to prohibit absolutely the use in foodstuffs intended for human consumption of any of the preservatives or antioxidants included in the lists appearing in the annexes thereto, or to prevent all marketing of such a substance, the provisions thereof may be relied upon before national courts.

In Case 88/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance [criminal court of first instance], Strasbourg, for a preliminary ruling in the proceedings pending before that court between

MINISTÈRE PUBLIC [Public Prosecutor's Office]

and

SIEGFRIED GRUNERT, managing director of a company, residing in Strasbourg,

on the interpretation of the Council Directives of 5 November 1963 (Official Journal, English Special Edition 1963-1964, p. 99) and 13 July 1970 (Official Journal, English Special Edition 1970 (II), p. 429) on additives authorized for use in foodstuffs intended for human consumption,

THE COURT (First Chamber)

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

Advocate General: H. Mayras
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to 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

On 13 August 1975 the Service de la Répression des Fraudes [service for the prevention of fraud] of the Département du Nord inspected products used in making pork-butcher's meat and marketed by the ADITEC company of which Siegfried Grunert is the Managing Director. The analyses carried out showed that one of the preservatives sold by Mr Grunert contained lactic acid and citric acid.

Mr Grunert has never denied using these products, but maintains that they are authorized, as they are referred to in an EEC directive.

Criminal proceedings were instituted before the Tribunal de Grande Instance, Strasbourg, against Siegfried Grunert who is charged with having offered for sale and sold a product liable to adulterate foodstuffs for human consumption, knowing its intended destination.

The Tribunal established, first, that Article 1 of the Décret of 15 April 1912 (replaced by the Décret of 12 February 1973, Journal Officiel de la République Française [Official Journal of the French Republic] of 15 February 1973, p. 1728) prohibits the addition to foodstuffs of all substances which have not been given express prior authorization and that the acids in question have not been given such authorization.

It found, secondly, that those products appear on the list included in the Community Directives of 5 November 1963 and 13 July 1970.

Considering that in those circumstances "the decision in this case depends upon the interpretation of the directives of the Council of the EEC, which have the effect either of authorizing the use of all such substances as they list or of prohibiting only such substances as they do not mention", the Tribunal decided in a judgment of 22 March 1979 to request the Court of Justice for a preliminary ruling as to:

"Whether the Member States were under an obligation to authorize in their national law all such preservatives for use in foodstuffs intended for human consumption as were listed in the said directives or whether they only had to prohibit the use of all substances not included in the nomenclatures adopted by the EEC, and,

if appropriate, whether a Community citizen adversely affected by national legislation which is contrary to the Community directive may plead that the national legislation is inapplicable to him".

The judgment referring the question to the Court was received at the Court Registry on 1 June 1979.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Government of the Kingdom of the Netherlands, represented for the purpose by its Agent, F. Italianer, Secretary-General at the Ministry for Foreign Affairs, and by the Commission of the European Communities, represented by its Legal Adviser, Jean-Claude Séché, 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 an order of 12 October 1979 the Court decided to assign the case to the First Chamber pursuant to the first and second sub-paragraphs of Article 95 (1) of the Rules of Procedure.

II — Summary of the written observations submitted to the Court

First question

The *Netherlands Government* submits that Article 1 of Council Directive No 64/54 of 5 November 1963 (Official Journal, English Special Edition 1963-1964, p. 99) on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (hereinafter referred to as the *directive on preservatives)* and Article 1 of Council Directive No 70/357 of 13 July 1970 (Official Journal, English Special Edition 1970 (II), p. 429) on the approximation of the laws of the Member States concerning the antioxidants authorized for use in foodstuffs intended for human consumption (hereinafter referred to as the *directive on antioxidants)* stipulate that Member States *shall not authorize the use,* for the protection of foodstuffs, of any preservatives *other* than those listed in the annexes to the directives.

That means that the use of substances other than those listed in the annexes to the directives is prohibited, whereas the use of those which are must, in principle, be authorized.

In the present case, part II of the annex to the directive on preservatives includes in the category of "substances intended mainly for other purposes but which may have a subsidiary preservative property" the product "E 270: Lactic acid". Part III of the annex to the directive on antioxidants includes in the category of "substances capable of increasing the antioxidant effect of other substances" the products "E 270: Lactic acid" and "E 330: Citric acid".

