OPINION OF ADVOCATE GENERAL JACOBS
delivered on 11 May 1995 *

The facts

1. In this case, the Commission seeks a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Articles 5, 6 and 16 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 [1] and under Article 30 et seq. of the Treaty by requiring that in order to be marketed in Germany certain foodstuffs containing an ingredient which is not traditionally used in those foodstuffs in Germany should carry an additional statement indicating the ingredient concerned even if it is already to be found in the list of ingredients displayed on the packaging.

2. The foodstuffs in question are 'hollandaise' sauce, 'béarnaise' sauce and certain pastry products containing an additive called E 160 F. Traditionally in Germany, hollandaise sauce is made with butter and eggs and béarnaise sauce is made with eggs, butter and shallots. In certain other Member States the egg and butter ingredients are replaced with vegetable fats when those sauces are produced industrially. In the period when the administrative procedure laid down by Article 169 of the Treaty was initiated, the German authorities prohibited the marketing of hollandaise and béarnaise sauces which contained vegetable fats instead of eggs. The German Government informed the Commission in a letter of 9 October 1991 that the ban would be lifted. In its place, the German authorities now require that 'hollandaise' and 'béarnaise' sauce must carry an additional statement on the label that the product contains vegetable fats. They also require that pastry products which contain the additive E 160 F state that fact separately on the label when the yellow colouring of the product is such that the authorities determine that consumers would be led to believe that they contain eggs.

3. The German authorities base those additional labelling requirements on Article 17 of the Law of 15 August 1974, the *Lebensmittel und Bedarfsgegenständegesetz* ('LMBG'). Article 17, paragraph 2, of the LMBG

* Original language: English.

1 — OJ 1979 L 33, p. 1.

prohibits the sale of foodstuffs without sufficiently precise labelling, when they have a composition which does not correspond to commercial practice in a manner which diminishes their utility or value to a significant degree, *inter alia* when they have an appearance which could lead purchasers to believe that they are of a superior quality than in fact they are. Article 17, paragraph 5, prohibits the sale of foodstuffs with a name, specification or a presentation which may mislead the purchaser. In particular, the consumer may be misled if certain effects are attributed to foodstuffs when the state of scientific knowledge does not permit those effects to be so stated or does not do so to a sufficiently precise degree. Likewise, the consumer may be misled if the name, specifications, presentation, representations or other allegations are employed to indicate their origin, their quantity, weight, date of manufacture or packaging, their durability or other elements of importance for establishing their quality in a manner likely to mislead. Article 47, paragraph 1, of the LMBG prohibits the import into Germany of products which do not comply with the regulations on foodstuffs in force in Germany.

4. The LMBG was amended by a law of 18 December 1992. In particular a new Article 47a was introduced which states that as from 1 January 1993 foodstuffs to which the LMBG applies which are legally produced and placed on the market in another Member State or which originate in a third country but have been legally placed on the market in a Member State can be imported and placed on the German market even if they do not comply with the applicable legislation in force in the Federal Republic of Germany. The new Article 47a also provides by paragraph 4 that if foodstuffs do not comply with the LMBG then that fact should be specified on the label in an appropriate manner to the extent required for the protection of consumers.

The relevant Community legislation

5. Article 5 of Council Directive 79/112/EEC ('the Directive') states:

'1. The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.

2. No trade mark, brand name or fancy name may be substituted for the name under which the product is sold.

3. The name under which the product is sold shall include or be accompanied by particulars as to the physical condition of the foodstuff or the specific treatment which it has undergone (e. g. powdered, freeze-dried, deep-frozen, concentrated, smoked) in all cases where omission of such information could create confusion in the mind of the purchaser.'

6. Article 6, in its material parts, states:

'1. Ingredients shall be listed in accordance with this Article and the Annexes.

2. ...

3. ...

4. (a) "Ingredient" shall mean any substance including additives, used in the manufacture or preparation of a foodstuff and still present in the finished product, even if in altered form.

(b) Where an ingredient of the foodstuff is itself the product of several ingredients, the latter shall be regarded as ingredients of the foodstuff in question.

(c) The following shall not be regarded as ingredients:

(i) ...

