OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 16 January 2001 [1]

1. The Tribunal de Première Instance de Bruxelles (Court of First Instance, Brussels), Belgium, is seeking a ruling under Article 234 EC on the interpretation of Articles 28 EC and 30 EC in order to decide whether Belgian laws (i) prohibiting the sale of bread containing more than 2 % salt and the advertising of foodstuffs in such a way as to suggest that a product possesses particular characteristics even though all similar products have the same characteristics and (ii) requiring the packaging of fresh milk to be marked 'whole' and 'pasteurised' constitute quantitative restrictions on imports or measures having an equivalent effect.

I — Facts

2. A judgment in default was delivered in December 1998 against Mrs Bellamy, the director of English Shop Wholesale, a limited company which imports foodstuffs from the United Kingdom for retail sale in Belgium, on the ground that in 1994 and 1995 she had contravened provisions of the Royal Decree of 2 September 1985 on bread and other bakery products [2] (hereinafter 'the 1985 Royal Decree'), the Royal Decree of 17 April 1980 concerning advertising of foodstuffs [3] (hereinafter 'the 1980 Royal Decree') and Article 14 of the Law of 24 January 1977 on the protection of consumers' health [4] (hereinafter 'the 1977 Law').

The contraventions consisted in selling bread with a salt content of 2.88 % in breach of the provisions of Article 3(2) of the 1985 Royal Decree, in giving the impression, in breach of Article 4(2) of the 1980 Royal Decree, that fresh whole pasteurised milk possessed particular qualities by stating that the product did not contain additives or preservatives and in selling milk with the name 'Breakfast Milk' without describing it as 'fresh whole pasteurised milk'.

3. Mrs Bellamy contested the judgment and contends that the charges are contrary to

1 — Original language: Spanish.

2 — *Moniteur Belge*, 7 November 1985.

3 — *Moniteur Belge*, 6 May 1980.

4 — *Moniteur Belge*, 8 April 1977.

provisions of European Community legislation, in particular, Article 28 EC.

II — The questions referred for a preliminary ruling

4. In order to enable it to give judgment in the proceedings, the Tribunal de Première Instance referred the following questions to the Court of Justice for a preliminary ruling:

'1. Are Articles 1.3 and 8 of the Royal Decree of 2 September 1985 on bread and other bakery products and Article 14 of the Law of 24 January 1977 on the protection of consumers' health in relation to foodstuffs and other products, in so far as they prohibit the marketing of bread whose cooking salt content, expressed in terms of sodium chloride and calculated on the basis of the dry matter, exceeds 2.0 %, compatible with the requirements of Article 28 ... and are they capable of being justified under Article 30 of the [Treaty on European Union]?

2. Are Articles 1(3) and 8 of the Royal Decree of 2 September 1985 on bread and other bakery products and Article 14 of the Law of 24 January 1977 on the protection of consumers' health in relation to foodstuffs and other products compatible with the requirements of Article 28 of the Treaty on European Union and are they capable of being justified under Article 30 of that instrument?

3. Are Articles 4(2) and 5 of the Royal Decree of 17 April 1980 concerning advertising of foodstuffs and Article 14 of the Law of 24 January 1977 on the protection of consumers' health in relation to foodstuffs and other products compatible with the requirements of Article 28 of the Treaty on European Union and are they capable of being justified under Article 30 of that instrument?'

5. I would like to make it clear that, although the order for reference sought a ruling on the interpretation of Articles 28 and 30 of the Treaty on European Union, it is actually a question of Articles 28 and 30 of the Treaty establishing the European Community, as renumbered and amended by the Treaty of Amsterdam.

III — Procedure before the Court of Justice

6. The applicant in the main proceedings and the Commission have submitted writ-

ten observations in these proceedings, within the period prescribed for those purposes by Article 20 of the EC Statute of the Court of Justice. Since none of the interested parties has asked to present oral argument, the Court has decided not to hold a hearing, in accordance with Article 104(4) of the Rules of Procedure.

IV — Consideration of the questions submitted by the national court

A. *The first question*

7. By this question, the Belgian court is seeking to ascertain whether Article 28 EC precludes the application of a Member State's legislation which prohibits the marketing in its territory of bread and other bakery products whose salt content, calculated on the basis of the dry matter, exceeds 2.0%, where those products have been lawfully manufactured and marketed in another Member State. If the answer to that question is affirmative, the national court is asking whether the legislation may be justified under Article 30 EC.