Article 36 of the EEC Treaty authorizes derogations from the principle of the free movement of goods on the ground, *inter alia,* of public health. As far as the products which fall within the sphere of application of the two directives in question are concerned, those derogations are defined in part by Article 2 (2) of the directive on preservatives and Article 9 of the directive on antioxidants, according to which provisions of national laws specifying the foodstuffs to which the preservatives listed may be added, and the conditions governing such addition, are not affected. In accordance with the principle of the free movement of goods, however, those provisions add that the use of the substances listed in the annexes may not be totally excluded

The administrative authority must retain a discretion regarding the use of substances which are not prohibited; it must be able to determine, for each additive, the foodstuffs in which the latter may be incorporated, as well as the quantity to be allowed and the procedures to be followed.

According to the preambles to the two directives the Council must decide on the approximation of the laws concerning individual foodstuffs intended for human consumption to which the substances listed in the annexes to the directives may be added and on the conditions governing the addition thereof. In so far as the Council has not yet drawn up such directives, Member States retain the power therefore to draw up such provisions themselves; if need be, Member States may require prior express authorization for each additive where national provisions concerning individual foodstuffs have not been, or will not be, adopted. There is therefore no reason, in the opinion of the Netherlands Government, to consider a national provision such as Article 1 of the Décret of 15 April 1912, replaced by the Décret of 12 February 1973, contrary to the provisions of the two directives, if such a provision is required on grounds of public health and if that objective cannot be achieved otherwise than by a general prohibition coupled with the possibility of exemptions. That method may not, however, have the effect of totally excluding in practice the use of any particular substances.

In the opinion of the Netherlands Government, however, it appears from the judgment making the reference that the business of ADITEC, the company managed by Mr Grunert, is not the addition of certain substances (in this case lactic acid and citric acid) to foodstuffs, but the marketing and sale of a preservative which contains lactic acid and citric acid.

On the subject of the marketing of preservatives and antioxidants, Article 9 of the directive on preservatives and Article 8 of the directive on antioxidants merely state that Member States shall take all measures necessary to ensure that the substances listed in the annexes and intended for use in foodstuffs are placed on the market only if their packaging or containers display certain information. That provision, in conjunction with the provision mentioned above which states that the provisions of national laws may not have the effect of totally excluding the use of a particular substance, leads one to conclude that the national authorities do not have the power to impose a requirement of prior express authorization for the marketing and sale of a substance which is, in principle, permitted.

The *Commission* observes that the method used by the Council in relation to preservatives and antioxidants is to draw up *positive lists.* Consequently substances which do not appear on those lists may not be authorized by Member States for the purposes referred to by the directives but, conversely, the two acids in question may be authorized because they are included in the annexes to the directives in question. However, the Council found itself unable, at that early stage, to decide on the approximation of the laws concerning individual foodstuffs intended for human consumption, to which the preservatives or antioxidants listed in the respective annexes to the directives may be added, nor to lay down the conditions under which that admixture must be effected (last recital of the preamble to the directive on preservatives and penultimate recital of

the preamble to the directive on antioxidants). That is why the first sentence in Article 2 (2) of the directive on preservatives states that the latter "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". Article 9 of the directive on antioxidants contains a similar provision.

Thus whilst consumers in the various Member States share a certain measure of common protection as a result of the prohibition of substances which are not authorized by the directives, the protection they enjoy will vary somewhat from one Member State to another as a result of, in the first place, the number of foodstuffs in respect of which each has granted authorization and, in the second place, the realtive importance of each of such foodstuffs in the daily diet of consumers.

At the same time, because the national provisions apply equally to imported products, such divergences oblige importers to comply with the legislation which is applicable to any one particular foodstuff. Doubtless this interpretation reveals that the directives have not eliminated the technical obstacles to the movement of the goods concerned. But that was not their principal aim. As may be seen from the preambles, their main concern was rather the protection of human health and of consumers, as well as considerations relating to competition.

Only one restriction was imposed by the directives on Member States' freedom to select the foodstuffs in respect of which they wish to authorize the addition of lactic or citric acid as a preservative and/or antioxidant.

As is stated in the first sentence af Article 2 (2) of the directive on preservatives, national provisions specifying foodstuffs to which the preservatives listed in the annex may be added and the conditions governing that addition "must not have the effect of totally excluding the use in foodstuffs of any of the preservatives". A similar provision appears in Article 9, cited above, of the directive on antioxidants.

According to information available to the Commission the French rules comply with that requirement. Thus, in particular:

lactic acid is additionally authorized by a circular of 27 January 1930 as a preservative in sparkling soft drinks and lemonade and, by a circular of 17 June 1965, as a synergic antioxidant in confectionery;

citric acid is authorized as a synergic antioxidant in mustard by virtue of a decree of 10 September 1937.