(ii) — additives:

— whose presence in a given foodstuff is solely due to the fact that they were contained in one or more ingredients of that foodstuff, provided that they serve no technological function in the finished product,

— which are used as processing aids;

— substances used in quantities strictly necessary as solvents or media for additives or flavouring.

...

5. (a) The list of ingredients shall include all the ingredients of the foodstuff, in descending order of weight, as recorded at the time of their use in the manufacture of the foodstuff. It shall appear preceded by a suitable heading which includes the word "ingredients".

...

6. Community provisions or, where there are none, national provisions may lay down that the name under which a specific foodstuff is sold is to be accompanied by mention of a particular ingredient or ingredients.

The procedure laid down in Article 16 shall apply to any such national provisions.'

7. Article 16, in its material parts, provides:

'Where reference is made to this Article, the following procedure shall apply:

...

(2) Should a Member State deem it necessary to adopt new legislation, it shall notify the Commission and the other Member States of the measures envisaged and give the reasons justifying them. The Commission shall consult the Member States within the Standing Committee on Foodstuffs if it considers such consultation to be useful or if a Member State so requests.

Member States may take such envisaged measures only three months after such notification and provided that the Commission's opinion is not negative.

In the latter event, and before the expiry of the abovementioned period, the Commission shall initiate the procedure provided for in Article 17 in order to determine whether the envisaged measures may be implemented subject, if necessary, to the appropriate modifications.'

The infringement of Article 6 of Council Directive 79/112/EEC

8. The Commission submits in the first place that Germany should have notified the measures it took to impose the additional labelling requirement: it failed to do so and therefore it has infringed Articles 6(6) and 16(2) of the Directive.

9. Germany submits that it has not infringed Articles 6(6) and 16 of the Directive. It considers that Articles 17 and 47a, paragraph 4, of the LMBG are not measures which require notification within the meaning of Article 6(6) of the Directive: their scope is much broader since they do not apply solely to foodstuffs, they follow the same philosophy as Article 2 of the Directive and take effect in practice only when measures are taken in respect of individual cases. Article 47a of the LMBG was notified to the Commission pursuant to Council Directive 83/189/EEC of 28 March 1983. [2] Germany also submits that individual measures are not covered by the obligation to notify contained in the Directive either: they are not 'provisions' within the meaning of the Directive. It points out that there is no national legislation which regulates the ingredients of the foodstuffs in question. It is only by traditional usage that these foodstuffs do not contain vegetable fats or E 160 F as the case may be.

10. In my view it is unnecessary to examine the issue of failure to notify the measures taken in respect of béarnaise sauce and hollandaise sauce since that was not identified as an infringement in the Commission's reasoned opinion concerning those products (Annex 3 to the application). Moreover, the only provision of the directive mentioned in the operative part of that reasoned opinion is Article 5. It is well established that it is the

2 — OJ 1983 L 109, p. 8.

Commission's reasoned opinion which determines the scope of the subsequent proceedings before the Court under Article 169 of the Treaty; the Commission's reasoned opinion and its application must be founded on the same grounds and submissions. [3]

11. I am of the opinion that, by failing to communicate the measures which it took in respect of the labelling and marketing of certain pastry products for which the additional mention of the additive E 160 F was required, Germany has infringed Article 6(6) of the Directive.

12. Article 6(6) of the Directive contains a clear obligation on Member States to notify in accordance with the procedure laid down in Article 16 national provisions laying down that the name under which a specific foodstuff is sold is to be accompanied by mention of a particular ingredient. What Germany submits in effect is that Article 6(6) only requires notification of general measures ('provisions') relating to foodstuffs whereas measures which single out products or brands do not need to be notified.

13. I do not agree with the German submission on this point for two reasons. First, I do not believe that such an interpretation of the word 'provisions' is supported by the wording of the paragraph taken as a whole. Article 6(6) refers to 'a specific foodstuff' and 'a particular ingredient'. In other words, the national provisions referred to in Article 6(6) are not only those dealing with general situations but also those which apply in very specific and precise situations. The purpose of the article, read as a whole, is to require the notification of precisely the type of measure taken by the German authorities in this case. The measures taken apply to a specific foodstuff in each case and refer to a particular ingredient.

