JUDGMENT OF THE COURT (First Chamber)
13 December 1990 *

In Case C-42/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de grande instance (Regional Court), Marseille, for a preliminary ruling in the criminal proceedings pending before that court against

Jean-Claude Bellon,

on the interpretation of Council Directive 65/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963-64, p. 99), as supplemented and amended by Council Directives 67/427/EEC of 27 June 1967 (Official Journal, English Special Edition 1967, p. 169), 71/160/EEC of 30 March 1971 (Official Journal 1971 L 87, p. 12) and 74/62/EEC of 17 December 1973 (Official Journal 1974 L 38, p. 29), and of Articles 30 and 36 of the EEC Treaty,

THE COURT (First Chamber),

composed of: G. C. Rodríguez Iglesias, President of Chamber, Sir Gordon Slynn and R. Joliet, Judges,

Advocate General: J. Mischo
Registrar: H. A. Rühl, Principal Administrator,

after considering the observations submitted on behalf of

* Language of the case: French.

Mr Bellon, by M. Grisoli, of the Marseille Bar,

the Commission of the European Communities, by Blanca Rodríguez Galindo, a member of its Legal Department, assisted by Hervé Lehman, a French official placed at the disposal of the Commission's Legal Department, both acting as Agents,

having regard to the Report for the Hearing

after hearing oral argument from Mr Bellon, from the French Government, represented by G. de Bergues, Principal Deputy Secretary in the Ministry of Foreign Affairs, acting as Agent, and from the Commission, at the hearing on 23 October 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 November 1990,

gives the following

Judgment

1 By judgment dated 20 November 1987, which was received at the Court on 15 February 1990, the Tribunal de grande instance, Marseille, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 65/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963-64, p. 99) and of Articles 30 and 36 of the EEC Treaty.

2 That question arose in the context of criminal proceedings against Bellon Import SARL, represented by its manager, Jean-Claude Bellon. Mr Bellon had imported and offered for sale in France light-pastry products from Italy, which were manufactured in that country under the name 'panettone' and contained sorbic acid, a preservative permitted under Italian law.

3 It appears from the case-file that the relevant French legislation, a decree of 15 April 1912 (*Journal officiel de la République française* of 29.6.1912), prohibits the addition to foodstuffs of any substance for which express prior authorization has not been granted by joint ministerial order. A circular of 8 August 1980 (*Journal officiel de la République française* of 25.9.1980) regulates the form of applications for authorization which must establish, *inter alia*, both the usefulness of the substance for users and consumers and its harmlessness when used under normal conditions.

4 The Tribunal de grande instance, Marseille, before which the dispute was brought, decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

'Is it lawful under Community law to refuse entry into France to a foodstuff lawfully produced and marketed by a Member State on the ground that it contains sorbic acid, a preservative which is permitted under Directive 64/54/EEC of 5 November 1963, as supplemented and amended by Directive 67/427/EEC of 27 June 1967, by Directive 71/160/EEC of 30 March 1971 and by Directive 74/62/EEC of 17 December 1973, but which, under French law, may be used only in a limited number of stipulated foodstuffs, although no overriding reason is given?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case in the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It must be pointed out first of all that although it is not for the Court, under Article 177 of the EEC Treaty, to rule on the compatibility with the Treaty of provisions of national law, it does, none the less, have jurisdiction to provide the national court with all the criteria for the interpretation of Community law which may enable that court to decide the issue of compatibility in the case before it.

7 The national court's question must therefore be understood as seeking to determine whether Articles 30 and 36 of the EEC Treaty are to be interpreted as precluding a Member State from prohibiting, pursuant to national legislation proscribing fraud and falsification in the sale of foodstuffs, the marketing in its territory of a product lawfully manufactured in another Member State, containing sorbic acid, a preservative the use of which is permitted by Directive 64/54.

8 It must be observed first of all that under Article 1 of Directive 64/54, which has been amended on a number of occasions, Member States may not authorize the use, for the protection of foodstuffs against deterioration caused by micro-organisms, of any preservatives other than those listed in the annex to the directive, which include sorbic acid.

9 According to its preamble, the directive is merely the first stage in the approximation of national laws in that field. At this stage, therefore, Member States are not obliged to authorize the use of all the substances listed in the annex to the directive. However, their freedom to determine their own rules concerning the addition of preservatives to foodstuffs may be exercised only subject to the twofold condition that no preservative not listed in the annex to the directive may be authorized for use and that the use of a preservative which is listed there may not be totally prohibited except, in the case of foodstuffs produced and consumed within their own territory, in special cases where the use of such a preservative does not meet any technological need (see the judgments in Case 88/79 *Ministère public* v *Grunert* [1980] ECR 1827 and in Case 108/80 *Ministère public* v *Kugelmann* [1981] ECR 433).

10 Since the products concerned in the main proceedings are products imported from another Member State where they are lawfully produced and marketed, the

application of national rules of the kind in issue in the main proceedings must be regarded as hindering intra-Community trade and thereby constituting in principle a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty. However, since there has been partial harmonization within the Community in the area concerned, it must be examined whether such a measure may be justified on the ground of the protection of human health, as provided for in Article 36 of the Treaty.

11 It must be borne in mind that, as the Court has consistently held (see, *inter alia*, the judgment in Case 174/82 *Sandoz BV* [1983] ECR 2445), in so far as there are uncertainties in the present state of scientific research, it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure, having regard, however, for the requirements of the free movement of goods within the Community.

12 It is also clear from the Court's case-law (especially the judgments in *Sandoz*, cited above, in Case 247/84 *Motte* [1985] ECR 3887, in Case 304/84 *Ministère public* v *Muller* [1986] ECR 1511 and in Case 178/84 *Commission* v *Germany* [1987] ECR 1227) that in those circumstances Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorization granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. Such legislation meets a genuine need of health policy, namely that of restricting the uncontrolled consumption of food additives.

13 However, the application to imported products of prohibitions on marketing products containing additives which are authorized in the Member State of production but prohibited in the Member State of importation is permissible only in so far as it complies with the requirements of Article 36 of the Treaty as it has been interpreted by the Court.

14 It must be borne in mind that in its judgments in Case 174/82 *Sandoz*, Case 247/84 *Motte*, Case 304/84 *Ministère public* v *Muller* and Case 178/84 *Commission* v *Germany*, all cited above, the Court inferred from the principle of propor-

tionality underlying the last sentence of Article 36 of the Treaty that prohibitions on the marketing of products containing additives authorized in the Member State of production but prohibited in the Member State of importation must be restricted to what is actually necessary to secure the protection of public health. The Court also concluded that the use of a specific additive which is authorized in another Member State must be authorized in the case of a product imported from that Member State where, in view, on the one hand, of the findings of international scientific research, and in particular of the work of the Community's Scientific Committee for Food, the *Codex alimentarius* Committee of the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization, and, on the other hand, of the eating habits prevailing in the importing Member State, the additive in question does not present a risk to public health and meets a real need, especially a technological one.

15 Secondly, it should be remembered that, as the Court held in its judgments in Case 304/84 *Ministère public* v *Muller*, and Case 178/84 *Commission* v *Germany*, cited above, by virtue of the principle of proportionality, traders must also be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.

16 It should be pointed out that it must be open to traders to challenge before the courts an unjustified failure to grant authorization. Without prejudice to the right of the competent national authorities of the importing Member State to ask traders to produce the information in their possession which may be useful for the purpose of assessing the facts, it is for those authorities to demonstrate, as the Court held in *Ministère public* v *Muller* and *Commission* v *Germany*, cited above, that the prohibition is justified on grounds relating to the protection of the health of its population.

17 The answer to the national court's question must therefore be that, on a correct interpretation, Articles 30 and 36 of the EEC Treaty do not preclude a Member State from prohibiting the marketing of a foodstuff imported from another Member State where it is lawfully produced and marketed and to which one of the substances listed in Annex I to Council Directive 64/54 of 5 November 1963 has been added. However, in the Member State of importation, the marketing of that foodstuff must be authorized under a procedure which is readily accessible to manufacturers and traders and which can be completed within a reasonable period, where the addition of the substance in question meets a genuine need — in

particular a technological need — and represents no danger to public health. It is for the competent national authorities to show in each case, in the light of national eating habits and with due regard to the results of international scientific research, that their rules are necessary in order to give effective protection to the interests referred to in Article 36 of the Treaty.

Costs

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

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Tribunal de grande instance, Marseille, by judgment of 20 November 1987, hereby rules:

On a correct interpretation, Articles 30 and 36 of the EEC Treaty do not preclude a Member State from prohibiting the marketing of a foodstuff which has been imported from another Member State where it is lawfully produced and marketed and to which one of the substances listed in Annex I to Council Directive 64/54/EEC of 5 November 1963, on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption, has been added. However, in the Member State of importation, the marketing of that foodstuff must be authorized under a procedure which is readily accessible to manufacturers and traders and which can be completed within a reasonable period, where the addition of the substance in question meets a genuine need — in particular a technological need — and represents no danger to public health. It is for the competent national authorities to

show in each case, in the light of national eating habits and with due regard to the results of international scientific research, that their rules are necessary in order to give effective protection to the interests referred to in Article 36 of the Treaty.

Rodríguez Iglesias Slynn Joliet

Delivered in open court in Luxembourg on 13 December 1990.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President