OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 6 June 2002 [1]

1. The Tribunale Civile di Padova (Civil District Court, Padua) Italy has referred several questions to the Court of Justice for a preliminary ruling under Article 234 EC. It asks whether Article 28 EC precludes the application by the Mayor of Padua of a rule requiring a trader or distributor to package, before offering for sale, bread baked from frozen or non-frozen part-baked bread. If so, the Italian court asks whether it should apply the derogation provided for by Article 30 EC for the purpose of protecting the health and life of humans.

I — Facts in the main proceedings

2. As stated in the order for reference, Tommaso Morellato is the owner of a bakery with attached outlet for baking deep-frozen bread and preparing frozen pastries. The bread sold in the shop had been manufactured, part-baked and frozen in France by the company BCS, which marketed it lawfully in that country.

3. On 26 April 1994, the Settore igiene pubblica de la Unit à sanitaria locale no 21 (local health department) inspected Mr Morellato's premises and found that there were different types of unpackaged bread, arranged by type, on shelves on which were cards stating the names under which the bread was sold, that it was bread baked from part-baked, deep-frozen bread, a list of ingredients, and the manufacturer and distributor. The bread was placed in paper bags at the moment of sale to the purchaser.

II — The Italian legislation

4. Under Article 14(4) of Law No 580 of 4 July 1967 laying down rules for the processing and marketing of cereals, flour, bread and pasta, [2] as amended by Article 44(4) of Law No 146 of 22 February 1994 [3] (hereinafter 'Law

1 — Original language: Spanish.

2 — GURI No 189, 29 July 1967.

3 — Provisions for fulfilling the obligations deriving from Italy's membership of the European Communities - Community law 1993. Ecology (implementation of directive).

No 580'), bread obtained by means of final baking of part-baked bread, whether or not deep-frozen, shall be distributed and offered for sale after being packaged and labelled with the information provided for by the legislation applicable to food products, separately from fresh bread and bearing the appropriate consumer information regarding the nature of the product.

5. The Commission informed the Court of Justice that that provision was clarified in a circular dated 30 May 1995, adopted by the Ministry of Industry and distributed to all the local government departments. Apparently, the clarification was made as the result of discussions between the Commission and the Italian authorities in the period 1992 to 1995, concerning the obstacles in Italy to the marketing of part-baked deep-frozen bread. The infringement proceedings initiated against Italy on that ground were abandoned in March 1995 because approval of the circular was imminent.

As stated in the circular, the bread must be packaged in bags made of material which allows the product to breathe and which lists the ingredients, the name of the manufacturer, its registered office, the origin of the part-baked, deep-frozen bread and the expiry date, which may be placed on the bag at the time of sale.

III — The question referred for a preliminary ruling

6. The Mayor of Padua decided that Mr Morellato had infringed Article 14(4) of Law No 580 and, by order of 17 March 1998, imposed a fine of ITL 1 200 000. Mr Morellato appealed against the order, claiming that the national legislation is contrary to the provisions of Article 28 EC.

7. The Italian court has considered it necessary to refer the following questions to the Court of Justice:

'1. Must Article 14(4) of Law No 580 of 4 July 1967 (as amended by Article 44(4) of Law No 146 of 22 February 1994), as interpreted by the Mayor of Padua in the contested order, in so far as it prohibits the sale of bread baked from frozen or non-frozen part-baked bread (lawfully manufactured in and imported from France), if it has not previously been packaged by the reseller, be regarded as incompatible with Articles 30 and 36 of the EC Treaty (now, following amendment, Articles 28 EC and 30 EC)?

2. Must Article 14(4) of Law No 580... and the subsequent construction placed

upon it by the Mayor of Padua be regarded as a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the EC Treaty?

3. If so, may the Italian State avail itself of the derogation provided for by Article 36 of the Treaty for the purpose of protecting the health and lives of humans?

4. Must Article 14(4) of Law No 580... be disapplied by the Italian courts?

5. Must bread baked from frozen or non-frozen part-baked bread (lawfully manufactured in and imported from France) be allowed into free circulation without any restriction, such as the "previous packaging" requirement provided for in Article 14(4) of Law No 580...?'

IV — The Community legislation

8. Articles 28 EC and 30 EC provide, respectively:

'Quantitave restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

V — The proceedings before the Court of Justice

9. The only written observations presented in these proceedings, within the period laid down in Article 20 of the Statute of the Court of Justice, are those of the Commission.

As none of the parties concerned has submitted a request stating the reasons why it wished to present oral argument, the Court of Justice has decided, in accordance with the provisions of Article 104(4) of the Rules of Procedure, to decide the case without holding a hearing.

