JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 5 FEBRUARY 1981 [1]

Ministère Public v René Joseph Kugelmann (preliminary ruling requested by the Cour d'Appel, Colmar)

"Approximation of legislation — Preservatives"

Case 108/80

Approximation of legislation — Preservatives which may be used in foodstuffs intended for human consumption — Duty of Member States — Scope — Right of individuals to rely upon the provisions of Directive 64/54/EEC — Limits

(Council Directive 64/54/EEC)

At the present stage in the approximation of legislation in the field of preservatives, Member States are not bound to authorize for use in foodstuffs all the substances the use of which is permitted by Directive 64/54/EEC. They have retained a certain discretion to determine their own rules concerning the addition of preservatives to foodstuffs, subject to the twofold condition that no preservative may be authorized unless it appears in the list annexed to the directive and that the use of a preservative which is listed there may not be totally prohibited except in special cases where there is no technological necessity.

In these circumstances, an individual who is prosecuted for using sorbic acid in certain foodstuffs intended for human consumption cannot rely upon the provisions of Directive 64/54/EEC authorizing the use of that preservative if the applicable national legislation permits the use thereof in other foodstuffs intended for human consumption.

In Case 108/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel [Court of Appeal], Colmar, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

MINISTÈRE PUBLIC [Public Prosecutor]

and

RENÉ JOSEPH KUGELMANN, company managing director, residing at Vendenheim,

and

SOCIÉTÉ DE PRODUITS ALIMENTAIRES POUR CHARCUTERIES (SOPAC) SÀRL, Furdenheim, party with civil liability,

on the interpretation of Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963-1964, p. 99),

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows.

I — Facts and procedure

Société de Produits Alimentaires pour Charcuteries (SOPAC) Sàrl, Furdenheim (Bas-Rhin), whose managing director is

Mr Kugelmann, supplied to the undertaking "Les Salaisons Mancelles", an industrial prepared meats factory, an additive called "cocktail jelly", intended for the manufacture of jellies for prepared meats and containing sorbic acid.

On the ground that the use of sorbic acid is prohibited in France in prepared meat products and salt provisions, criminal proceedings were instituted against Mr Kugelmann for an offence against the legislation on frauds, more precisely against Articles 1 and 2 of the Order of 15 April 1912 [1] implementing the Law of 1 August 1905 on the repression of frauds. [2] Those articles provide as follows:

"Article 1

It shall be prohibited to stock for the purpose of sale, to offer for sale or to sell any goods and foodstuffs intended for human consumption where chemical products have been added to them other than those whose use is declared lawful by orders adopted in conjunction by the Minister of Agriculture, the Minister of Economy and Finance, the Minister of Industrial and Scientific Development and the Minister of Public Health, on the advice of the French Board of Public Health and the National Academy of Medicine.

Article 2

It is also prohibited to introduce, even temporarily, in the course of the preparation of goods and foodstuffs intended for human consumption, chemical products other than those whose use is declared to be lawful by orders adopted according to the form of procedure laid down in Article 1 above."

Under Article 3 (4) of the above-mentioned law of 1 August 1905 a penalty will be imposed on "any person who ... offers for sale or sells, knowing their intended use, products ... suitable for adulterating foodstuffs for human consumption ... and any person who has encouraged their use by the means of any brochures, circulars, prospectuses, posters, advertisements or instructions".

By judgment of 16 February 1979 the Tribunal Correctionnel [Criminal Court], Strasbourg, found the accused guilty on a charge of contravening the legislation on frauds and found the Société de Produits Alimentaires pour Charcuteries civilly liable for the damage caused by Mr Kugelmann, its official.

Before the Cour d'Appel, Colmar, the accused claimed in particular that under Council Directive 64/54/EEC of 5 November 1963 concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963-1964, p. 99), although Member States may only authorize the preservatives listed in the annex to the directive (in which sorbic acid appears), they cannot lay down provisions the effect of which is to exclude totally the use in foodstuffs of one of the preservatives listed in the annex. It concluded from this that the use of sorbic acid as a preservative cannot lead to the bringing of criminal proceedings based on the Law of 1905.

Articles 1 and 2 of Directive 64/54/EEC (as amended by Council Directive

1 — Order of 15 April 1912 laying down a public service regulation in implementation of the Law of 1 August 1905 on the repression of frauds in the sale of goods and of the adulteration of foodstuffs, especially meat, prepared meat products, fruit, vegetables, fish and preserved products, amended by Order No 73/138 of 12 February 1973, Article 15-I (Journal Officiel de la République Française of 15 February 1973, p. 1728).

2 — Law of 1 August 1905 on frauds and adulteration relating to products or services, amended by Law No 78/23 of 10 January 1978 (Journal Officiel de la République Française of 11 January 1978, p. 301).