8. Article 28 EC prohibits quantitative restrictions on imports between Member States as well as all measures having equivalent effect. For its part, Article 30 EC provides that Articles 28 and 29 are not to preclude prohibitions or restrictions on imports, exports or goods in transit which can be justified on grounds of *inter alia* the protection of health and life of humans and animals, provided that such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

9. It appears from the order for reference that the first question was drawn up as a consequence of Mrs Bellamy being fined for contravention of Article 1(3) and Article 8 of the 1985 Royal Decree and Article 14 of the 1977 Law. I must point out, in the interests of clarity, that the requirement relating to the maximum salt content in bread is to be found in Article 3(2) of the 1985 Royal Decree and not in Article 1(3) or Article 8.

10. That question has already been answered by the Court of Justice in its judgment in *Van der Veldt*, [5] delivered in response to a question from another Belgian court hearing a case dealing with facts similar to those described here.

11. In that judgment, the Court confirmed that, in the absence of common or harmonised rules on the making and marketing of

5 — Case C-17/93 *Van der Veldt* [1994] ECR I-3537.

bread and other bakery products, it is for Member States to regulate all matters relating to the composition, making and marketing of those foodstuffs, provided that they do not thereby discriminate against imported products or hinder the importation of products from other Member States. [6]

12. A requirement that they contain no more than a specific amount of salt, calculated by reference to the dry matter, may prevent bread and other bakery products originating in other Member States from being marketed in the State concerned. Complying with such a requirement may make it necessary, if identical manufacturing standards are not prescribed for the manufacture of bread, to vary the method of manufacture according to the place where the bread or bakery products are to be sold and may thus impede the movement of the products.

Accordingly, the Court held that a Member State's legislation prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter exceeds the maximum permitted level of 2%, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of what is now Article 28 EC.

13. I also consider the legal arguments deployed by the Court of Justice to refute the argument that the Belgian legislation was justified on grounds of the protection of public health to be valid, since the national authorities responsible for health policy had alleged that if the Netherlands rules on salt content in bread were adopted, the daily intake of that type of chloride would amount to 3.1 g, which was too high.

However, according to that judgment, [7] general conjecture of that nature does not prove that increasing salt intake by such an amount poses a risk to public health. Furthermore, although the mere fact that there is a risk to consumers is sufficient to make legislation of the kind at issue compatible with the requirements of Article 30, [8] the risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific investigation. [9] Since no scientific data of that kind had been produced, on which the Belgian legislature could have relied,

6 — Case 130/80 *Kelderman* [1981] ECR 527, paragraph 5, and Case 237/82 *Jongeneel Kaas and Others* v *Netherlands* [1984] ECR 483, paragraph 13.

7 — See paragraph 17.

8 — Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 18.

9 — Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 44.

the Court of Justice held that, instead of prohibiting and penalising the marketing of bread whose salt content was higher than 2 %, the Belgian legislature could have prescribed suitable labelling to give consumers the desired information regarding the composition of the product. The protection of public health would thus have been ensured without such serious restrictions on the free movement of goods. [10]

14. In the case that I am considering, no new arguments have been presented to show that the legislation is necessary for the protection of public health or that it is proportionate to that end. Consequently, it must be held that Article 28 EC precludes the application of a Member State's legislation prohibiting the marketing in its territory of bread and other bakery products whose salt content, calculated by reference to the dry matter, exceeds 2 %, where those products have been lawfully manufactured and marketed in another Member State, and that the legislation cannot be regarded as justified under Article 30 EC on the ground of the protection of public health.

10 — Paragraphs 18 and 19 of the judgment in *Van der Veldt*, cited in footnote 5.

B. *The second question*

15. I confess that the wording of this question puzzles me since, to a large extent, it is the same as that of the first question, although there is no reference to the maximum salt content in bread.

I understand from my reading of the national legislation referred to in the order for reference (i) that Article 1(3) of the 1985 Royal Decree defines speciality breads; (ii) that under Article 8 contraventions of the Decree are investigated, prosecuted and punished in accordance with the Law on the protection of consumers' health; and (iii) that Article 14 of that law lays down that a person who manufactures or imports foodstuffs or other products referred to therein, or a person who is neither the manufacturer nor the importer but who knowingly places such foodstuffs or other products on the market, is liable either to imprisonment for a period of between eight days and six months or to a fine of between 50 and 1 000 francs, or to both.

The national court is asking whether that legislation is consistent with Article 28 EC and whether it can be justified by reason of Article 30 EC.