VI — Preliminary considerations

10. Already, in the past, the application of Italian Law No 580 has caused questions to be referred to the Court of Justice for a preliminary ruling in connection with the interpretation of the principle of the free movement of goods.

By way of an example, I may cite the cases of *3 Glocken and Kritzinger* and *Zoni*,[4] which dealt with the prohibition on the marketing, in Italy, of imported pasta made, in whole or in part, from common wheat, and *Morellato*,[5] in which a trader of the same name as the bread reseller in the present case and, in all probability, the same person, had been fined for marketing wholemeal, deep-frozen bread, lawfully manufactured and sold in France, because it did not comply with the Italian standards concerning maximum moisture content, minimum ash content and use of bran.

In all three cases it was held that the application of the contested Italian provisions was incompatible with Articles 28 EC and 30 EC.

11. The obstacles to intra-Community trade in bread have also been the subject of several questions referred to the Court of Justice for a preliminary ruling. As well as the *Morellato* case cited above, we may refer to *Kelderman*,[6] regarding the content of dry matter; *Edah*,[7] regarding the minimum retail price for bread; *Van der Velt*,[8] and *Bellamy and Others*,[9] both regarding salt content.

12. The five questions referred for a preliminary ruling in this action are not new. They are almost identical to those raised by the Pretura di Pordenone in the previous *Morellato* case, although the specific infringement alleged is different in each case.

13. This dispute could therefore be decided in abbreviated proceedings, in accordance with Article 104(3) of the Rules of Procedure, which applies when the questions referred for a preliminary ruling are identical to questions on which the Court has already ruled, when the answer to the

4 — Case 407/85 [1988] ECR 4233, and Case 90/86 [1988] ECR 4285.

5 — Case C-358/95 [1997] ECR I-1431.

6 — Case 130/80 [1981] ECR 527.

7 — Joined Cases 80/85 and 159/85 [1986] ECR 3359.

8 — Case C-17/93 [1994] ECR I-3537.

9 — Case C-123/00 [2002] ECR I-2795.

question may be clearly inferred from the case-law or when the reply raises no reasonable doubt. In those circumstances the Court of Justice gives its decision by means of an order.

On this occasion, however, the Court did not take that opportunity but, relying on Article 21 of the EC Statute, granted measures of organisation of procedure, which entailed putting written questions to the Italian Government and inviting the Commission to add to some of the information it had supplied.

VII — Consideration of the question referred for a preliminary ruling.

A — *The first, second and third questions*

14. By these three questions, which should be examined together, the national court wishes to know, on the one hand, whether Article 14(4) of Law No 580, which requires a trader or distributor to package, before offering for sale, bread baked from frozen or non-frozen part-baked bread, as applied by the Mayor of Padua, constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of 28 EC. If so, it wishes to know whether the measure is covered by the derogation provided for in Article 30 EC for the purpose of protecting the health or life of humans.

15. The Commission considers, rightly in my view, that the above requirement is an additional burden for economic traders, which is liable to discourage the importation of that type of bread into Italy. Furthermore, in view of the fact that fresh bread does not need to be prepackaged, there is unjustified discrimination in favour of fresh bread, a product which is, by definition, national, and baked and sold on the same day, whether it is manufactured by traditional or industrial methods. The Commission maintains that the obstacle to the movement of goods represented by the Italian legislation cannot be justified by the need to protect the health and life or humans.

16. I should point out that the contested legislation applies indiscriminately to part-baked bread produced in Italy and part-baked bread imported from other Member States. In *Keck and Mithouard*, [10] the Court of Justice relies on the distinction between provisions relating to the characteristics of products and provisions concerning selling arrangements in order to determine which measures applying without distinction to national and imported products have a restrictive effect such that they may be regarded as measures having equivalent effect.

10 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

17. In the judgment, the Court confirmed that, 'in the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, constitute measures of equivalent effect prohibited by Article 28 EC. That is so 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.' [11]

It then stated, contrary to what it had previously held, that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, [12] so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

The Court added that, provided those conditions are fulfilled, the application of such rules to the sale of products from another Member States is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 28 EC.

18. Since that judgment, in order to decide whether Article 28 EC takes precedence over legislation which applies indiscriminately to national and imported products, it is necessary to distinguish the provisions laying down requirements which have to be fulfilled by the goods, such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging, from those designed to govern selling arrangements.

Since its judgment in *Keck and Mithouard*, in which it considered the prohibition in France on resale at a loss, the Court of Justice has regarded as selling arrangements, for example, a rule of professional conduct adopted by a professional association, prohibiting pharmacists from advertising, outside the pharmacy, the quasi-pharmaceutical products they are authorised to sell; [13] rules on business opening hours; [14] the requirement that retail shops

11 — Case 120/78 *Rewe-Zentral* [1979] ECR 649, also known as *Cassis de Dijon*; and *Keck and Mithouard*, paragraph 15.

