JUDGMENT OF THE COURT (Fifth Chamber)
4 June 1992 *

In Joined Cases C-13/91 and C-113/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura Circondariale Pordenone, (in Case C-13/91) and the Pretura Circondariale, Vigevano, (in Case C-113/91) for a preliminary ruling in the criminal proceedings before those courts against

Michel Debus, in his capacity as legal representative of Brasserie Fischer SA,

on the interpretation of Articles 30 and 36 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by B. R. Bot, Secretaris-generaal in the Ministry of Foreign Affairs,

* Language of the case: Italian.

— the Italian Government, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato,

— the Commission of the European Communities, by Antonio Aresu, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Debus, represented by Pierre Soler Couteaux, of the Strasbourg Bar, the Netherlands Government, represented by J. W. De Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, the Italian Government and the Commission at the hearing on 13 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1992,

gives the following

Judgment

1 By orders of 9 January 1991 and 25 March 1991, which were received at the Court on 16 January 1991 and 12 April 1991, respectively, the Pretura Circondariale (District Magistrate's Court) Pordenone (Case C-13/91), and the Pretura Circondariale, Vigevano, (Case C-113/91) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Articles 30 and 36 of the EEC Treaty.

2 The questions arose in criminal proceedings brought against Michel Debus, legal representative of the French company Brasserie Fischer SA.

3 Article 4(c) of Italian Law No 1354/62 of 16 August 1962 (GURI No 234 of 17 September 1962) provides that the sulphur dioxide content of beer may not exceed 20 milligrammes per litre (20 mg/l). That limit also applies to imported beers by virtue of the first paragraph of Article 19 of that law, which provides that imported beer must have the characteristics and fulfil the conditions laid down by the law in question.

4 Brasserie Fischer SA produces a special beer containing natural plant extracts called '36.15 Pêcheur — La bière amoureuse' which contains as an additive 36.8 mg/l of sulphur dioxide, this being in conformity with the relevant French legislation. The beer was imported into Italy, where it is sold as an 'alcoholic beverage based on beer'.

5 NAS — Nucleo Antisofisticazioni e Sanità (food purity and hygiene unit) — took a sample of that beverage at a public establishment in Azzano Decimo. When the sample was analysed it proved to contain sulphur dioxide in excess of the Italian statutory limit for similar products and the Procuratore della Repubblica (State Prosecutor) brought criminal proceedings for fraud against Mr Debus.

6 In that context, the national courts referred to the Court of Justice for a preliminary ruling the following identical questions in the two cases:

'1. Are Articles 30 and 36 of the Treaty establishing the European Economic Community to be interpreted as meaning that the Italian provisions on health rules for the production and marketing of beer (Law No 1354 of 16 August 1962 and Law No 141 of 17 April 1989) are to be regarded as incompatible with those articles in so far as those rules permit the use of not more than 20 mg per litre of sulphur dioxide?

2. Are the Italian provisions to be disregarded by the criminal courts?

3. Must beer containing more than 20 mg per litre of sulphur dioxide be allowed to be in free circulation?'

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

8 As regards the doubts raised by the Commission with regard to the admissibility of the request for a preliminary ruling in Case C-113/91 on the ground that it was made by a court which, under the national law of criminal procedure, has no jurisdiction to entertain the main proceedings, suffice it to say that, in principle and in the absence of exceptional circumstances, the Court does not have to verify the jurisdiction of national courts under national procedural rules.

The first question

9 By their first question, the national courts seek to establish whether Articles 30 and 36 of the EEC Treaty have to be interpreted as meaning that they preclude national legislation which prohibits the marketing of beers imported from another Member State in which they are lawfully marketed, if they contain a quantity of sulphur dioxide in excess of 20 mg/l.

10 It should be held in the first place that, under Article 1 of 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 (OJ, English Special Edition 1963-1964, p. 99), the 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 sulphur dioxide.

11 According to its preamble, the directive is merely the first stage in the approximation of national laws in that field. At this stage, therefore, the 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, in Case 108/80 *Ministère Public* v *Kugelmann* [1981] ECR 433 and in Case C-42/90 *Bellon* [1990] ECR I-4863).

12 Since the case involves products imported from another Member State where they are lawfully produced and marketed, the application of national rules of the kind at 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 Treaty. However, since there has been only partial harmonization within the Community in the area concerned, it must be examined whether such a measure may be justified on grounds of the protection of human health, as provided for in Article 36 of the Treaty.

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

14 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. This is also true of the fixing of a maximum level for the use of an additive in certain products. Such legislation meets a legitimate need of health policy, namely that of restricting the uncontrolled consumption of food additives.

15 However, the application to imported products of the prohibition on marketing products containing a quantity of additives in excess of the limit authorized by the legislation of the Member State of importation when that quantity is authorized in the Member State of production 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.

16 It must first be borne in mind in this connection that in its judgments in Case 174/82 *Sandoz*, in Case 247/84 *Motte*, in Case 304/84 *Ministère Public* v *Muller*, in Case 178/84 *Commission* v *Germany* and in Case C-42/90 *Bellon*, all cited above, the Court inferred from the principle of proportionality 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.

17 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 Agri-

cultural Organization of the United Nations (FAO) and the World Health Organization (WHO) 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.

18 Secondly, it should be remembered that, as it follows in particular from the judgments in Case 304/84 *Ministère Public* v *Muller*, in Case 178/84 *Commission* v *Germany* and in Case C-42/90 *Bellon*, all cited above, and in Case 227/82 *Van Bennekom* [1983] ECR 3883, it is for the national authorities to demonstrate that their legislation is justified on grounds relating to the protection of the health of their population.

19 In that regard, the Italian Government asserts that the Joint FAO/WHO Committee on Food Additives and the Scientific Committee for Food have recognized that excessive use of sulphur dioxide is harmful to human health, in particular in the case of drinkers of large amounts of beer. Consequently, it considers that the policy of minimizing the quantities of sulphur dioxide absorbed otherwise than through the respiratory tract is justified by public health requirements.

20 For its part, the Netherlands Government observes that, in principle, it is for each Member State to assess whether or not it is compatible with health protection requirements to authorize the use of a specific preservative in foodstuffs, having regard to the eating habits of its population. It states that the World Health Organization has fixed at 40 mg the maximum tolerable daily dose of sulphur dioxide, and that, in order to determine the quantity of sulphur dioxide absorbed by consumers, account must be taken of the fact that sulphur dioxide is added to many foodstuffs, apart from beer.

21 The Commission submits that a general prohibition on the importation and marketing of products lawfully marketed in another Member State on the ground that they contain a proportion of one of the additives listed in Directive 64/54 in excess

of that which is authorized by the legislation of the State of importation is excessive where the addition of that additive remains within permissible limits having regard to international scientific knowledge.

22 More specifically with regard to sulphur dioxide, the Commission argues, on the basis of toxicological data produced by the FAO and the WHO and of the report of the technical consultant commissioned by the Procuratore della Repubblica attached to the Pretura Circondariale of Pordenone in connection with the proceedings brought against Mr Debus, that there is no question that the sulphur dioxide contained in the French beer seized can have toxic effects. On the basis of jointly produced toxicological data, the FAO and the WHO suggest authorizing the absorption of a daily dose not exceeding 0.35 mg per kilogram of body weight, which, in the case of a consumer weighing 60 kg, works out at a maximum of approximately 21 mg per day. According to the calculations carried out by the national technical consultant, an Italian consumer drinking beer containing 36.8 mg/l of sulphur dioxide would absorb a daily dose averaging 5.5 mg.

23 It must be held that the rules in question result in a general, absolute prohibition of all beers containing more than 20 mg/l of sulphur dioxide without any exception.

24 The need for such a prohibition for the purposes of health protection has not been demonstrated. Quite to the contrary, it appears from the Commission's uncontested statements that the absorption of sulphur dioxide as a result of the consumption of beer containing 36.8 mg/l of that additive does not involve a serious risk that the limits to the maximum daily dose of sulphur dioxide authorized by the FAO and the WHO will be exceeded.

25 The disproportionate nature of such a general, absolute prohibition affecting imported beers is also evidenced by the fact that the same Member State's

legislation authorizes the use of much higher proportions of sulphur dioxide in other beverages, notably wine, the consumption of which seems to be much higher in the Member State concerned than that of beer.

26 However, the Italian Government asserts that the addition of sulphur dioxide is not indispensable for the preservation of beer, since the same effect can be obtained by using other methods, such as pasteurization.

27 That fact cannot justify a general, absolute prohibition of the type at issue.

28 It appears from the judgment in Case 178/84 *Commission* v *Germany*, cited above, that reference to another manufacturing method of the product used by national manufacturers does not suffice to preclude the possibility that some additives may meet a technological need, since that interpretation of the concept of technological need, which results in favouring national production methods, constitutes a disguised means of restricting trade between Member States.

29 The concept of technological need must be assessed in the light of the raw materials utilized, bearing in mind the assessment made by the authorities of the Member State where the product is lawfully manufactured and marketed. Account must also be taken of the findings of international scientific research, in particular of the work of the Community's Scientific Committees for Food, the Codex Alimentarius Committee of the FAO and the WHO (judgment in Case 178/84 *Commission* v *Germany*, cited above).

30 It follows from all the foregoing considerations that it must be stated in reply to the national courts' first question that Articles 30 and 36 of the EEC Treaty must

be interpreted as meaning that they preclude national legislation which prohibits the marketing of beers imported from another Member State, where they are lawfully marketed, if they contain a quantity of sulphur dioxide greater than 20 mg per litre.

The second and third questions

31 By their second and third questions, the national courts seek to establish whether the national court must not apply national rules which are contrary to Community law or whether it must wait until general rules have been adopted.

32 It is sufficient to recall in this connection the well-established case-law to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (judgment in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629).

33 It must therefore be stated in reply to the national courts' second and third questions that national courts must not apply national rules which are contrary to national law.

Costs

34 The costs incurred by the Governments of the Italian Republic and the Kingdom of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the question referred to it by the Pretura Circondariale di Pordenone (in Case C-13/91) and the Pretura Circondariale di Vigevano (in Case C-113/91), hereby rules:

1. **Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude national legislation which prohibits the marketing of beers imported from another Member State, where they are lawfully marketed, if they contain a quantity of sulphur dioxide greater than 20 mg per litre.**

2. **National courts must not apply national rules which are contrary to Community law.**

Joliet Grévisse

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 4 June 1992.

J.-G. Giraud R. Joliet

Registrar President of the Fifth Chamber