16. As the Commission rightly points out in its observations, it is apparent from the

national court's description of the facts that the dispute before it does not concern the applicable legislation, the nature of the penalties imposed on the persons who have contravened it, or the amount of the fines. Nor is there any dispute as to the definition of bread.

17. The Court of Justice has stressed [11] how important it is for a national court making a reference to give the precise reasons which have prompted it to raise a question on the interpretation of Community law and to submit questions seeking a preliminary ruling, [12] and has held that it is essential that it should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and on the link between those provisions and the national legislation applicable to the dispute. [13]

18. Taking account of the fact that the national court has not given any such explanation and that Mrs Bellamy and English Shop Wholesale are alleged to have contravened the prohibition in Article 3(2) of the 1985 Royal Decree, a matter covered by the first question referred for a ruling, I consider that the Court should not answer the second question.

11 — Order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16.

12 — Orders in Case C-101/96 *Italia Testa* [1996] ECR I-3081, paragraph 6, Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 15, and Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 6.

13 — Order in Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 9.

C. *The third question*

19. By this question, which needs to be reformulated, the national court is seeking to ascertain whether Article 28 EC precludes legislative provisions of the kind found in Article 4(2) of the 1980 Royal Decree, which prohibits presenting a branded product in such a way as to suggest that it possesses particular qualities although all similar products have such qualities. It is also seeking to establish whether Article 28 EC prohibits the application of a national rule such as that found in Article 5 of the 1980 Royal Decree, under which all advertising of foodstuffs must use in a clearly visible manner a description laid down, where appropriate, by provisions of laws or regulations, in order to ensure that consumers are not misled as to the nature of the foodstuff. If the answer to the question is affirmative, an analysis of whether the national legislation in question can be justified under Article 30 EC will be called for.

20. According to the case-law of the Court of Justice, obstacles to free movement of goods which are the consequence of rules that lay down requirements to be met by goods (such as requirements relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect

prohibited by Article 28 EC. This is so even if the 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]

The Court has also interpreted Article 28 EC as meaning that the application of national legislation, enacted in the absence of common or harmonised rules, to products imported from other Member States, where they are lawfully manufactured and marketed, is compatible with the Treaty only in so far as it is necessary on grounds of public interest under Article 30 or in order to satisfy mandatory requirements relating *inter alia* to fair trading and consumer protection. [15]

Where, in application of Article 100 of the EC Treaty (now Article 94 EC), Community directives provide for the harmonisation of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 30 EC is no longer justified and the appropriate checks must be carried out, and the measures of protection adopted, within the framework outlined by the harmonising directive. [16]

21. As the Commission has pointed out in its observations, Directive 79/112/EEC [17] ('Directive 79/112') constitutes the first stage in the process of harmonisation which is intended to remove progressively all obstacles to the free movement of goods resulting from the differences between the laws of the Member States in relation to labelling. [18] Similarly, Directive 92/46/EEC [19] harmonises the rules regulating the heat treatment of drinking milk and Chapter III of Annex C thereto sets out the rules applicable to wrapping and packaging.

22. Under Article 2(1)(a) of Directive 79/112, the labelling and methods used

14 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 14, and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15.

15 — Judgment in Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 13.

16 — Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 35.

17 — Council Directive 79/112/EEC of 18 December 1978 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 (OJ 1979 L 33, p. 1).

18 — That Directive has been consolidated with the amendments made to it since its adoption by Directive 2000/13/EC.

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).

must not be such as could mislead the purchaser to a material degree, particularly (i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production; (ii) by attributing to the foodstuff effects or properties which it does not possess; and (iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics.

23. Article 4(2) of the 1980 Royal Decree, in prohibiting advertising of foodstuffs which suggests that they possess special characteristics when in fact all similar products possess such characteristics, incorporates into national law the provision found in Article 2(1)(a)(iii) of Directive 79/112.

24. It must therefore be held that Article 28 EC and Article 2 of Directive 79/112 do not preclude a national legislative provision of the kind found in Article 4(2) of the 1980 Royal Decree.

25. The obligation imposed by Article 5 of the 1980 Royal Decree to use a recognised name in all advertising material, in order to avoid giving a misleading impression, applied in the case before the national court to whole pasteurised milk called 'Breakfast Milk' on the ground that the description 'fresh whole pasteurised milk' had been omitted.

26. Like the Commission, I infer from the facts explained by the national court that in the case in question Article 5 of the Royal Decree applied to the labelling on the milk's packaging. The obligation imposed relates to the product's characteristics and does not have any effect on advertising. Advertising is distinct from the product itself and its packaging and constitutes a 'selling arrangement' of the kind referred to in paragraph 16 of the judgment in *Keck and Mithouard*, [20] which falls outside the scope of Article 28 EC.

27. Under Article 3(1)(1) of Directive 79/112, the name under which the product is sold is one of the compulsory details to be included on the labelling of foodstuffs. Therefore, the application of Article 5 of the 1980 Royal Decree to the labelling of a food product, is neither more nor less than the implementation in national law of the provision in the Directive.

20 — Cited in footnote 14.

28. It remains to be seen whether Community legislation precludes a Member State from requiring milk which is marketed under the name 'Breakfast Milk' to include in the name under which it is sold the words 'whole' and 'pasteurised'.

Article 5(2) of Directive 79/112 lays down that no trade mark, brand name or fancy name may be substituted for the name under which the product is sold.

Under Article 2(2) of Regulation (EC) No 2597/97[21] ('Regulation No 2597/97'), the sales descriptions to be used for milk products are those given in Article 3, paragraph 1 of which requires the name under which the product is sold to indicate whether the milk is raw, whole, semi-skimmed or skimmed.

29. As for the requirement that the word 'pasteurised' should appear on the packaging, Article 5(3) of Directive 79/112 provides that the name under which the product is sold is to include or to be accompanied by particulars as to the physical condition of the foodstuff or the specific treatment which it has undergone (for example, powdered, freeze-dried, deep-frozen, concentrated, smoked), in all cases where omission of such information could create confusion in the mind of the purchaser.

In spite of the fact that pasteurisation is not mentioned among the examples, I agree with the Commission that it must be regarded as a specific treatment undergone by the food product and that its omission from the name under which the product is sold could confuse the consumer.

30. Furthermore, in accordance with Article 5 of Directive 92/46, Member States are obliged to ensure that drinking milk is placed on the market only if it meets *inter alia* the conditions of having been treated in the way provided for in Annex C, Chapter I.A, labelled in accordance with Annex C, Chapter IV, and wrapped in accordance with Annex C, Chapter III, at a treatment establishment where the milk has been subjected to final treatment. Paragraph 5 of Chapter III of Annex C to the directive, which regulates wrapping and packaging, requires the operator or manager of the establishment to ensure for control purposes that, in addition to the information required by Chapter IV, the nature of the heat treatment which the raw milk has undergone and other information whereby the date of the heat treatment may be established and the temperature at which the pasteurised milk must be stored is visibly and legibly displayed on the packaging of the milk and milk-based products.

21 — Council Regulation (EC) No 2597/97 of 18 December 1997 laying down additional rules on the common organisation of the market in milk and milk products for drinking milk (OJ 1997 L 351, p. 13).

31. In view of those provisions, I must conclude that, since Regulation No 2597/97 and Directives 79/112 and 92/46 have made it compulsory to include the words 'whole' and 'pasteurised' in order to approximate the laws of the Member States, the requirement in Article 5 of the 1980 Royal Decree cannot be regarded as contrary to Community law.

Therefore, the answer to the national court's question must be that Article 28 EC and Article 5 of Directive 79/112 do not preclude a national legislative provision such as Article 5 of the Royal Decree of 17 April 1980, which provides that any advertising of foodstuffs must use in a clearly visible manner a sales description of the product laid down, where appropriate, by laws or regulations.

V — Conclusion

32. In the light of the foregoing, I propose that the Court of Justice should give the following answers to the questions submitted by the Court of First Instance, Brussels:

(1) Article 28 EC precludes the application of a Member State's legislation which prohibits the marketing in its territory of bread and other bakery products whose salt content, calculated by reference to the dry matter, exceeds 2 %, where those products have been lawfully manufactured and marketed in another Member State and where that legislation cannot be regarded as justified under Article 30 EC on the ground of the protection of public health.

(2) Article 28 EC and Article 2 of Council Directive 79/112/EEC of 18 December 1978 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 do not preclude a national legislative provision such as Article 4(2) of the Royal Decree of 17 April 1980, which prohibits advertising attributing particular qualities to products where all similar products have such qualities.

Article 28 EC and Article 5 of Directive 79/112 do not preclude a national provision such as Article 5 of the Royal Decree of 17 April 1980, which requires any advertising of foodstuffs to use in a clearly visible manner a sales description laid down, where appropriate, by provisions of laws or regulations, such as the words 'whole' and 'pasteurised' for a product having such characteristics.