheese producers to affix a cheese mark not merely indicating the country of production and the type of cheese, but also a specific letter depending on the region of production, although there are no appreciable regional differences in quality, consistent as regards the latter requirement with 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, in particular Article 15 thereof?'

Relevant national and Community legislation

2. I shall summarize the relevant national legislation — with which the Court has already had to deal in the case of *Jongeneel Kaas* [2] — as follows. The preparation and sale of cheese are governed in the Netherlands by a number of provisions which are based on the *Landbouwkwaliteitswet* (Law

* Original language: Dutch.

1 — OJ 1979 L 33, p. 1. The labelling directive has been successively amended by Council Directive 85/7/EEC of 19 December 1984 (OJ 1984 L 2, p. 22), Council Directive 86/197/EEC of 26 May 1986 (OJ 1986 L 144, p. 38), Council Directive 89/395/EEC of 14 June 1989 (OJ 1989 L 186, p. 17) and Council Directive 91/72/EEC of 16 January 1991 (OJ 1991 L 42, p. 24). A consolidated version would undoubtedly make the directive more accessible.

2 — Case 237/82 *Jongeneel Kaas* [1984] ECR 483.

on the Quality of Agricultural Products) of 8 April 1971. [3] Article 2 of that law provides that, in order to promote sales, rules may be laid down concerning product quality which may relate to the origin, quality, grading, conservation, packaging, shape, finishing, specification and the size and weight of products.

Pursuant to that provision, the *Landbouwkwaliteitsbesluit* (Decree on the Quality of Agricultural Products) of 2 December 1981 was adopted, [4] of which Article 8 for its part also constitutes the basis for the *Landbouwkwaliteitsbeschikking Kaasproducten* (Order on the Quality of Agricultural Products — Cheese Products) of 28 December 1981. [5]

Under Article 14 of the Landbouwkwaliteitsbeschikking, when producing sorts of cheese for which a national cheese mark is provided, cheese-makers must apply the mark prescribed by the Keuringsreglement (Inspection Regulation). The national cheese marks to be used, together with the sorts of cheese to which the marks are to be applied, are set out in Annex 2 to that order. Under Article 11(2) of the Landbouwkwaliteitsbeschikking, national cheese marks are also to include, in accordance with the provisions of the Inspection Regulation, different indications which may vary according to the region. Article 12 provides that the national cheese mark constitutes a control sign designed to prove that the cheese complies with the general and specific requirements laid down for the particular sort of cheese by the Landbouwkwaliteitsbesluit or the Landbouwkwaliteitsbeschikking.

Lastly, there is the *Keuringsreglement* (Inspection Regulation), which was adopted on 14 April 1982 by the Stichting Centraal Orgaan Zuivelcontrole (Foundation for the Central Control of Dairy Products). [6] Article 2 of the Inspection Regulation provides that national cheese marks must show, in the space below the word 'HOLLAND', a serial number running from 00001 to 99999 and, below that, a combination of letters or letters and numbers consisting of at least two serial letters immediately preceded by (a) the letter F in the case of cheese marks for industrial cheeses manufactured in the provinces of Groningen, Friesland, Drenthe and Overijssel; (b) the letters HB for industrial cheese manufactured in the provinces of Zuid-Holland, Utrecht, Gelderland, Limburg, Noord-Brabant and Zeeland; (c) the letters NH for industrial cheese manufactured in the province of Noord-Holland; and (d) the letter Z for farmhouse cheeses.

3. The system of the labelling directive may be summarized as follows. It contains general Community provisions relating to the labelling, presentation and advertising of foodstuffs to be delivered as such to the ultimate consumer (Article 1(1)). [7] It also applies to foodstuffs intended for supply to restaurants, hospitals, canteens and other similar mass caterers. [8] According to Article 1(3)(a),

3 — *Staatsblad*, p. 371.

4 — *Staatsblad* p. 726.

5 — Order No J 7974, *Staatscourant*, p. 251.

6 — According to Article 13 of the Landbouwkwaliteitsbesluit, this foundation is a legal person governed by private law with full legal capacity, which is responsible for supervising that its members comply with the rules laid down by or pursuant to the Landbouwkwaliteitsbesluit, inspecting cheese products and issuing marks, stamps or evidence.

7 — See also the third recital in the preamble to the directive.

8 — Article 1(2) of the labelling directive as replaced by Directive 89/395/EEC.

'labelling' within the meaning of the directive signifies:

'any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff'.

Under Article 2(1) of the labelling directive, the labelling and the methods used may not be such as could mislead the purchaser, particularly:

'(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production,

(ii) by attributing to the foodstuff effects or properties which it does not possess,

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics'.

Article 3(1) of the directive sets forth an *exhaustive* list of particulars which must be included on foodstuffs labelling. Under Article 3(1)(7), they include:

'particulars of the place of origin or provenance in the cases where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff'.

By way of derogation from Article 3, Article 4 of the labelling directive states that Community provisions applicable to specified foodstuffs (and not to foodstuffs in general) may exceptionally provide that other additional particulars must appear on labelling. There are no such Community provisions for cheese products. [9]

Lastly, under Article 15(1) of the labelling directive, Member States 'may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonized national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general'. However, according to Article 15(2), that provision

'shall not apply to non-harmonized national provisions justified on grounds of:

9 — The second subparagraph of Article 4(2) provides that, where there are no Community provisions, Member States may make provision for particulars other than those set out in Article 3 in accordance with the procedure laid down in Article 16. In brief, Article 16 distinguishes between national provisions which were already in force before the directive was adopted and provisions adopted subsequently: (i) if a Member State wishes to *maintain* provisions of the first type, it must inform the Commission and the other Member States within two years of notification of the directive; (ii) if a Member State wishes to adopt *new legislation*, a specific Community procedure applies

— protection of public health,

— prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,

— protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition'.

Reply to the national court's question

4. *Position taken by the parties taking part in the proceedings before the Court.* Two opposing viewpoints were put to the Court: on the one hand, that of Twee Provinciën, on the other, that of the Netherlands Government and the Commission. I shall describe them briefly.

Twee Provinciën — after initially mentioning that the compulsory inclusion of the F mark makes for distortion of the conditions of competition [10] — argues that the labelling directive is applicable to the measure at issue and that that measure is incompatible therewith. Its reasoning is in three stages. In the first place, it argues that its cheese is a foodstuff within the meaning of the directive. Secondly, it maintains that the national cheese mark, albeit supplied by the State and required to be affixed to cheeses by producers, constitutes 'words, pictorial matter or a symbol' which 'relate to a foodstuff' or, in any event, 'accompanies a foodstuff' within the meaning of Article 1(3)(a) of the directive. Thirdly, in Twee Provinciën's view, the requirement to indicate letters differing according to the region of production concerned cannot be brought within one of the justificatory grounds exhaustively listed in Article 15(2) of the labelling directive for the application of non-harmonized national provisions. Cheese production in the Netherlands is generally carried on using the same method. Since the cheeses have no properties capable of identifying them from the point of view of their different regional provenance, the particulars as to provenance required by the Netherlands measures do not perform any specific function and consequently, according to the case-law of the Court, are in breach of Article 30 of the EEC Treaty.

Both the *Netherlands Government* and the *Commission* argue in contrast that the labelling directive is not applicable in this case. The requirement to include a letter varying according to the region of production does not in their view constitute labelling within the meaning of Article 1(1) of the directive. Their arguments to this effect are sufficiently different as to warrant their being set out separately.

10 — According to Twee Provinciën, the price obtained for cheeses made in the F region — including therefore its cheeses — is as much as HFL 0.50 per kilo less than that paid for cheeses made in other parts of the Netherlands, although they are comparable in point of taste, smell and external appearance. It maintains that the F mark constitutes a very important sign of their distinction from cheeses produced elsewhere in the Netherlands, with the result that the compulsory F mark makes for a distortion of the conditions of competition, causing, *inter alia*, the lower price of cheese in the F region to be reflected in a lower price for milk. In my discussion, I shall not be going into these remarks, since Twee Provinciën has not adduced any evidence to support them (its written observations include only a notice setting out cheese prices in February 1992) and it did not emerge from its arguments at the hearing whether, and if so to what extent, the F mark has the effect of distorting competition. Moreover, this question is separate from the *legal* issue in this case as to whether the mark in question constitutes labelling prohibited by the labelling directive.

According to the Netherlands Government, the national cheese mark is not a label but a control mark which is applied to an unpackaged (whole) cheese. It describes the cheese mark as a colourless, perforated wafer made of casein, five to seven centimetres in diameter pressed into the (whole) cheese. The national cheese mark, which includes the letter specific to the region, makes it possible to trace back a particular (whole) cheese to a particular producer, a particular production date and even a particular batch or consignment. Since cheese is generally cut up (in a packaging plant or at the point of sale) before it is supplied to the ultimate consumer, it will be pure chance if the consumer should get to see the national mark or any part of it. Even if he does, the average ultimate consumer will not know what the code letter signifies. According to the Netherlands Government, all in all the cheese mark does not perform the function of a label, that is to say, of informing the ultimate consumer; in contrast, the mark indicates that the cheese was produced in conformity with the statutory provisions and satisfies certain quality requirements. The place of production can be identified using the code in the course of (spot) checks.

The Commission bases its argument principally on a teleological interpretation of the labelling directive. In its view, the aim of the directive is to inform and protect the consumer and the term 'labelling' within the meaning of Article 1(1) should be read in that light. Labelling is based on particulars intended for the ultimate consumer in order to inform him or influence his behaviour. Particulars on foodstuffs labelling which are not of direct interest to the ultimate consumer should not be categorized as labelling, for instance, particulars relating to fiscal, health or quality standards controls. To prohibit such particulars would not serve the ultimate consumer and would be seriously detrimental to the possible controls open to the public authorities. The Commission considers that it is clear that that was not the intention of the Community legislator from a declaration on interpretation made by the Council and the Commission when the Council directive was adopted. According to that declaration, 'this Directive does not concern labelling relating to the prices, fiscal control, batch identification, health control or quality standards control'. In the Commission's view, that declaration is exemplified by this case: the consumer will appreciate immediately that the serial number and the combination of letters or letters and numbers on the national cheese mark have nothing to do with the characteristics of the cheese, but constitute simply a control mark. [11]

5. *Opinion.* As far as the outcome is concerned, I concur with the view taken by the

11 — In its written observations, the Commission also sets out a number of remarks with regard to the other particulars set out on the national cheese mark, in particular 'Gouda', 'Volvet 48+' and 'Holland', and their compatibility with the labelling directive. It considers that a question from the national court relating thereto cannot be ruled out at a later stage in the proceedings. For details of the Commission's view, I would refer to the Report for the Hearing; I shall not go into it here, since, as the Commission itself acknowledges, the national court's question does not relate to those other particulars. Furthermore, Twee Provincien gave it to be understood at the hearing that it had no intention of raising this matter before the national court even at a later stage in the proceedings.

Netherlands Government and the Commission: to my mind, too, the obligation at issue to indicate letters varying according to the region of production does not constitute labelling within the meaning of the labelling directive. As the Court held in the judgment in *Smanor*, the 'meaning and exact scope' of the provisions of the directive must be determined regard being had to their context 'and, in particular, the directive's general purpose and its structure'. [12] Consequently, my starting point is that the provisions of the labelling directive should be interpreted in the light of the aim and system of the relevant measure. In that connection, the Court has held as follows, also in the judgment in *Smanor*:

'it is clear from both the statement of the reasons on which the directive is based and the terms of Article 2 thereof, that its object was to inform and protect the ultimate consumer of foodstuffs, in particular as regards the nature, identity, properties, composition, quantity, durability, origin or provenance, and the method of manufacture or production thereof'. [13]

In that light, I can agree with the interpretation placed by Commission on the term 'labelling' within the meaning of the directive — without having to rely on the aforementioned interpretative declaration of the Council and the Commission. [14] Consequently, labelling within the meaning of Article 1(1)(3)(a) signifies words, particulars, signs and so on which relate *to the foodstuff itself*, that is to say, to its intrinsic qualities. Precisely for the sake of the information and protection of the ultimate consumer, Article 2 lays down, as the Court observed in the judgment in *SARPP*, 'the principle upon which any provisions on labelling and advertising must be based'. [15] A key point of that principle is the prohibition laid down by Article 2 on labelling, presentation and advertising which mislead the purchaser 'as to the *characteristics* of the foodstuff', including its '*effects or properties*' (see section 3 above).

6. It appears to me that the measure at issue in this case manifestly does not relate to the 'characteristics', 'effects' or 'properties' of the foodstuff in question, cheese. The obligation to indicate different letters according to the region of production constitutes, according to Article 2 of the Inspection Regulation (see section 2 above), only an initial component of a more extensive set of data, consisting, as regards the remainder, of a serial number and a combination of letters or a

12 — Case 289/87 *Smanor* [1988] ECR 4489, paragraph 29.