14. Secondly, to conclude that measures which regulate specific situations do not have to be notified because of the form they take would in my view defeat the object of Article 6(6). The purpose of the notification procedure laid down becomes apparent on examination of the aim of the Directive itself. As stated in the first and second recitals of the preamble, the approximation of the laws, regulations and administrative provisions of the Member States on the labelling, presentation and advertising of foodstuffs contributes to the free movement of those products and to the harmonization of the conditions of

3 — See e. g. Case 166/82 *Commission* v *Italy* [1984] ECR 459, paragraph 16 of the judgment.

competition. However, the eighth recital of the preamble makes clear that the Directive does not aim to lay down rules on 'the compulsory indications of all the indications which must be added to the list applying in principle to the whole range of foodstuffs' and expressly states that in a second stage supplementary Community rules will be adopted. Likewise, the fourth recital states that rules of a specific nature which apply only to particular foodstuffs should be laid down by the Community. The ninth recital and Article 6(6) itself expressly envisage that Member States may adopt measures in the absence of these specific Community rules. The Court has held that the Directive represents only the initial stage of a harmonization process which is designed progressively to eliminate all obstacles to the free movement of foodstuffs resulting from the differences which exist between the laws, regulations and administrative provisions of the Member States with respect to the labelling of those products. [4] The premise of the Directive is that divergent national rules on labelling may hinder the free movement of the products and distort conditions of competition. Therefore, if the Directive expressly allows Member States to take measures in the absence of detailed Community rules, the corollary is that there must be a mechanism to prevent the reintroduction of obstacles to free movement and distortions of competition: that mechanism is the procedure laid down in Article 6(6) together with Article 16 of the Directive. Accordingly, I am of the opinion that a distinction between national measures which take a general form and national measures which take a specific or detailed form is not relevant. A specific and detailed measure adopted by a Member State may hinder intra-Community trade in a specific product just as much as a measure couched in more general terms.

15. Therefore the word 'provisions' in Article 6(6), cannot be relied upon to exclude certain national measures from the field of application of the obligation to notify. Accordingly, I am of the opinion that in failing to notify the measures taken in respect of extra labelling requirements for certain pastry products, Germany has failed to fulfil its obligations under Article 6(6) of the Directive.

The infringement of Article 30 of the Treaty

16. The Commission submits that the German measures infringe not only Article 30 of the Treaty but also Article 5 of the Directive. In consequence it asks the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations under both provisions. In my view however the issue is not whether there has been a breach of Article 5 independent of the alleged breach of

4 — Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 26 of the judgment.

Article 30 of the Treaty but rather whether Germany can justify the measures it introduced on the basis of Article 5(3) of the Directive.

17. The Commission submits that the German labelling requirements constitute measures having an effect equivalent to quantitative restrictions and therefore infringe Article 30 of the Treaty. It submits that the result of the German measures is to deprive an imported foodstuff of the trade description which it legally bears in its Member State of origin. Although the importation and marketing in Germany of the foodstuffs in question are not prohibited, the German measures act, at least indirectly, as a hindrance to their importation and marketing there. The Commission submits that the measures do not pass the test of proportionality which has to be applied to laws regulating the marketing of products which purport to satisfy mandatory requirements relating to consumer protection. In determining whether consumers need protection, the assumption must be that consumers are attentive and aware of the contents of the list of ingredients displayed on foodstuffs which they buy. The Commission further observes that the labelling requirement has the effect of lowering the products in the eyes of the consumer whereas the Court held in *Miro* [5] and in *Commission* v *Germany* [6] that labelling requirements must not have such an effect. Finally, the Commission submits that adequate labelling of the foodstuffs in question is provided for by the list of ingredients itself.

18. Germany submits that the measures in question, although they are measures having an effect equivalent to quantitative restrictions, are justified on the grounds of consumer protection. According to Germany, consumers frequently buy foodstuffs without first making a careful examination of the product and the information supplied with it. Accordingly, when deciding whether consumers require protection against the danger of being misled, the authorities should bear in mind not only that certain consumers are attentive but that others are inattentive. Although the list of ingredients displayed on foodstuffs should in principle form the basis of their protection, consumers of the foodstuffs in issue in the present proceedings may be misled as to the ingredients by the trade name under which they are sold. According to Germany, consumers attribute special qualities to products made with particular ingredients or with a certain quantity of those ingredients so that when those ingredients are replaced by others in the products in question, that fact should be disclosed on the label. In consequence, an additional mention is needed to supplement the information which can be ascertained from the list of ingredients. Even if one takes the attentive consumer as the correct point of reference,

5 — Case 182/84 [1985] ECR 3731.
6 — Case 178/84 [1987] ECR 1227.

Germany submits that consumers may identify certain products with particular ingredients to such an extent that additional labelling must be imposed in order to alert the consumer to a different composition. As regards the foodstuffs in issue in the present proceedings, Germany maintains that the German consumer identifies the products so strongly with eggs and butter that those ingredients become a characteristic of the foodstuffs.

19. The Commission submits that the case-law of the Court does not permit the use of a generic name to be restricted solely to products made with certain ingredients. Germany on the other hand replies that in the present proceedings there is no prohibition on the foodstuffs in question bearing the designation according to which they are legally manufactured in another Member State. Germany contends that Community law requires only that a national system of mandatory consumer information must not entail negative assessments for the products in question and must not prevent consumers' conceptions of the product from evolving. [7]

20. Germany submits that the additional statement that the sauces are made of vegetable fats allows the consumer to compare that type of product with the familiar one in Germany. Likewise, the additional statement that the pastry products in question contain E 160 F is needed because the intense yellow colouring of the finished products misleadingly induces consumers to believe that they are made with a large concentration of egg yolks. Germany points out that the additional mention is not required systematically for pastry products containing E 160 F but only when their colour is so intensely yellow that the authorities fear that consumers will be misled.

21. Germany denies that the labelling requirement has the effect of lowering the product in the eyes of the consumer because the ingredients used are not of a lower value but only replacements. The only effect of the labelling is to draw the attention of the consumer to ingredients the presence of which would be unexpected.

22. Finally, Germany submits that the measures are necessary to protect domestic producers against unfair competition from manufacturers of béarnaise or hollandaise sauces who do not use eggs and butter but vegetable fats. It is stated that vegetable fats

7 — See Case 178/84 above, note 6, paragraphs 32 and 35 of the judgment.

are cheaper than eggs and butter and as a result those manufacturers have a competitive advantage over indigenous producers.

23. Germany has pointed out that the Commission has made a proposal to the Council to modify Article 5 of the Directive in order to allow better labelling for the protection of the consumer. [8] I do not consider that this proposal has any direct bearing on these proceedings. The fact that negotiations on an amendment to the Directive are taking place in the Council does not exempt the Member States from compliance with the applicable Community provisions so long as the amendments under discussion have not entered into force. [9] In any event, it does not seem that the proposal as it is currently drafted would permit the German measures.

24. It is important to stress at the outset that Germany has not contested that the sauces in question, when they are made with vegetable fats, remain hollandaise or béarnaise sauce as the case may be nor that pastry products containing E 160 F are still of the same type as pastry products without that substance. The parties also agree that hollandaise and béarnaise sauces containing vegetable fats are commonly and legally marketed in other Member States. Both parties agree that it is only in Germany that there is any particular consumer sensitivity as regards the inclusion of the ingredients in the foodstuffs concerned. Thus the dispute is whether the measures taken are necessary to protect the German consumer from being misled as to the composition of the products in question.

25. This case constitutes a sequel to those in which the Court has held that a prohibition of the marketing or importation of a product is contrary to Article 30 of the Treaty but that labelling may constitute an alternative which is compatible with that article. [10] Indeed, the Court has stated that 'it is accepted that labelling is one of the means that least restricts the free movement of those products within the Community.' [11]

26. The Commission has also submitted that the additional labelling requirement would not have been justified under Article 5 of the Directive, read together with Article 2(1),

8 — OJ 1992 C 122, p. 12.

9 — See Case C-317/92 *Commission* v *Germany* [1994] I-2039, paragraph 5 of the judgment.

10 — See *inter alia*, Case 193/80 *Commission* v *Italy* [1981] ECR 3019, paragraph 27 of the judgment and Case 407/85 *3 Glocken* [1988] ECR 4233, paragraph 16.