67/427/EEC of 27 June 1967, Official Journal, English Special Edition 1969, p. 169) are worded as follows:

"Article 1

Member States shall not authorize the use, for the protection of foodstuffs intended for human consumption (hereinafter called 'foodstuffs') against deterioration caused by micro-organisms, of any preservatives other than those listed in the annex to this directive.

Article 2

1. Member States shall take all measures necessary to ensure that the preservatives for whose use the annex lays down certain conditions are used solely in accordance with those conditions.

2. Save as otherwise provided in paragraph 1, this directive shall not affect provisions of national laws specifying the foodstuffs to which the preservatives listed in the annex may be added and the conditions governing the addition of such preservatives. However, the laws of a Member State may totally exclude the use of any of the preservatives listed in the annex only where there is no technological reason for using such preservatives in foodstuffs produced and consumed in its own territory."

The Cour d'Appel, Colmar, taking the view that the interpretation of Directive 64/54/EEC was required in order to decide the case, so as to ascertain whether national legislation must authorize all the preservatives listed in the directive or whether the Member States must simply prohibit the use of all substances not listed in that directive, decided, by judgment of 21 December 1979, to stay the proceedings and to refer the following question to the Court of Justice:

"Does the fact that the national legislation of a Member State of the EEC prohibits the use of a preservative used in foodstuffs intended for human consumption, when the use of that preservative is authorized by the Community Directive of 5 November 1963, constitute a breach of the rule regarding the supremacy of Community law over internal law which may be relied on by a Community subject prosecuted for adulteration of foodstuffs with that preservative (sorbic acid)?"

The judgment making the reference was entered on the Court Register on 8 April 1980.

Written observations were submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by Mr Kugelmann, the accused in the main action, represented by Richard Huffschmitt, of the Strasbourg Bar, by the Government of the French Republic, and by the Commission of the European Communities, represented by Jean-Claude Séché, Legal Adviser of the Commission, acting as Agent.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By order of 16 September 1980, the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, decided to assign the case to the First Chamber.

II — Summary of the written observations submitted to the Court

Mr Kugelmann, the accused in the main action, refers to the conclusions which he submitted to the Cour d'Appel, Colmar.

The *Government of the French Republic* emphasizes that Directive 64/54/EEC lists exclusively the preservatives whose use *may* be authorized by the Member States and not those whose use *must* be authorized.

Moreover, Article 2 of Directive 64/54/EEC specifies that that directive shall not affect provisions of national laws specifying the foodstuffs to which the preservatives listed in the annex may be added, whilst specifying that such provisions must not have the effect of totally excluding the use in foodstuffs of any of the preservatives thus listed.

In this respect, the French Government refers to the judgment of 12 June 1980 in Case 88/79 *Ministère Public* v *Grunert* [1980] ECR 1827.

In the present case, although the use of sorbic acid is not authorized in France for prepared meat products, licences for use have been granted for several other products, in other words certain articles of confectionery, fruit prepared with sugar intended for fermented milk products, mead, prunes and chestnuts.

In conclusion, the French Government considers that the question submitted to the Court should be answered in the negative.

The *Commission* observes that, as regards preservatives, the Council has drawn up *positive lists.* Consequently, substances not appearing on those lists cannot be permitted by Member States for the purposes indicated in the directive but, conversely, sorbic acid may be authorized because it is listed in the annex to the directive in question. However, the Council did not consider it was able as a first stage to decide on the approximation of the legislation concerning individual foodstuffs intended for human consumption to which the preservatives listed in the annex to the directive may be added or on the conditions governing the addition of such preservatives (last recital of the preamble to Directive 64/54/EEC). For this reason the first phrase of Article 2 (2) of Directive 64/54/EEC provides that that directive "shall not affect provisions of national laws specifying the foodstuffs to which the preservatives listed in the annex may be added and the conditions governing the addition of such preservatives".

In this way, although the consumers of the various Member States are to a certain extent equally protected, by virtue of the prohibition on substances not authorized by the directive, their protection varies however from one Member State to another according, first, to the number of foodstuffs with regard to which each State has granted licences and, secondly, to the relative importance of each of those foodstuffs in the daily nutrition of consumers.

In the same way, since national legislation applies also to imported products, such differentiation compels importers to comply with the legislation applicable to a given foodstuff. There is no doubt that this interpretation shows that the directive has not eliminated the technical barriers to the movement of the products concerned. That, however, was not its principal objective. As shown by the recitals of the preamble to the directive, it was, rather, inspired by the objectives of the protection of human life and consumers and by concerns relating to competition.

Only one restriction has been imposed by the directive on the free choice by Member States of foodstuffs in respect of which they wish to permit the addition of sorbic acid as a preservative.

As laid down in the above-mentioned first phrase of Article 2 (2) of the directive, provisions of national law specifying the foodstuffs to which the preservatives listed in the annex may be added and the conditions governing the addition of such preservatives "may totally exclude the use of any of the preservatives listed in the annex only where there is no technological reason for using such preservatives in foodstuffs produced and consumed in its own territory".

According to the information available to the Commission, the French rules comply with that requirement.

