OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 April 1986

My Lords,

Article 1 of the French Law of 29 June 1934 on the protection of milk products (*Journal officiel de la République française*, 1 July 1934) provides: 'It is forbidden to manufacture . . . , sell, import, . . .

(3) under the name "milk powder", "concentrated milk" whether or not followed by a qualification, or under any fancy name whatsoever, a product having the appearance of milk powder or concentrated milk, intended for the same uses and not originating exclusively from the concentration or drying of milk or of skimmed milk, sweetened or not; in particular the addition of extraneous fats is forbidden'.

The Commission contends that this provision has the effect of prohibiting the importation into France of any product designed to replace milk powder and concentrated milk, but made of different substances, whatever the trade name of the product may be. It accordingly asks the Court to declare that in maintaining and applying these provisions France is in breach of Article 30 of the Treaty.

France does not deny that the prohibition amounts to a complete ban on the importation of such products, but contends that the prohibition is justified on three grounds: (a) to protect public health; (b) to protect the consumer from deception; (c) to avoid an obstacle to the implementation of Article 39 of the EEC Treaty.

There is no doubt that prima facie this provision falls within Article 30 as a measure having an equivalent effect to a quantitative restriction as defined in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at p. 852, notwithstanding that it is applicable both to domestic and to imported products. (Case 120/78 *Cassis de Dijon* [1979] ECR 649.)

In support of its claim that this measure is justified on grounds of public health France relies both on Article 36 of the Treaty and Article 15 of Directive 79/112 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 (Official Journal 1979, L 33, p. 1) which enables Member States to forbid on grounds of public health trade in foodstuffs which otherwise comply with the rules laid down in the directive. The argument is in three parts. First, it is said that milk substitutes made from vegetable products are nutritionally inferior to milk. They have, for example, lower quantities of protein, certain minerals and vitamins. This the Commission accepts in respect of some of the base products such as coconut and palm oil but not in respect of others such as soya. On the evidence, it seems to me, that it cannot be said that all of the sources of the substitute products are necessarily

inferior. In any event it does not seem to me that the mere fact that one product is better than another necessarily justifies the total exclusion of the latter. Secondly, it is said that these products are or may be positively harmful to health. There is obviously an issue between medical practitioners and scientists as to the relative merits of animal and vegetable fats and their effect on, e. g. cholesterol levels and heart disease. I do not consider that this ground has been made out even on the basis put forward that the Frenchman's diet is already overloaded with fats which milk substitutes only go to increase. If this were a valid ground it is difficult to see why the prohibition is not absolute equally in respect of margarine and other vegetable-based products. Thirdly, it is said that these products are particularly deficient for such groups as young children, old people and pregnant women who need milk. It may be so, but it cannot justify a complete ban for the whole population, even if it obliges these classes to make particular enquiries to ensure that they are getting milk.

The second ground put forward is that these products must be banned or the consumer will never know what he is getting. In so far as powdered milk substitutes are sold separately direct to the consumer in a shop, there is plainly no problem. Clear labelling, which is in any event required by Directive 79/112, is an adequate protection. There is more difficulty where the powder is incorporated in a composite drink served from an automatic vending machine, where the purchaser of the powder as such is not the ultimate consumer. However, it seems to me that there is no insurmountable problem here. The base product sold to the middleman can be labelled so that he knows what he is getting and there is nothing to prevent a Member State from requiring that vending machines should clearly indicate whether milk powder or a substitute is being used. It is said, however, that the greatest difficulty arises in canteens or restaurants where powdered substitutes may be used in coffee or tea and in preparing other foods. This is obviously a much wider problem than that relating to milk — the consumer does not know, unless he asks, whether his food is sweetened by sugar or saccharine, prepared with butter or vegetable-based margarine, flavoured with natural or synthetic products. If it matters to him on grounds of taste or health he can ask. If it matters to Member States they can prescribe rules requiring restaurants and canteens to give clear notice of the particular products which they use. Such a power is given by Article 1 (2) of the directive although, as I see it, it exists independently of the directive.

A Member State is clearly entitled to forbid the use of misleading names which in this case, suggest for example that a powder is milk-derived, when it is not, or that it has the nutritional properties of milk which it does not have. That seems to me to be sufficient protection, and a complete ban on this ground is not justified.

It is said, however, that labelling is not sufficient for a separate reason. In reality the consumer has no choice. Substitute products are cheaper; the middleman's or the retailer's profit margins are higher so that all vending machines and canteens will use a powder substitute. This is, however, a two-edged argument. If choice is the determining factor, at present the person who wants vegetable-derived substitutes has no choice in France so that on that argument the products should be let in. Again, however, it seems to me that the matter should be left for the consumer to decide. If he wants only milk he will ask for it in a restaurant and not take white coffee from a machine which gives only milk substitute. He must decide between the lower price and the product he really wants. If the demand for milk is as great as is suggested then marketing practices will change. Only if it could be shown that the use of substitutes was harmful to health could such a prohibition on grounds of choice be justified. Here it has not been shown.

Finally it is said that the Community has vast milk and milk powder surpluses. To let in vegetable substitutes undermines the common agricultural policy since a large percentage of the vegetable substitutes come from outside the Community. It also imposes a burden on the Community budget. The Commission's reply is that an increasing quantity of oleaginous seeds are now produced in the Community and that the quantity of powdered substitute sold is so small that it can have no appreciable effect on milk stocks.

In my view, whether a ban on the importation and sale of a product is in breach of Article 30 cannot depend on whether, at any moment of time, the Community has a glut or a deficit of another product. It is in any event for the Community and not Member States to deal with the problem as part of the common agricultural policy.

Accordingly, in my view, the provision of Article 1 of the French Law of 29 June 1934 on the protection of milk products, in so far as it prohibits the sale or importation of a product having the appearance of milk powder or concentrated milk intended for the same uses and not originating exclusively from the concentration or drying of milk or of skimmed milk under any name (other than one which indicates that that product is, or is derived from, milk) constitutes a measure having equivalent effect to a quantitative restriction on imports and is prohibited by Article 30 of the EEC Treaty.

The Commission's costs of these proceedings should, in my opinion, be paid by France.