11 — Case C-39/90 *Denkavit Futtermittel* [1991] ECR I-3069, paragraph 24 of the judgment.

even if the procedure set out in Article 16 had been followed. Article 2(1) provides among other things that the labelling used must not be such as could mislead the purchaser to a material degree, particularly as to (*inter alia*) its composition or method of manufacture or production. According to the Commission, the omission of an additional statement to the effect that the foodstuffs in question are made with vegetable fats or with colouring E 160 F would not mislead consumers to a material degree within the meaning of Article 2(1) of the Directive, since those substances would be included in the list of ingredients required by the Directive. Germany has submitted that the measures in question are justified on the basis of Article 5(3) of the Directive. Article 5(3) expressly provides that the trade name of a product shall be accompanied by certain particulars as to the physical condition of the foodstuff when the omission of such information could confuse consumers.

27. I propose to deal with this point together with the question whether the measures taken by the German authorities are proportionate. Indeed, if a Member State requires the particulars mentioned in Article 5 of the Directive to be added, the principle of proportionality must still be respected. The Court has held that a directive must be interpreted in the light of the Treaty rules on the free movement of goods. [12] Thus, a Member State cannot justify extra labelling requirements on the basis of Article 5 of the Directive if those requirements are disproportionate and lead to restrictions on the free movement of goods.

28. In order to determine whether the measures imposed by the German authorities which are the subject of the present proceedings are contrary to Article 30 of the Treaty, three questions must be answered in turn:

(i) Can the measures imposed be characterized as measures having equivalent effect to quantitative restrictions prohibited by Article 30 of the Treaty?

(ii) Can the measures be justified by a mandatory requirement taking precedence over the free movement of goods?

and

(iii) Are the measures proportionate to the goal which they purport to achieve?

12 — Case C-47/90 *Delhaize and Le Lion* v *Promalvin and AGE Bodegas Unidas* [1992] ECR I-3669, paragraph 26 of the judgment and Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* [1994] ECR I-317, paragraph 12.

(i) The prohibition of measures having equivalent effect

29. There is consistent case-law of the Court to the effect that an obligation to mark on the packaging of products sold certain extra information makes it more difficult to import products from other Member States where no such obligation is imposed and that such an obligation is in principle caught by the prohibition in Article 30 of the Treaty. [13] This remains true after the Court's judgment in *Keck and Mithouard* [14] in which the Court held:

'... in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 include obstacles to the free movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, *presentation, labelling, packaging*) to goods from other Member States where they are lawfully manufactured and marketed, 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.' (emphasis added).

30. In this case it is clear that the additional labelling requirements imposed by the German authorities are caught by the prohibition contained in Article 30 of the Treaty. Those labelling requirements oblige the producer or the importer to change the packaging or labelling of the foodstuffs concerned because the additional information required by the German authorities is not required in other Member States. The measures therefore affect trade between Member States. [15]

(ii) The justification of the measures

31. The Court has repeatedly stated that it follows from Article 30 of the Treaty that national rules, adopted in the absence of common or harmonized rules and applicable without distinction to national products and to products imported from other Member States where they are lawfully manufactured and marketed, are compatible with the Treaty only in so far as they are necessary on

13 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 and more recently in Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 23 of the judgment.

14 — Joined cases C-267/91 and C-268/91 [1993] ECR I-6097, paragraph 15 of the judgment.

15 — Case C-238/89 *Pall Corp.* v *P J Dahlhausen & Co.* [1990] ECR I-4827, paragraph 13 of the judgment, Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* [1994] ECR I-317, paragraphs 18 and 19.

the grounds relating to public interest listed in Article 36 of the Treaty or in order to satisfy imperative requirements relating, *inter alia*, to fair trading and consumer protection. [16] As stated above, the Directive does not constitute complete harmonization of the rules applicable to labelling of the sort in issue in these proceedings.

32. Member States may thus rely on the mandatory requirement of labelling for the purpose of consumer protection, provided that the measures taken comply with the principle of proportionality.

(iii) The proportionality of the measures

33. Member States may only rely on the mandatory requirement of labelling for the purpose of consumer protection to justify a restriction of imports if the same objective cannot be achieved by any other measure which restricts the free movement of goods less. [17]

34. The Court has held that:

'If national rules relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and to enable it to be distinguished from products with [which] it might be confused, it may well be necessary, in order to give consumers effective protection, to extend this obligation to imported products also, even in such a way as to make necessary the alteration of the original labels of some of these products.' [18]

35. The German Government has pointed out that there are no rules in force in Germany on the composition of the products in question in the present proceedings. Additional labelling requirements are laid down by the German authorities because they believe that the German consumer strongly identifies the foodstuffs in question with eggs and butter and assumes that E 160 F is not used in their manufacture.

36. I am of the view that the requirements imposed by the German authorities in respect of béarnaise and hollandaise sauces

16 — Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 13 of the judgment.

17 — Ibid.

18 — Case 27/80 *Fietje* [1980] ECR 3839, paragraph 11 of the judgment and Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 17.

and of pastry products containing E 160 F go beyond that which is required by consumer protection. Several factors lead to this conclusion.

37. First, the Government has stated that German consumers are likely to have heightened sensitivity to the composition of the products in question. It has not asserted that the presence of vegetable fats or E 160 F so fundamentally changes the characteristics of the products that they cannot be deemed to be of a similar kind to those not containing those ingredients. On the contrary, the Government accepts that the products can properly be called béarnaise or hollandaise sauce. Similarly, the Government accepts that no change in the designation of the pastry products is required because of the presence of E 160 F. Thus, the Government accepts that German consumers would not be misled into thinking that the products in question are substantially different. The Government merely asserts that consumers would not expect those ingredients to be present in products of that type.

38. Secondly, the presence of vegetable fats or of E 160 F would be indicated in the list of ingredients required by Article 6 of the Directive in any case. It should also be borne in mind that the presence of E 160 F is regulated by Commission Regulation (EEC) No 262/79 of 12 February 1979 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice creams and other foodstuffs [19] and in particular by the second indent of Article 5(2) and Annex II, point II (a) of that regulation. Indeed the former provision makes the use of E 160 F obligatory in certain circumstances.

39. Thirdly, I am of the view that consumers who are sufficiently sensitive to the composition of the foodstuffs they purchase will first read the list of ingredients on the package. I do not agree with the contention that consumers are so inattentive that when the composition of a product departs from some perceived traditional norm additional labelling is required because the list of ingredients is insufficient. If that were so, the very requirement of a list of ingredients laid down by Article 6 of the Directive would be otiose. I agree with Advocate General Tesauro, who stated in *Complaint against X* that the average consumer was 'not wholly undiscerning'. [20] If a consumer is sufficiently sensitive to the composition of the foodstuffs in question as to feel confused or misled on discovering that vegetable fats or E 160 F were

19 — OJ 1979 L 41, p. 1.

20 — Case C-373/90 [1992] ECR I-131 at I-145.

present, then such a consumer would read the list of ingredients. The same holds true whether one takes as a point of reference a German consumer, who may be particularly sensitive to the composition of the foodstuffs in question here, or the average consumer in other Member States.

40. Finally, if it is true that German consumers do not expect to find vegetable fats or E 160 F in the products in issue and the presence of those ingredients gives producers who use them a competitive advantage over more traditional producers who do not, then it is open to the latter to underline the traditional qualities and ingredients of their products. In this manner they will attract consumers who are sensitive to the presence of those ingredients and who are willing to pay a higher price. Accordingly, I cannot accept that the measures are necessary to protect German producers using eggs and butter as ingredients against unfair competition from competitors using cheaper vegetable fat ingredients instead.

Conclusion

41. Accordingly, I am of the opinion that the Court should:

(1) declare that, by failing to notify the Commission of the requirement that certain pastry products which contain the additive E 160 F should, in order to be marketed in Germany, carry a trade description with an additional statement indicating the presence of the additive, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(6) 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;

(2) declare that, by requiring that béarnaise sauce and hollandaise sauce made with vegetable fats and certain pastry products which contain the additive E 160 F should, in order to be marketed in Germany, carry a trade description with an additional statement indicating the substance concerned even if it is already to be found in the list of ingredients displayed on the packaging, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty;

(3) order the Federal Republic of Germany to pay the costs.