13 — *Smanor*, paragraph 30. In particular, the sixth recital in the preamble to the directive states that 'the prime consideration for any rules on the labelling of foodstuffs should be the need to inform and protect the consumer'.

14 — The Court has often stated that it is not prepared to allow its interpretation of a Community provision to be influenced by such (unpublished, confidential) declarations, *a fortiori* where such a declaration is prayed in aid in order to justify an interpretation which differs from the actual wording of the provision at issue: see in particular the judgments in Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9, and Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18. It is further questionable whether such a practice would be desirable, regard being had to the need for transparency in the activities and legislative process of the Community.

15 — Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 12.

combination of letters and numbers comprising at least two serial letters. It is clear that the code is prompted by the necessity for effective control. It makes it possible, as the Netherlands Government has argued — also in the case of *Jongeneel Kaas* [16] —, to conduct inspections by sampling to make sure that the applicable quality requirements and statutory provisions are complied with and, where necessary, to identify the producers concerned.

In other words, the code at issue has no informative value at all for the ultimate consumer — who, as the Netherlands Government observes, seldom or never gets to see the whole of the code owing to the fact that the cheese is cut — as regards the product supplied to him, not even with respect to its place of origin or provenance. It is therefore not to be regarded as labelling within the meaning of the directive and hence the national provision in question cannot be described as a provision regarding labelling which is prohibited by Article 15(1) of the directive. In contrast, what is involved is a control mark imposed by the Netherlands authorities (cf. Article 12 of the Landbouwkwaliteitsbeschikking, referred to in section 2 above) which is intended to enable those authorities to supervise compliance with the statutory provisions on the quality of agricultural products, provisions which, in the words used in *Jongeneel Kaas*, 'have as their purpose to improve the quality of domestic production so as to make it more attractive to consumers'. [17]

7. The foregoing also enables me to distinguish the judgment in Case C-32/90 *Commission* v *Italy*, [18] which was cited by Twee Provinciën in its written observations. That judgment related to an uncontested case of failure to fulfil obligations, in which the Commission complained that Italy had failed to comply with the labelling directive and the Court found that that was the case. The case was concerned with an Italian law on the conditions relating to the manufacture of extruded pasta products which required the date of manufacture and the place of origin or provenance of the product to be indicated on the label. The date of manufacture did not fall within the exhaustive list set out in Article 3(1) of the labelling directive (see section 3 above), whilst the particulars of the place of origin or provenance may not be required to appear, under Article 3(1)(7), unless their omission is liable to mislead the consumer (see also section 3).

Since what was involved in that case was a requirement relating to labelling and not, as in this case, a control mark independent of any particular on the labelling, the judgment does not constitute a precedent for this case.

8. Since no labelling is involved within the meaning of the labelling directive, it is not necessary to consider whether Article 15(2) of the directive may justify the requirement for the code letter to appear. In contrast, since provisions of secondary Community law are not applicable, it is necessary to examine the compatibility of the measure in question with the *Treaty provisions* on the free movement of goods. However, as far as

16 — *Jongeneel Kaas*, cited in footnote 2, paragraph 24.

17 — *Jongeneel Kaas*, cited in footnote 2, paragraph 20.

18 — [1991] ECR I-4189 (summary publication only).

this point is concerned, it is sufficient to refer to the judgment in *Jongeneel Kaas*, in which the Court held as regards the Netherlands legislation on the quality of agricultural products that

'Articles 30 and 34 of the EEC Treaty are to be interpreted as meaning that a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules which, whilst leaving imported products unaffected, are intended to improve the quality of domestic production so as to make it more attractive to consumers, and rules on the compulsory use of stamps, marks or inspection documents, provided that no distinction is drawn according to whether the cheese is intended for the domestic market or for export'. [19]

Consequently, there is no incompatibility with the Treaty provisions on the free movement of goods. Moreover, it is very doubtful whether Twee Provinciën could successfully rely on such incompatibility, since in the situation at issue no movement of goods between Member States is involved.

Conclusion

9. I therefore propose that the Court should reply as follows to the national court's question:

A national measure requiring cheese producers to affix to their cheeses a cheese mark not merely indicating the country of production and the type of cheese, but also a letter depending on the region of production and, in addition, a serial number and a combination of letters or of letters and numbers cannot be regarded as a provision on labelling within the meaning 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.

19 — *Jongeneel Kaas*, cited in footnote 2, paragraph 28.