OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 29 June 2000 *

1. The present infringement action concerns the compatibility with Articles 28 EC and 30 EC of a labelling requirement, imposed by Belgian law, under which nutrients and foodstuffs to which nutrients have been added must carry a national notification number.

I — Legal and factual context

2. The Belgian Royal Decree of 3 March 1992 concerning the placing on the market of nutrients and foodstuffs to which nutrients have been added (hereinafter 'the 1992 Decree') [1] establishes a system of prior notification of such products to the Inspection Service for Foodstuffs of the Ministry of Public Health and the Environment (hereinafter 'the Service').

3. Article 4 of the 1992 Decree details the requirements for notification: two copies of a notification file must be submitted and the file must contain at a minimum the following information: the nature of the product; a qualitative and quantitative list of the product's ingredients; a nutritional analysis; the proposed label; information to enable a proper examination of the nutritional value to be carried out; an undertaking to carry out frequent analyses and to inform the Service of the results. Within a month of the receipt of a notification the Service sends an acknowledgment to the notifying party. This acknowledgment contains a notification number.

4. Article 4 also permits the Service to make observations and recommendations concerning, amongst other things, the changing of the label and in particular the inclusion of an obligatory mention of warnings.

5. The first paragraph of Article 6 of the 1992 Decree requires that the product's label contain the notification number provided for in Article 4 and the date up to which the nutritional content is guaranteed.

* Original language: English.

1 — *Monteur Belge* of 15 April 1992, p. 8467.

II — Background to the action

6. After receiving several complaints about the 1992 Decree's effects on the free movement of goods, the Commission initially contacted the Belgian authorities on 3 August 1993. During subsequent exchanges of correspondence most of the Commission's concerns regarding the Decree were allayed, with the exception of the obligation contained in the first paragraph, first indent, of Article 6 (hereinafter 'the notification-number obligation').

7. Therefore, on 28 June 1996, the Commission sent Belgium a letter of formal notice stating its view that, while the notification procedure itself could be justified by the need to protect public health, the notification-number obligation contained in Article 6 constituted a measure of equivalent effect to a quantitative restriction on the free movement of goods contrary to Article 28 EC. The Commission expressed the view that the obligation was not justified in the public interest and did not, in any event, respect the principle of proportionality.

8. Belgium replied to that letter on 31 October 1996. It observed that the 1992 Decree did not discriminate between Belgian and other products and that it established a liberal regime.

9. On 4 February 1998, the Commission sent a reasoned opinion to Belgium in which it maintained its view that the notification-number obligation was contrary to Article 28 EC.

10. Belgium replied to the reasoned opinion in a letter of 29 July 1998, in which it referred to the Royal Decree of 20 May 1998 amending the Decree of 3 March 1992,[2] which, in its opinion, effectively eliminated the supposed infringement.

11. The Commission did not agree and, by application lodged on 8 June 1999, brought an application requesting the Court, pursuant to Article 226 EC, to declare that, by laying down in the first paragraph, first indent, of Article 6 of the 1992 Decree, concerning the placing on the market of nutrients and foodstuffs to which nutrients have been added, an obligation to indicate on the labelling of the products involved a notification number provided for by Article 4 thereof, the Kingdom of

2 — *Moniteur Belge* of 17 July 1998, p. 23576.

Belgium had failed to fulfil its obligations under Article 28 EC. It also sought an order that the Kingdom of Belgium pay the costs.

III — Overview of the arguments

12. The written proceedings have concentrated on three legal issues. First, the Commission contends that the notification-number obligation constitutes a measure of equivalent effect to a quantitative restriction and is therefore contrary to Article 28 EC. Belgium contests this. Secondly, the Commission contends that no public-interest requirement recognised by the Court is pursued by the obligation. Belgium argues that the obligation serves the protection both of public health and of consumers. Finally, the Commission argues that, in any event, the requirement is disproportionate to the aim being pursued by Belgium. This too is disputed by the defendant Member State.

(a) *On the existence of a measure of equivalent effect to a quantitative restriction*

13. The Commission recalls that in accordance with settled case-law, in the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 28 EC. [3] This is so even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

14. Belgium submits that the notification-number obligation is not a measure of equivalent effect to a quantitative restriction on the import of goods, because it does not constitute a barrier to imports. It contends that the label, although designed for marketing the products in Belgium, could also be used when the goods are marketed elsewhere in the Community. The possible absence of utility of the number in other Member States cannot, it is submitted, be equated with the existence of a barrier to the free movement of goods.

3 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter '*Cassis de Dijon*'); Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15; Case C-368/95 *Familiapress* v *Bauer Verlag* [1997] ECR I-3689, paragraph 8 and Case C-383/97 *Arnoldus van der Laan* [1999] ECR I-731, paragraph 19.

15. Belgium also invokes the specific nature of the products covered by the 1992 Decree and the conditions in which their marketing in the Community is permitted. It considers, citing the example of obligatory labelling in different languages, that, in practice, a separate label will be required in most Member States of the Community. The practical consequence of the differing national nutritional requirements is that a universally acceptable label is impossible and, therefore, that it can hardly be said that the specific obligation in question amounts to a barrier to trade.

16. Finally, while doubting that the obligation to carry the notification number will always increase costs, Belgium believes that any extra costs would be willingly borne by Belgian consumers to whom they may be passed on.

(b) *On the possible justification of the national measure*

17. The Commission considers that the system laid down by the 1992 Decree, as a whole, contains adequate safeguards for public health and protection of consumers. It therefore claims that the further obligation to place the notification number on the label is in no way concerned with assuring additional health or consumer protection. It does not see what additional information about the product's characteristics or composition or what additional guarantee is provided by the notification-number obligation.

18. The Commission submits that the real purpose of the obligation is to facilitate controls of the products covered by the Decree and to verify that notification has indeed occurred. Such concerns with the lightening of administrative burdens are not recognised by the Court as constituting public-interest objectives capable of taking precedence over the free movement of goods. [4]

19. In the alternative, Belgium contests the Commission's submissions about the impossibility of justifying the obligation contained in the first indent of the first paragraph of Article 6. It invokes a judgment of the Belgian Conseil d'État (Council of State) of 15 February 1994 in which it was held that obligations concerning labelling and advertising contained in the Royal

4 — Case 104/75 *De Peijper* [1976] ECR 613, paragraphs 18 and 26 and Case C-18/95 *F.C. Terhoeve* v *Inspecteur van de Belastingdienst* [1999] ECR I-345, paragraph 45.

Decree of 25 April 1990, which contained an identical obligation to that impugned by the Commission, were adopted to protect public health and the health of consumers. [5]

20. The Commission, in its reply, disputes the relevance of the Conseil d'État judgment. It observes that the Conseil d'État was not concerned with the notification-number obligation but with other labelling requirements. In its rejoinder, Belgium contests this view.

21. Belgium further submits that as protection of public health and of consumers is the principal aim of the 1992 Decree, any administrative concerns are secondary. It refers to the specific character of the products covered by the Decree, some of which are designed for groups considered as vulnerable (e.g. pregnant women, the young, the aged), while others are designed for consumption by the general public. Prior notification is, in its view, essential to prevent the marketing of products that are harmful to such vulnerable groups. Belgium also argues that the public-health objective of the obligation is shown by Article 11 of the 1992 Decree, which provides that breaches of the Decree will be punished under the law of 24 January 1977 on the protection of the health of consumers concerning foodstuffs and other products.

(c) *On the proportionality of the national measure*

22. The Commission maintains that the notification-number obligation is disproportionate to its alleged aim. First, it points out other features of the system established by the 1992 Decree which already serve to protect public health and consumers. Secondly, it argues that less restrictive measures would achieve the same supposed aim. It observes that the notification number may be found by consulting the list of notifications itself or by referring to the documents accompanying the product such as invoices. Thirdly, the Commission contests the right which has been invoked for an authority to determine the most appropriate means of control which is contained in Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs. [6] It submits that this Directive aims to establish a general market surveil-

5 — Judgment of 15 February 1994, *Goffart Healthcrafts & Others* v *Belgian State* CE No 46108.

6 — OJ 1989 L 186, p. 23.

lance mechanism whereas the Belgian notification system follows another approach, viz. the control of what must appear on a product label. In addition the Directive itself, unlike the 1992 Decree, envisages less restrictive ways of attaining the obligation's objective, e.g. the consultation of other documents.

23. Belgium submits, again in the alternative, that the notification-number obligation is proportionate to the goal of protecting public health. The two obligations, i.e. the obligation to notify and the obligation to label with the notification number, are but minor constraints on those wishing to market the affected products. The existence of the possibility of reaction by the Service and of sanctions are not in themselves supplementary obligations.

24. Belgium claims that the appearance of the notification number on the label complements the other elements of the 1992 Decree as it provides consumers with a reference number.

25. It denies that the aim of the provision could be achieved in a less restrictive manner.

IV — Analysis

26. At the outset I feel that a preliminary point needs to be made regarding the context in which my analysis of the legal arguments will take place. Nutrients are substances which the human body requires but cannot produce itself and for this reason have to be obtained in foodstuffs. Thus we are concerned with human health. However, the products affected by the 1992 Decree are not 'medicinal products' and Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products [7] does not apply to them. Belgium has not chosen to institute an authorisation procedure for the products affected by the Decree. It could have done so, [8] indeed some of the products in question were, in the past, classified as medicines in Belgium but have been removed from this category. Likewise, in the past, some were only available on prescription. Instead of retaining or extending these systems, Belgium has established the notification procedure in which it claims that the notification-number obligation is central.

7 — OJ, English Special Edition, Series I 1965-1966, p. 20.

8 — Indeed, the Court has found compatible with Article 28 et seq. EC a national rule prohibiting, without prior authorisation, the marketing of foodstuffs lawfully produced in another Member State to which vitamins have been added, provided that the marketing is authorised where the addition of vitamins meets a real need, especially a technical or nutritional one; Case 174/82 *Sandoz* [1983] ECR 2445. For a similar ruling in the case of additives, see Case 304/84 *Ministere Public* v *Muller* [1986] ECR 1511.

(a) *On the existence of a measure of equivalent effect to a quantitative restriction*

27. Throughout both the oral and written stages of pleadings Belgium has maintained that the notification-number obligation does not constitute a measure of equivalent effect to a quantitative restriction and is thus not contrary to Article 28 EC. However, I fully accept the Commission's argument that this is incorrect.

28. It is clear that the products affected by the 1992 Decree may be legally marketed in other Member States without mention of any notification number. Therefore, according to well-established case-law, a measure like the one in question which lays down a requirement to be met by the product itself constitutes prima facie a violation of Article 28 EC, even if it applies indistinctly to both domestic and imported goods. [9]

29. A stipulation that a product be labelled or packaged in a certain manner is without doubt a product characteristic rather than a 'selling arrangement' in the sense of paragraph 16 of the Court's judgment in *Keck and Mithouard*. [10] The stipulation at issue obliges persons wishing to market the affected products in Belgium to create a special label for use on the Belgian market. This involves the incurring of additional packaging costs and may act as a disincentive to marketing the products in Belgium. [11]

30. Belgium's argument that, in the absence of harmonising legislation, the notification number may be of some use in other Member States is without foundation. As the Commission argued, the utility or otherwise in other Member States of the notification number is, in the context of Article 28 EC, without any relevance as Article 28 EC concerns the importation of goods into the national market.

31. Neither am I convinced by Belgium's argument to the effect that similar obligations exist in other Member States. If it be the fact that other Member States are in

9 — *Cassis de Dijon*, cited at footnote 3 above, and Case 261/81 *Rau* [1982] ECR 3961, paragraph 12.

10 — *Keck and Mithouard*, cited at footnote 3 above, paragraph 15 and Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst Sass* [2000] ECR I-151, paragraph 23 et seq.

11 — Case C-51/93 *Meyhui* v *Schott Zwiesel Glaswerke* [1994] ECR I-3879, paragraph 13; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* [1995] ECR I-1923, paragraph 13 and Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 36 et seq.

default of their Treaty obligations that is no defence to an allegation of breach of an obligation imposed by the Treaty. [12]

32. Finally, Belgium has argued that any additional packaging costs will be readily borne by Belgian consumers. A number of points can be made about this. In the first place, the prospect of incurring additional costs in advance (even assuming that these costs can be entirely passed on) may, as I said above, act as a disincentive to those wishing to market goods in Belgium. Secondly, even if the costs are passed on to consumers, the imported product is deprived of a competitive advantage it would otherwise have had on the Belgian market. This advantage is removed in the same manner as when a minimum retail price is imposed on products. [13] Thirdly, even presuming that the extra cost is minimal and that the obligation is relatively innocuous, Article 28 EC still applies. According to this Court's case-law there is no *de minimis* exception to Article 28 EC unlike in the case of Articles 81 EC and 82 EC. [14]

(b) *On the existence of a justification for the measure and on its compatibility with the principle of proportionality*

33. I now turn to consider whether or not the notification-number obligation is justified by any public interest capable of overriding the fundamental Community freedom contained in Article 28 EC.

34. Belgium submits that the notification system as a whole pursues the protection of human health, a public interest recognised in Article 30 EC. As the Commission admitted at the hearing, the system ensures that the Belgian authorities are informed about new products containing nutrients, enables the authorities to obtain supplementary information about the products and enables them to make remarks and recommendations concerning the labelling thereof. Over-consumption of nutrients is

12 — Joined Cases 52/65 and 55/65 *Germany* v *Commission* [1966] ECR 159, pp. 170 to 172 and Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 63.

13 — Case 82/77 *Openbar Ministerie of the Netherlands* v *van Tiggele* [1978] ECR 25, paragraphs 14 and 18 and Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, paragraph 17. When a minimum price of a specific amount is fixed at a higher level than the cost price of the imported goods, then even if the minimum price is indistinctly applicable, it can still restrict imports by preventing their lower cost price from being reflected in a lower retail selling price.

14 — Joined Cases 177/82 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, paragraph 14; Case C-67/97 *Anklagemyndigheden* v *Ditlev Bluhme* [1998] ECR I-8033, paragraph 20 et seq. and paragraphs 18 and 19 of my Opinion in that case as well as my Opinion of 15 June 2000 in Case C-376/98 *Germany* v *Parliament and Council* and Case C-74/99 *Imperial Tobacco*, paragraph 103.

without doubt a danger against which Member States may take legitimate steps. [15] In its letter of formal notice of 28 June 1996 the Commission accepted that the obligation of prior notification is justified by the interest of protecting human health, an interest which is explicitly recognised in Article 30 EC and by this Court as being potentially superior to the Community's interest in the free movement of goods. [16] However, whether or not the supplementary notification-number obligation is justified in the same manner is a different question and this supplementary obligation must always be proportionate to the public-health interest being pursued.

35. The principle of proportionality is a fundamental principle of Community law whose observance the Court must assure. [17] It has three cumulative limbs: first, the measure must be necessary and appropriate to achieving its purpose, secondly, this purpose must not be attainable in a less restrictive or less intrusive manner, and thirdly, the advantages pursued must not be disproportionate to the measure's onerous effects. [18]

36. As Belgium stated at the hearing, the most important thing for consumers to know about on contemplating purchasing a nutrient or foodstuff to which a nutrient has been added is the following: is this product one that I require and/or one that will be beneficial to me? It is for this reason that the 1992 Decree introduces the obligation of prior notification, the undertaking to carry out further tests, the possibility of the Service making remarks and recommendations, and sanctions for breach of the Decree.

37. It is important to remember exactly how the notification number appears on a product. It appears, as was explained at the hearing, along with the letters 'NUT NR' (nutrient number), the number of the nutrient itself and then the number of the firm.

15 — *Sandoz*, cited at footnote 8 above, paragraph 17, regarding vitamins.

16 — For example, *Sandoz*, cited at footnote 8 above; Case 188/84 *Commission* v *France* [1986] ECR 419 and Case C-271/92 *LPO* [1993] ECR I-2899.

17 — Case 182/84 *Miro* [1985] ECR 3731, paragraph 14.

18 — See in respect of Community action, *inter alia*, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96; and as regards Member State action, see the Opinion of Advocate General Van Gerven in Case C-159/90 *Society for the Protection of Unborn Children Ireland* (hereinafter '*Grogan*') [1991] ECR I-4685, paragraph 35 and the Opinion of Advocate General Jacobs in Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 80. This view is also supported by academic authorities; see for example Tridimas, Takis, '*The General Principles of EC Law*', Oxford University Press, 1999, at p. 91 and De Búrca, Gráinne, '*The Principle of Proportionality and its Application in EC Law*' (1993) 13 YEL 105, 113.

38. Belgium relies on the existence of a very close link between the notification procedure itself and the notification-number obligation. Seeing the number on the label is a guarantee for consumers that notification has occurred and it also makes it possible for them to request information about the product. It considers that, if this possibility of verifying whether or not notification has taken place did not exist, the notification procedure itself would lose its significance.

39. However, I do not see how the notification-number obligation contributes, in any substantial manner, to the protection of health or of consumers. At present on seeing the notification number on the label consumers merely know, at most, that the product has been notified to the Service. This number does not convey any additional information about the amount of the particular nutrient contained in the product, about any tests that may have been carried out on the product or about whether or not the Service made any remarks or recommendations concerning the product. Consumers may know that over-consumption of a particular nutrient is harmful but the added presence of the notification number will not help them decide whether or not they should consume the labelled product or, if so, in what quantities. The presence of the notification number only shows compliance with a particular standard but does not provide any additional advice to consumers at large, let alone to the vulnerable groups mentioned by Belgium. Its additional contribution to the objective pursued by the requirement of notification itself is highly doubtful.

40. Further, any claimed utility of the notification number is predicated on consumers knowing exactly what the number means. The appearance of the number only carries significance if consumers are aware of the existence of the notification system. This is by no means certain, as even Belgium has admitted that consumers are more often 'unqualified' in such areas. In addition, those who do have this high level of consumer awareness *already know* of the existence of the notification system and they therefore know that a product should not be on sale in the absence of prior notification.

41. Therefore the argument that consumers will lose confidence in the notification system in the absence of the appearance of the notification number on the product simply cannot be accepted. Most consumers will not appreciate what the number signifies and, for those who do, the number does not inform them of anything new. In other words, the obligation is not only burdensome but is also ineffective and inappropriate for attaining its self-proclaimed purpose. It thus fails to satisfy the first condition of proportionality.

42. Belgium nevertheless cites examples of obligatory markings imposed in Commu-

nity legislation on the veterinary sector, on milk products, [19] on toys, [20] on aerosols [21] and on medicines in order to show that similar obligations are created by Community law itself. However, as the Commission argues, these Community requirements have a twofold purpose; to allow free movement of goods and to indicate conformity with applicable legislation. Without the number or symbol the products in question could not enjoy free movement in the Community. On the other hand, the notification-number obligation merely shows compliance with a particular national standard and no Member State can take it on itself to legislate for the entire Community.

43. Belgium also maintains that the notification number facilitates tracing of products about which consumers request information. It is claimed that consumers will not have access to the other documents mentioned by the Commission and, therefore, that the notification-number obligation is the only way of protecting them.

44. It is true that the presence of a reference number may facilitate consumers but they must still make an actual request for information. Nevertheless other details about the product, e.g. its name, the manufacturer or distributor, the date up to which its nutritional content is guaranteed, are already in the possession of consumers and will be of assistance when requesting information. Most of this information will appear on the product's packaging and additional information may also be found in other documents accompanying the products. Thus there are other far less restrictive means of obtaining information and the second condition of the proportionality test is not fulfilled. [22]

45. It follows that the third limb is also not satisfied, as the advantages for the protection of public health or of consumers, if any, which flow from the notification-number obligation are clearly far outweighed by the disadvantages for the free movement of goods which it entails.

19 — Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products, OJ 1992 L 268, p. 1.

20 — Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys, OJ 1988 L 187, p. 1.

21 — Council Directive 75/324/EEC of 20 May 1975 on the approximation of the laws of the Member States relating to aerosol dispensers, OJ 1975 L 147, p. 40.

22 — See my Opinion of 6 April 2000 in Case C-55/99 *Commission* v *France*, paragraph 47.

V — Conclusion

46. In the light of the foregoing analysis, I recommend that the Court:

(1) Declare that the Kingdom of Belgium is in breach of its obligations under Article 28 EC as a result of its requiring, in the first paragraph, first indent, of Article 6 of the Belgian Royal Decree of 3 March 1992 concerning the placing on the market of nutrients and foodstuffs to which nutrients have been added, that products affected by the Decree bear the national notification number attributed to them under Article 4 of the same Decree;

(2) Order that the Kingdom of Belgium pay the costs of these proceedings.