So far as the relationship between Community law and internal law is concerned, the Commission observes that Directive 64/54/EEC has not compelled Member States to act in a certain way but on the contrary left them free to authorize or prohibit the use of the preservatives listed in the annex to that directive in respect of each foodstuff.

In conclusion it suggests that the Court should give the following reply:

"1. Under Article 1 of Council Directive 64/54/EEC of 5 November 1963, Member States must only prohibit the use of the additives not mentioned in that directive.

2. Under Article 2 (2) they are only obliged to authorize their use in one foodstuff of their choice.

3. National provisions exercising that power must be considered as validly laid down by the Member State in question within the limits of that directive."

III — Oral procedure

At the hearing on 20 November 1980, the Commission of the European Communities, represented by its Agent, Jean-Claude Séché, Legal Adviser to the Commission, presented oral argument.

The Advocate General delivered his opinion at the sitting on 17 December 1980.

Decision

1 By judgment of 21 December 1979, which was received at the Court on 8 April 1980, the Cour d'Appel [Court of Appeal], Colmar, referred to the Court of Justice under Article 177 of the EEC Treaty a question for a preliminary ruling on the interpretation of Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963 to 1964, p. 99).

2 An appeal was brought before the Cour d'Appel, Colmar, from a judgment of the Tribunal de Grande Instance [Criminal Court of First Instance], Strasbourg, in which a company director was charged and found guilty of having offered for sale and sold, knowing their intended use, products, in other words, decorative jelly containing sorbic acid or products derived therefrom, suitable for adulterating foodstuffs for human consumption.

3 The Tribunal de Grande Instance, Strasbourg, had found that according to the French rules on the manufacture of foodstuffs, sorbic acid and products derived therefrom are preservatives the use of which is prohibited in the manufacture of prepared meat products and salt provisions. The Cour d'Appel, Colmar, however, wondered whether such rules were not contrary to Community law, in particular Directive 64/54/EEC.

4 The question referred to the Court of Justice by the Cour d'Appel, Colmar, is whether the fact that the national legislation of a Member State prohibits the use of a preservative used in foodstuffs intended for human consumption when the use of that preservative is authorized by Directive 64/54/EEC constitutes a breach of Community law which may be relied upon by a Community subject prosecuted for adulteration of foodstuffs with sorbic acid.

5 Article 1 of Directive 64/54/EEC, as subsequently amended, prohibits Member States from authorizing the use, for the protection of foodstuffs intended for human consumption against deterioration caused by micro-organisms, of any preservatives other than those listed in the annex thereto, which includes sorbic acid. Article 2 (2) of the directive states that the directive shall not affect provisions of national laws specifying the foodstuffs to which the preservatives listed in the annex may be added, but it also stipulates that such provisions may totally exclude the use of any of the preservatives listed in that annex only where there is no technological reason for using such preservatives in foodstuffs produced and consumed on the territory of the Member State concerned.

6 According to its preamble, the directive is merely the first stage in the approximation of national laws relating to preservatives involving the establishment of a single list of preservatives the use of which is authorized. During the second stage the approximation of laws will entail consideration of individual foodstuffs intended for human consumption to which the preservatives authorized by the directive may be added.

7 At the present stage in the approximation of national laws in this field, Member States are not therefore bound to authorize for use in foodstuffs all the substances the use of which is permitted by the directive. On the contrary, they have retained a certain discretion to determine their own rules concerning the addition of preservatives to foodstuffs, subject to the twofold condition that no preservative may be authorized unless it appears in the list annexed to the directive and that the use of a preservative which is listed there may not be totally prohibited except in special cases where there is no technological necessity.

8 It follows from the information supplied to the Court by the French Government and the Commission that although the French rules do not authorize the use of sorbic acid in prepared meat products, they permit the use of that preservative in other foodstuffs intended for human consumption, in particular in certain articles of confectionery, fruit prepared with sugar intended for fermented milk products, chestnuts, prunes and certain other foodstuffs.

9 In these circumstances, an individual charged with having used sorbic acid as a preservative in breach of the applicable national legislation cannot rely upon the provisions of Directive 64/54/EEC against the application of that legislation.

10 It is therefore necessary to reply to the question referred to this Court by the Cour d'Appel, Colmar, that an individual who is prosecuted for using sorbic acid in certain foodstuffs intended for human consumption cannot rely upon

the provisions of Directive 64/54/EEC authorizing the use of that preservative if the applicable national legislation permits the use of sorbic acid in other foodstuffs intended for human consumption.

Costs

11 The costs incurred by the Government of the French Republic and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Cour d'Appel, Colmar, by judgment of 21 December 1979, hereby rules:

An individual who is prosecuted for using sorbic acid in certain foodstuffs intended for human consumption cannot rely upon the provisions of Directive 64/54/EEC authorizing the use of that preservative if the applicable national legislation permits the use of sorbic acid in other foodstuffs intended for human consumption.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 5 February 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber