**consumers and to that end fixes the maximum number of such micro-organisms that may be present on the date of sale of the product on the basis of its deterioration in the time between its sale and consumption**

**complies with the requirements of Article 36 of the EEC Treaty.**

Mackenzie Stuart Galmot

Due Everling Kakouris

Delivered in open court in Luxembourg on 6 June 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber

# OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 11 APRIL 1984 [1]

*Mr President,*
*Members of the Court,*

With this reference for a preliminary ruling made by the Hoge Raad [Supreme Court] in the criminal proceedings brought against the firm to which I shall refer as Melkunie the Court is once again confronted with the question how far provisions of Netherlands food legislation may conflict with Articles 30 and 36 of the EEC Treaty. Before discussing the facts I shall first review the Netherlands legislation applicable to milk and milk products which is at issue in this case.

## 1. The relevant legislation on milk and milk products

Netherlands food legislation is mainly based on the Warenwet [Law on Goods] of 28 December 1935 laying down

1 — Translated from the Dutch.

requirements as to the quality and description of goods (Staatsblad No 793). Pursuant to Articles 14, 14a, 16 and 16a of that Law, the Melkbesluit [Milk Order] of 25 October 1974 laying down rules on milk (Staatsblad, No 699) was adopted. It contains *inter alia* rules concerning the description "pasteurized" and lays down the requirements that "pasteurized" products must satisfy. Article 34 (3) of the Melkbesluit provides that "pasteurized" products must satisfy the following requirements:

"(a) active coliform bacteria must not be detectable in one millilitre;

(b) the number of active micro-organisms must not exceed 50 000 per millilitre save in the case of whipping cream, in which case that number must not exceed 200 000;

(c) no phosphatase must be present unless the product has undergone, instead of anti-microbial heat treatment, other treatment having the same anti-microbial effect."

Pasteurized products must bear the description "pasteurized" on their packaging (Article 34 (6) and — apart from exceptions which are not relevant to this case — must also be kept and carried by the vendors at a temperture not exceeding 10°C (Article 43 (1)). Offences against those provisions are punishable under the Wet op de Economische Delicten [Law on Commercial Offences] of 22 June 1950 (Staatsblad No 258).

Supervision of compliance with the requirements laid down by or pursuant to the Warenwet is carried out on a decentralized basis by municipal inspection authorities. To this end, the municipalities lay down inspection regulations, in accordance with a prescribed model. Such requirements may not depart from the substantive requirements of the Warenwet (Warenwet, Article 6).

## 2. The principal facts and the questions

Melkunie imported from the Federal Republic of Germany, for sale in the Netherlands, milk products described on their packaging as "pasteurized skimmed vanilla" and "caramel custard with whipped cream". Analyses of samples revealed infringements of Article 34 (3) of the Melkbesluit on or immediately before the *latest date for sale* stated on the packaging. After being acquitted by the Economische Politierechter [magistrate dealing with commerical offences] but subsequently convicted by the Gerechtshof [Regional Court of Appeal], Amsterdam, on appeal by the Openbaar Ministerie [Public Prosecutor's Department] Melkunie then sought cassation principally on the ground that the aforementioned provisions of the Melkbesluit conflicted with Article 30 of the EEC Treaty. Melkunie maintained that the products in question satisfied the requirements of the legislation of the country from which they had been exported (the Federal Republic of Germany) and that those requirements were equivalent to the relevant Netherlands requirements. That argument prompted the Hoge Raad to refer the following questions to the Court for a preliminary ruling:

"1. Must the provisions of the Melkbesluit (Warenwet) 1974, in

particular the requirements which Article 34 (3) of that order places on goods described as 'pasteurized', namely that:

(a) active coliform bacteria must not be detectable in one millilitre; and

(b) the maximum number of active micro-organisms must not exceed 50 000 per millilitre save in the case of whipping cream, in which case that number must not exceed 200 000;

be regarded as measures having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the EEC Treaty if they are applied in conjunction with the provisions referred to in part 6 of this judgment to goods imported from another Member State of the European Communities?

2. If Question 1 is answered in the affirmative, is the adoption of the requirements referred to in that question and their application to goods imported from another Member State of the European Communities none the less justified under Article 36 of the EEC Treaty on one of the grounds mentioned in that article and in particular on grounds of the protection of 'the health of humans'?"

The "provisions referred to in part 6" are the relevant provisions of the municipal inspection regulations.

## 3. The first question

In my view, the first question should raise few problems for the Court. It has been etsablished by the Court in its decisions that "[all] trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (Case 8/74, *Procureur du Roi* v *Dassonville*, [1974] ECR 837, paragraph 5 at p. 852). Legislation, such as that in the present case, on the pasteurization of milk, which applies to both domestically-produced and imported products, comes within that definition, since imported products must satisfy the requirements of the Member State from which they are exported besides those of the importing Member State. Compared with domestic products, imported products are thereby subjected *de facto* to a dual "burden" and thus indirectly discriminated against. The Commission, Melkunie and the Netherlands Government also argue that the provisions in question amount to measures having equivalent effect within the meaning of Article 30 of the EEC Treaty. I would add that, even national measures which are justified under Article 36 of the EEC Treaty (second question) are none the less to be regarded as measures having equivalent effect within the meaning of Article 30 of the EEC Treaty. Not only does this follow from the wording and scheme of the provisions concerned; the Court has also expressly recognized this view in its judgments in *(Bauhuis* v *Netherlands*, [1977] ECR 5, paragraph 48 at p. 20) and Case 34/79, *Regina* v *Henn and Darby*, [1979] ECR 3795, paragraph 12 at p. 3812).

## 4. The second question

4.1. The real significance of the present case therefore lies in the second question submitted by the Hoge Raad in which the question of the applicability of

Article 36 of the EEC Treaty is raised. It is clear from its explanation of the questions that the Hoge Raad also considered the possibility of this national legislation being justified under the proviso on reasonable measures discernible in the *Cassis de Dijon* judgment (Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649). On this point the Netherlands Government also developed arguments more by way of an alternative, whereas Melkunie's case is based essentially on that construction of Article 30 of the EEC Treaty. This nexus arises directly from the provisions of, or made pursuant to, the Warenwet itself, which not only in fact protect consumers on a broader front than that of health alone but also relate to fair trading. It must be emphasized that it is a general feature of modern food legislation for different aims to be pursued, often concurrently, by means of a coherent set of legal provisions without its being possible to determine in each specific case which aim is the principal one. In the case of quality requirements, the interests of public health, consumer protection and fair trading may certainly overlap to some extent and reinforce one another. This has also been recognized by the Court in its decisions. In the *Cassis de Dijon* case, besides listing the interests of consumer protection and fair trading under "reasonable measures", the Court also referred to the interests of public health, which are mentioned in Article 36 of the EEC Treaty. Especially in those instances of food legislation in which such interests overlap and complement each other, it does not always matter which proviso provides the justification. Since the legislation concerned will always apply to domestic and imported goods alike, it is primarily in the case of provisions in which interests of public health and consumer protection overlap that both provisos may conceivably provide a justification. It will then depend above all on whether the national legislation satisfies the principle of proportionality underlying both provisos, though it must also be shown that the relevant subject-matter is not exhaustively regulated by Community legislation. In the light of those observations I will examine the second question of the Hoge Raad. I shall concentrate mainly on Article 36 of the EEC Treaty, since the question submitted expressly refers to that provision alone. I shall begin with some observations on the nature of the health provisions in question and then investigate whether relevant Community rules exist. After that, I shall consider the principle of proportionality.

4.2. The basic principle underlying all modern health legislation on milk is that because it perishes very quickly this extremely important food is fit for consumption only if it has undergone a certain kind of heat treatment. This may consist of pasteurization, sterilization or ultra heat treatment (UHT), with which the Court is very familiar. That minimum principle is also embodied in Articles 3 (1) and 5 of Regulation (EEC) No 1411/71 (Official Journal, English Special Edition 1971 (II), p. 412) in which a start was made towards a

common milk consumption policy. Some other rules cited by the Commission, which concern specific aspects of milk production and marketing, are also based on that basic requirement. The aim of such heat treatment can be described as the minimizing of the risks to public health which the presence of pathogenic micro-organisms in raw milk entail. As such, pasteurization is a measure which is necessary for public health and thus justified under Article 36 of the EEC Treaty, a fact which is not disputed by any of the parties to the main proceedings.

With pasteurization, not all micro-organisms present in the milk are killed. The length of time for which pasteurized milk can be kept is therefore limited, although its keeping qualities can be guaranteed and prolonged by putting it in a sealed package and keeping it at a low temperature. Consequently, besides containing provisions on the pasteurization process, the legislation also lays down a number of microbiological requirements which pasteurized milk must satisfy. Observance of those requirements ensures not only that the pasteurization process itself has worked but also that the pasteurized product remains fit for consumption during the period of minimum conservation. As the Commission has explained at some length in its observations, there are, as yet, no Community provisions regarding such micro-biological requirements.

The first of those requirements, which is not at issue in this case, is that no phosphatase must be present. This test shows that pasteurization took place for the correct length of time and at the right temperature. A second requirement is that coliform bacteria should not be detectable in a specified quantity of the pasteurized product. In view of the risks presented to consumers' health by the presence of such a strain of bacteria, that requirement is hardly contested either. A further requirement, with which this case is chiefly concerned, places a maximum limit on the number of active micro-organisms that may be present in a specified quantity of milk. It is not exactly clear what the correct limit should be for the purposes of public health. However, it is clear from the data supplied by the Commission and uncontested by the parties that an actual risk to health arises *at the time of consumption* if the number of micro-organisms present reaches one to two million. Given the rapid rate at which such micro-organisms multiply — fuller particulars of this were provided by the Netherlands Government at the hearing — it can be readily appreciated that the maximum permissible number is directly related to the length of time for which the product can be safely kept. This, too, is uncontested. This maximum limit must therefore be much lower at the time of marketing but still cannot be precisely determined. It is at this point that the different bodies of legislation diverge, which has been illustrated by the Commission. At all events, the limit must be so fixed that at the end of the period of minimum conservation — preferably leaving a safety margin — the product can be consumed without risk to health.

In order to assess the latter aspect of the microbiological requirements of the legislation on milk from the legal point of view, reference can then be made to

the principle formulated by the Court in its judgment in Case 272/80, *Frans-Nederlandse Maatschappij voor Biologische Produkten BV,* [1981] ECR 3277. Given the lack of harmonization of legislation and the uncertainty in the present state of scientific research, the Member States have a measure of freedom to decide the degree to which they wish to protect the interests covered by Article 36 of the EEC Treaty. In the Court's judgments in Case 53/80, *Officier van Justitie* v *Koninklijke Kaasfabriek Eyssen BV,* [1981] ECR 409 and Case 174/82, *Officier van Justitie* v *Sandoz,* [1983] ECR 2445, that freedom is considered primarily in the light of the principle of proportionality where measures applying indiscriminately to domestic and imported goods are concerned.

4.3. In my view, a national provision such as Article 34 (3) of the Melkbesluit should be examined against the background of those technical and legal observations. As I have already stated, when a quantitative limit on micro-organisms in milk is considered, the stage at which that standard is applied — immediately after pasteurization or at the time of sale to the consumer or at the time of consumption itself — is very important. At the hearing it became apparent that a difference of opinion exists between the Netherlands Government and the Commission on this question. In the view of the Netherlands Government, that requirement must be satisfied on the latest date for sale. This is also clear from the extracts from the charges brought against Melkunie which show that the maximum limits laid down by the Melkbesluit were far exceeded on that date. The Commission, however, considers that the crucial time is the date until which the goods will remain fresh. That view is based on Article 10 of the Algemeen Aanduidingenbesluit [General Description of Goods Order] (Warenwet) of 10 September 1981 (Staatsblad No 621), which provides that pre-packed foods and drinks must bear the words "Best before . . ." followed by the relevant date. If that date depends on the goods being kept in a particular way, this must be stated. Those provisions owe their origin to Articles 3 and 9 of Council 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).

In my view, however, the difference between the two dates is of great importance for assessing whether the microbiological standards in question are permissible in Community law. As the Commission has correctly pointed out, the rationale of the requirement laid down in Directive 79/112/EEC is that on the date of minimum durability the product must retain its characteristic properties (when properly stored). This means that on that date it must still be possible to consume the milk without risk to health; therefore the bacteriological count must be sufficiently low. In this case the question is whether the requirement that the number of micro-organisms must not exceed 50 000 per millilitre is actually in proportion to the interest to be protected. Indeed, it is clear that even higher levels, for instance 100 000 per millilitre, are in themselves not harmful to public health. This is clear from the fact that for whipping cream the Melkbesluit stipulates a maximum of

200 000 micro-organisms per millilitre. If the legislation of another Member State allows a higher bacteriological count on the date of minimum conservation then, in my view, there is a conflict with the proportionality principle if imported products are required to have a lower bacteriological count. In such a case, the importing Member States should adduce justification as to why it considers a lower count essential once it is clear that the higher count permitted in the exporting Member State also safeguards public health to a satisfactory degree.

However, if it is a question of the latest date for sale, the situation must, in my view, be assessed differently. The Netherlands Government has argued and the other parties do not dispute that the rationale of the latest date for sale is that the milk must be capable of being consumed without risk even after that date. The representative of the Netherlands Government spoke of a period of two days. According to that view, the latest date for sale therefore comes before the date of minimum conservation. This means that, given the rate at which micro-organisms multiply, the limits which may not be exceeded on that date must be, or are capable of being, lower. If the legislation of the exporting Member State has no similar rules, there can be no conflict with the principle of proportionality. In view of the foregoing argument I therefore consider it quite compatible with Article 36 of the EEC Treaty that, considering the principle of proportionality, a higher number of micro-organisms is permitted where the method based on the date of minimum conservation is used and a lower number where the method based on the latest date for sale is used.

Which method is, in fact, used in the Netherlands legislation is not wholly clear. It is a matter for regret that the Netherlands Government was unable to cast light on the legal basis of the requirement of the latest date for sale. My own research has shown that the requirement to state the latest date for sale on the packaging is based on Article 4 (a) of the Zuivelverordening Consumptiemelk [Dairy Regulation on Milk for Human Consumption] 1958 of the Dutch Dairy Board. That requirement must be considered together with the provision of the Warenwet requiring the minicipalities to adopt inspection regulations. These practically identical regulations prohibit the *sale* of goods in an unsound condition or of unsound composition (according to the criteria laid down in the Warenwet). Furthermore, the inspection regulations equate a number of other transactions with selling. This complex interrelation between the regulations was considered by the Hoge Raad itself in its judgment of 7 July 1977 (reported in Nederlandse Jurisprudentie 1978, No 498, at p. 1666). Since in proceedings brought under Article 177 of the EEC Treaty the Court may not explicitly pronounce upon national legislation, such complexity need not hamper the Court when it answers the second question submitted

by the Hoge Raad. I would also add that it is unclear to what extent the Netherlands requirement concerning the latest date for sale conflicts with the requirement laid down in Directive 79/112/EEC or whether it falls within the exceptions provided for therein. On that point I think that the Court must qualify its answer.

Since the maximum count requirement is applied at the latest date for sale, the question remains whether the number of 50 000 active micro-organisms per millilitre is itself disproportionately low. As a precise limit cannot be determined, only a comparison with other legislation laying down similar rules can cast some light on this question. Melkunie's reference to the German legislation affords no assistance, however, since, as the Commission has explained in answer to questions from the Court, in that legislation microbiological counts are not used to determine the keeping qualities of milk and milk products. In so far as the Commission has provided examples of legislation in which microbiological counts are used (Switzerland — 50 000 per millilitre on delivery to the consumer; Federal Republic of Germany — 100 000 for imported milk; Bavaria — 75 000), the requirement of 50 000 per millilitre laid down in the Netherlands legislation would not appear to be excessively low.

## 5. Conclusion

In conclusion, I would suggest that the Court should answer the questions submitted by the Hoge Raad as follows:

1. The application by a Member State to products lawfully produced and marketed in another Member State of national legislation requiring milk and milk products that are to be described as "pasteurized" to satisfy certain microbiological requirements prohibiting any presence of coliform bacteria and specifying the maximum permissible number of active micro-organisms per unit of volume is a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Articles 30 and 36 of the EEC Treaty.

2. Unless such legislation conflicts with Community directives on the harmonization of the national laws and administrative provisions of the

Member States, its application to the situation referred to in the first question cannot be regarded as a measure contrary to Article 36 of the EEC Treaty if the legislation of the importing Member State places a maximum limit on the number of active micro-organisms that may be present on the latest date for sale in each unit of volume, the aim of that limit being to ensure that milk and milk products can still be consumed for some time after that date without harm to public health.