Second question

The case-law of the Court is, in the opinion of the *Netherlands Government*, clear. Its effect is that individuals may, in certain circumstances, rely on obligations which are imposed by a directive and that the national courts must consider those obligations as forming part of

Community law. That is especially the case when an individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits as to their discretion set out in the directive (see in particular the judgment of 1 February 1977 in Case 51/76, *Verbond van Nederlandse Ondernemingen* [1977] ECR 113 at p. 127.)

In the opinion of the Netherlands Government the obligation contained in the first article of each of the two directives does not in itself confer on individuals a right to the unrestricted use of the substances listed in the directives. Although the obligation imposed by the directive regarding the use of authorized substances is not perfectly defined and unconditional, yet there is a clear restriction imposed on the freedom of Member States. The two directives provide — in Article 2 (2) and in Article 9 respectively — that the substances listed in those directives may not be totally excluded. The restriction is, admittedly, not a total one, because under Article 4 of the directive on preservatives and Article 3 of the directive on antioxidants Member States are still permitted to prohibit, on certain specified grounds, the use of a substance which is listed in the directives. That permission is, however, clearly subject to procedural requirements — immediate notification to the Commission, validity limited to one year — so that the validity of national provisions which have not been drawn up in accordance with that procedure may be challenged (see, in particular, judgment of 5 April 1979 in Case 148/78, *Tullio Ratti* [1979] ECR 1629.)

Since, therefore, the substances listed may, in principle, be used, or since at least the use of those substances may not be totally excluded, the marketing and sale of such substances cannot be prohibited either. In the opinion of the Netherlands Government the prohibition against marketing and selling those substances imposed at the national level must be considered to be contrary to the directives in question, so that an individual may challenge on that ground, too, the applicability to him of a national legislative measure of that nature.

The *Commission* maintains that the Court has already laid down the conditions under which an individual may rely upon a Community directive before the courts, in particular in order to obtain a declaration as to whether the Member State in question has respected the limits on the discretion left to it in order to achieve the objective imposed by the directive (judgments of 4 December 1974, *Van Duyn,* Case 47/74 [1974] ECR 1337; 1 February 1977, *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen,* Case 51/76 [1977] ECR 113; 23 November 1977, *Enka* v *Inspecteur der Invoerrechten en Accijnzen,* Case 38/77 [1977] ECR 2203; 29 November 1978, *Delkvist* v *Anklagemyndigheden,* Case 21/78 [1978] ECR 2327).

However, as regards the prohibition by a Member State on the use of the additives in question in any particular foodstuff, no such situation arises because the directives which mention them do not impose an obligation on the Member States to adopt a specific course of

action, but leave them, on the contrary, free to authorize or to prohibit them in respect of each type of foodstuff.

In conclusion the Commission considers that the reply to the two questions which have been asked should be as follows:

"1. Article 2 of Council Directive No 64/54 and Article 9 of Council Directive No 70/357 leave Member States the power to prohibit the use of the additives to which they refer in specific foodstuffs.

2. National legal provisions which exercise that power are to be considered as provisions validly adopted by the Member State concerned in compliance with the restrictions imposed by the directives."

III — Oral procedure

At the sitting on 6 March 1980 the Commission of the European Communities, represented by Jean-Claude Séché, acting as Agent, presented oral observations.

The Advocate General delivered his opinion at the sitting on 24 April 1980.

Decision

1 In a judgment of 22 March 1979, which was received at the Court Registry on 1 June, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive No 64/54 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) and Council Directive No 70/357 of 13 July 1970 on the approximation of the laws of the Member States concerning the antioxidants authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1970 (II), p. 429).

2 Criminal proceedings were instituted before the Tribunal against the Managing Director of a company who is charged with having offered for sale and sold, knowing its intended destination, a product liable to adulterate foodstuffs for human consumption, in this case a preservative containing lactic acid and citric acid. The product in question was used in making pork-butcher's meat and was marketed by the company managed by the accused.

3 In the judgment making the reference it was said that the French law applicable in the matter prohibits the addition to foodstuffs of any substances

which have not been previously expressly authorized, that neither lactic acid nor citric acid have been so authorized, and that their use is therefore prohibited according to the national rules. However, the Tribunal considered that Directive No 64/54, and certain other directives, provide an exhaustive list of the preservatives authorized in the Member States for safeguarding foodstuffs intended for human consumption and that that list includes lactic acid and citric acid.

