JUDGMENT OF THE COURT (First Chamber)

14 September 2006 *

In Joined Cases C-158/04 and C-159/04,

REFERENCES for a preliminary ruling under Article 234 EC, from the Diikitiko Protodikio Ioanninon (Greece), made by decisions of 10 and 26 November 2003, received at the Court on 29 March 2004, in the proceedings

Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE (C-158/04)

v

Elliniko Dimosio,

Nomarkhiaki Aftodiikisi Ioanninon,

and

Carrefour-Marinopoulos AE (C-159/04)

v

Elliniko Dimosio,

Nomarkhiaki Aftodiikisi Ioanninon,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of K. Schiemann, President of the Fourth Chamber, acting for the President of the First Chamber, N. Colneric, K. Lenaerts, E. Juhász (Rapporteur) and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 February 2006,

after considering the observations submitted on behalf of:

— Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE, by P. Giatagantzidis and E. Metaxaki, dikigoroi,

— Carrefour-Marinopoulos AE, by P. Giatagantzidis and E. Metaxaki, dikigoroi,

— Nomarkhiaki Aftodiikisi Ioanninon, by D. Stathis, acting as Agent,

— the Greek Government, by M. Apessos, N. Dafniou and D. Stathis, acting as Agents,

— the Commission of the European Communities, by M. Patakia, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2006,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Article 28 EC, more specifically the compatibility of Greek legislative provisions governing the marketing of bakery products produced using the 'bake-off' method with that provision of the EC Treaty. The 'bake-off' method consists of quick thawing followed by re-heating or baking, at the sales outlets, of fully or partially pre-baked and frozen products. This is the meaning in which the term 'bake-off' is used in the present judgment.

2 The references were made in the context of actions for annulment brought, first, by Alfa Vita Vassilopoulos AE (formerly Trofo Super-Markets AE) and, second, by Carrefour-Marinopoulos AE against decisions of the Nomarkhiaki Aftodiikisi Ioanninon (Prefectural Authority of Ioannina) ('the Prefectural Authority') ordering them to cease operation of the sales outlets for 'bake-off' products in their respective supermarkets.

Legal framework

Community legislation

3 Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

4 Pursuant to Article 30 EC, Article 28 EC does not preclude prohibitions or restrictions on imports justified on grounds of, inter alia, the protection of health and life of humans, provided that those prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

National legislation

5 Presidential Decree of 13 September 1934 concerning the conditions for establishing and operating baking premises and bakeries generally (FEK A' 309) sets out the requisite procedure for obtaining all licences to establish and operate a bakery. It lays down the town-planning and construction restrictions with regard to the areas which the bakeries must contain and prescribes their layout, their minimum floor area, lighting and ventilation conditions and the machinery which they must have.

6 Law No 726/1977 (FEK A' 316) amends and supplements the legislation in force concerning bakeries and bread shops. Under Article 16 thereof, in order for a bakery or bread shop to be established, a licence must first be obtained from the competent prefect.

7 Article 65 of Law No 2065/1992, amending and supplementing the abovementioned legislation on bread-making (FEK, A' 113), provides, inter alia, for the imposition of penalties on any person operating a bakery or bread shop without first having obtained a licence. A bakery is defined for the purposes of that article as being a permanent, specially laid out and suitably equipped building, whatever its capacity, for the production of bread, bakery products generally and other food products having flour as their basis, except pasta, and for the cooking of meals and other food products for the public.

8 Decree No 369/1992 (FEK, A' 186), adopted on the basis of Article 65 of Law No 2065/1992, lays down the procedure and the supporting documents for the issue of licences and the conditions governing the sale of bakery products. Article 1 thereof provides that the issue of a licence for the operation of a bakery is subject, inter alia, to the condition that there be areas for kneading equipment, an oven and the cooling of products, a solid-fuel store, the feeding of solid fuel, a flour store, the selling of bread, a cloakroom, the washing of utensils and toilets.