4 By its first question the Tribunal asks the Court to rule whether Member States are bound to authorize through their national laws all the preservatives which may be used in foodstuffs intended for human consumption listed in Directives No 64/54 and No 70/357, or if they must merely prohibit the use of all such substances as are not included in those lists.

5 Article 1 of Directive No 64/54 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 lactic acid. Article 2 (2) 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 must not have the effect of totally excluding the use in foodstuffs intended for human consumption of any of the preservatives listed.

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 By virtue of the provisions of Directive No 70/357, especially Articles 1 and 9 thereof and the preamble, the same scheme has been adopted in respect of antioxidants. Lactic acid and citric acid appear in the annex to that directive.

8 Accordingly, at the present stage in the approximation of national laws relating to preservatives and antioxidants Member States are not bound to authorize for use in foodstuffs all the substances the use of which is permitted by the two directives. The Member States have retained a certain discretion to determine their own rules concerning the addition of preservatives and antioxidants to foodstuffs, subject to the twofold condition that no preservative or antioxidant may be authorized unless it appears in one of the lists annexed to the directives and that the use of a preservative or antioxidant which is listed there may not be totally prohibited.

9 It should be noted that the two directives in question concern the use of preservatives or antioxidants in foodstuffs; as far as the marketing of such substances is concerned the directives merely impose an obligation on Member States, laid down in Article 9 of Directive No 64/54 and Article 8 of Directive No 70/357, to take all measures necessary to ensure that the substances are placed on the market only if their packagings or containers bear certain information.

10 In view of those provisions, and as the use of the preservatives and antioxidants listed in the two directives may not be prohibited for all foodstuffs, a general prohibition against the marketing of such substances would, however, result in hindering the application of the Community rules and must therefore be considered as contrary to the objectives of the two directives.

11 The reply to the first question should therefore be that Directives No 64/54 and No 70/357 require Member States not to authorize the use in foodstuffs intended for human consumption of preservatives or antioxidants which are not included in the lists annexed to those directives. However, the Member States' freedom to prohibit or to authorize the use of such substances must not have the effect of totally excluding the use in foodstuffs intended for human consumption of any of the preservatives or antioxidants included in those lists, or of preventing all marketing of such a substance.

12 The second question asked by the Tribunal requests the Court for a ruling as to whether a national of a Member State may rely upon the provisions of Directives No 64/54 and No 70/357 where the national laws applicable in the matter are contrary to those directives.

13 The judgment making the reference makes it apparent that the Tribunal asked that question in order to establish whether the provisions of the two directives which are concerned in the first question may be relied on in proceedings before the national courts.

14 Consideration of the first question has shown that although in general the two directives leave a large measure of freedom to the Member States as to whether or not to authorize the use in foodstuffs of the preservatives and antioxidants listed in the annexes to those directives, the laws of the Member States may no longer prohibit altogether the use of any of those preservatives or antioxidants in foodstuffs, nor may they prevent all marketing of such a substance. The prohibition against the introduction or maintenance of legislative or regulatory provisions to that effect by the Member States is unconditional and sufficiently precise to enable an individual to rely on it before a national court where there is a likelihood that legislative or regulatory provisions of such a nature may be applied against him.

15 The reply to the second question should be, therefore, that in so far as Directives No 64/54 and No 70/357 do not allow Member States to prohibit absolutely the use in foodstuffs intended for human consumption of any of the preservatives or antioxidants included in the lists appearing in the annexes thereto, or to prevent all marketing of such a substance, the provisions thereof may be relied upon before national courts.

Costs

16 The costs incurred by the Government of the Kingdom of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the 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, costs are a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by judgment of 22 March 1979, hereby rules,

1. **Council Directives No 64/54 of 5 November 1963 and No 70/357 of 13 July 1970 require Member States not to authorize the use in foodstuffs intended for human consumption of preservatives or antioxidants which are not included in the lists annexed to those directives. However, the Member States' freedom to prohibit or to authorize the use of such substances must not have the effect of totally excluding the use in foodstuffs intended for human consumption of any of the preservatives or antioxidants included in those lists, or of preventing all marketing of such a substance.**

2. **In so far as Directives No 64/54 and No 70/357 do not allow Member States to prohibit absolutely the use in foodstuffs intended for human consumption of any of the preservatives or antioxidants included in the lists appearing in the annexes thereto, or to prevent all marketing of such a substance, the provisions thereof may be relied upon before national courts.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 12 June 1980.

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the First Chamber