The main proceedings and the questions referred for a preliminary ruling

9 On 28 February 2001, the Ministry of Development (Industry Support Directorate) issued a bulletin (No F 15(F17.1)/4430/183), by which it notified the prefectural authorities in Greece that the operation of ovens for the baking of frozen bread (or dough) using the 'bake-off' method constituted part of bread production and that therefore, in order to operate those ovens, the persons concerned had to hold a bakery operating licence in accordance with the legislation in force.

10 Following that bulletin, the prefectural authorities carried out inspections in the food shops Alfa Vita Vassilopoulos AE (formerly Trofo Super-Markets AE) and Carrefour-Marinopoulos AE, the applicants in the main proceedings. It having been found that bread was being sold and that ovens for the baking of frozen bread were being used without a licence, those authorities, by two decisions taken on 27 November 2001, ordered the cessation of the operation of those bread ovens.

11 The applicants in the main proceedings brought an action before the national court for annulment of those decisions, claiming, inter alia, that the national legislation, as applied by the prefectural authorities, amounted to a quantitative restriction which was prohibited by Article 28 EC and could not be justified on grounds of public health or consumer protection.

12 In those circumstances, the Diikitiko Protodikio Ioanninon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the requirement for the prior licence [referred to above in the grounds of the decision for reference] in order to market "bake-off" products constitute a measure equivalent to a quantitative restriction within the meaning of Article 28 EC?

(2) If it were considered to be a quantitative restriction, does the requirement for a prior licence in order to make bread pursue a purely qualitative objective, that is to say, establish a mere qualitative differentiation with regard to the characteristics of the bread marketed (of smell, taste, colour and the appearance of the crust) and its nutritional value (judgment of the Court of Justice in Case C-325/00 *Commission* v *Germany* [2002] ECR I-9977) or does it seek to protect consumers and public health from any deterioration in the bread's quality (Simvoulio tis Epikratias (Council of State) 3852/2002)?

(3) On the basis that the abovementioned restriction concerns both domestic and Community "bake-off" products without distinction, is there a link with Community law and is that restriction capable of affecting, whether directly or indirectly, actually or potentially, the free trading of those products between Member States?'

The questions referred for a preliminary ruling

13 By its questions referred for a preliminary ruling, which it is appropriate to consider together, the national court asks essentially whether national legislation, which subjects the sale of 'bake-off' products to the same requirements as those applicable to the complete manufacturing and marketing procedure for traditional bread and bakery products, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC and, if so, whether it may be justified on the ground that it is intended to guarantee the quality of those products or protect consumers or public health.

14 It should be borne in mind, as a preliminary point, that the free movement of goods between Member States is a fundamental principle of the Treaty which is expressed, inter alia, in the prohibition in Article 28 EC of quantitative restrictions between Member States and all measures having equivalent effect.

15 The prohibition of measures having equivalent effect to quantitative restrictions set out in Article 28 EC covers all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case 178/84 *Commission* v *Germany* (*Beer purity*) [1987] ECR 1227, paragraph 27; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 39; and Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraph 28).

16 The Court has, however, clarified that measures having equivalent effect to quantitative restrictions and therefore prohibited by Article 28 EC do not include national provisions restricting or prohibiting certain selling arrangements, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16).

17 In their written observations, the Prefectural Authority and the Greek Government, referring to the *Keck and Mithouard* case-law, claim that the national legislation merely regulates the manner in which 'bake-off' products may be sold, and, consequently, do not come within the scope of application of Article 28 EC.

18 As noted by the Advocate General in point 15 of his Opinion, that categorisation cannot be accepted. An examination of the provisions of the national legislation shows clearly that it aims to specify the production conditions for bakery products, including 'bake-off' products.

19 It is common ground that the principal characteristic of 'bake-off' products is that they are delivered at sales outlets after the main stages of preparation of those products have been completed. At those sales outlets, only a brief thawing and reheating or final baking are carried out. In those circumstances, requiring vendors of 'bake-off' products to comply with all of the requirements imposed on traditional bakeries, including, in particular, the requirement of having a flour store, an area for kneading equipment and a solid-fuel store, does not take the specific nature of those products into account and entails additional costs, thereby making the marketing of those products more difficult. That legislation therefore constitutes a barrier to imports which cannot be regarded as establishing a selling arrangement as contemplated in *Keck and Mithouard* (paragraphs 15 and 16).

20 The Court has consistently held that a national rule which hinders the free movement of goods is not necessarily contrary to Community law if it may be justified by one of the public-interest grounds set out in Article 30 EC or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction (see, to this effect, Case 120/78 *Rewe-Zentral* (*Cassis de Dijon*) [1979] ECR 649, paragraph 8, and *Schwarz*, paragraph 30).

21 In the absence of harmonisation, it is for the Member States to decide on their intended level of protection of human health and life and on whether to require prior authorisation for the marketing of foodstuffs, always taking into account the requirements of the free movement of goods within the Community (see, inter alia, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 16, and Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, paragraph 42).

22 However, in order for such rules to comply with the principle of proportionality, it must be ascertained not only whether the means which they employ are suitable for the purpose of attaining the desired objectives but also whether those means do not go beyond what is necessary for that purpose (Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705, paragraph 78, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 79).

23 Regarding the justification of an objective as to quality put forward by the national court, the Court finds that a national measure which restricts the free movement of goods may not be justified solely on the ground that it aims to promote quality foodstuffs. In order to justify a restriction on the free movement of goods, such an objective may be taken into account only in relation to other requirements which have been recognised as being imperative, such as consumer or health protection.

24 Regarding the goal of consumer protection, the national court states that, in the main proceedings, the Prefectural Authority referred to an opinion from a food technology expert stating that 'bake-off' products tend to make consumers believe that they are purchasing fresh bread or another similar fresh product, whereas in reality the product is altered and without vitamins.

25 The Court finds, however, that whilst it may be legitimate to adopt measures aimed at avoiding a situation in which consumers confuse traditional bakery products with 'bake-off' products, the national legislation at issue here, as it has been put into practice, does not enable customers at bread sales outlets to distinguish traditional products from 'bake-off' products. As noted by the Advocate General in point 62 of his Opinion, this objective could be achieved by means which are less restrictive on the marketing of 'bake-off' products, such as appropriate information and labelling.

26 Lastly, concerning health protection, the Prefectural Authority's written observations indicate that the national legislation at issue in the main proceedings is aimed at ensuring that hygiene requirements are complied with, not only during the first stage of production of half-baked, frozen bread, but also during the final stage, consisting of the final baking at the point of sale. They state that bread and similar products are sensitive to alteration and might become contaminated, inter alia, by insects, mould, yeast, bacteria and viruses.

27 Whilst it may be true that the national legislation at issue in the main proceedings contains provisions aimed at ensuring that bakery products are prepared and marketed in proper hygienic conditions, the fact remains that it also lays down a number of requirements relating to the manufacturing method of traditional bakery products which are inappropriate and go beyond what is necessary to protect public health when they apply to products such as 'bake-off' products, which are pre-baked and are merely thawed and reheated or receive the final stage of baking at the outlets

where they are sold. As acknowledged by the Greek authorities in their observations, this is the case inter alia in regard to those requirements relating to the presence of a flour store or an area for kneading equipment.

28 In the light of the foregoing, the answer to the questions referred must be that Article 28 EC is to be interpreted as precluding national legislation which makes the sale of 'bake-off' products subject to the same requirements as those applicable to the full manufacturing and marketing procedure for traditional bread and bakery products.

Costs

29 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 28 EC is to be interpreted as precluding national legislation which makes the sale of 'bake-off' products subject to the same requirements as those applicable to the full manufacturing and marketing procedure for traditional bread and bakery products.

[Signatures]