12 — Case 8/74 [1974] ECR 837.

13 — Case C-292/92 *Hünermund and Others* [1993] ECR I-6787.

14 — Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199.

shall not open on Sundays; [15] rules prohibiting the marketing other than by pharmacies of processed milk for infants; [16] legislation which reserves the retail sale of manufactured tobacco products to a distributor authorised by the State; [17] rules prohibiting televised advertising in the distribution sector; [18] prohibition on sales yielding very low profit margins; [19] the total prohibition on advertising aimed at children under 12 years of age and on misleading advertising; [20] the prohibition on manufacturers and importers of alcoholic drink into a Member State circulating advertising material directed at consumers; [21] and the restriction of sales rounds of foodstuffs in a specific administrative district to traders carrying on their activity in fixed premises and the restriction on the goods they sell. [22]

19. In the light of those examples, I consider that the Italian legislation requiring a trader or distributor to package, before offering for sale, bread baked from frozen or non-frozen part-baked bread, cannot be classified as a selling arrangement but constitutes a requirement which the goods must fulfil in order to be marketed and therefore forms part of the measures relating to the characteristics of the products.

20. Although the provision applies in the same way to the part-baked bread made in Italy and that imported from other Member States, it discourages imports of the product into Italy, by imposing on the economic traders who complete the baking process and market the bread an additional cost, in respect of the packaging, which does not affect fresh bread. Whether the cost is borne by the purchaser, in which case it increases the price and makes the purchase less attractive, or is absorbed by the processor or reseller, the sale of part-baked bread is adversely affected.

Given that fresh bread does not keep, it being intended for immediate consumption, and part-baked bread is, in practice, the only type which may be the subject of intra-Community trade, it is clear that the obligation to package bread before sale, which is applicable only to a person marketing part-baked bread, penalises the sale of that bread to the benefit of the fresh variety, as it applies essentially to imported products. As a result of this restriction of

15 — Joined Cases C-69/93 and C-258/93 *Punto Casa y PPV* [1994] ECR I-2355.

16 — Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621.

17 — Case C-387/93 *Banchero* [1995] ECR I-4663.

18 — Case C-412/93 *Leclerc-siplec* [1995] ECR I-179.

19 — Case C-63/94 *Belgapom* [1995] ECR I-2467.

20 — Joined cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843.

21 — Case C-405/98 *Gourmet* [2001] ECR I-1795.

22 — Case C-254/98 *TK-Heimdienst* [2000] ECR I-151.

intra-Community trade, that obligation constitutes a measure having an effect equivalent to a quantitative restriction.

21. The Court of Justice has recently pointed out that, for a national measure to be categorised as discriminatory or protective for the purposes of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products. [23]

22. It remains to be seen whether the derogation provided for in Article 30 is available. Article 30 provides, in the absence of Community harmonisation, for a residual power of the Member States which enables them to adopt and maintain in force provisions contrary to Article 28 EC with the object of protecting the health and life of humans, among other fundamental social interests.

23. In accordance with the case-law of the Court of Justice, it is for the national authorities to prove that the legislation at issue is necessary in order to protect consumer health and that the measures adopted comply with the principle of proportionality. [24]

However, in the present case, the national court does not provide the Court of Justice with any evidence to show that the fact that the bread sold by Mr Morellato was not packaged before being put on sale represents a risk to the health of consumers. Furthermore, the Italian Government has expressly acknowledged, in reply to the written questions put by the Court of Justice, that the amendments made to the provision were not motivated by requirements of food safety or by considerations of consumer protection, but only by the fact that part-baked bread, whether or not deep-frozen, marketed after final baking, was too competitive for the bread produced by traditional methods.

24. I therefore consider that Article 14(4) of Law No 580, which requires a trader or distributor to package, before offering for sale, bread baked from frozen or non-frozen part-baked bread, as applied by the Mayor of Padua, constitutes a measure having an effect equivalent to a quantitative measure, prohibited under Article 28 EC, which is not justified by the derogation

23 — Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 24; and *TK-Heimdienst*, paragraph 27.

24 — *Van der Veldt*, paragraph 20.

for the protection of public health provided for in Article 30 EC.

B — *The fourth question*

25. The Tribunale Civile di Padova then asks whether, as a national court, it is required to disapply internal rules such as Law No 580 which may be contrary to Community law.

26. As I have already pointed out in the Opinion in the first *Morellato* case,[25] the Court of Justice has recognised the direct effect of Article 28 EC since its judgment in *Iannelli*,[26] in which it stated that the prohibition of measures having equivalent effect is mandatory and explicit and its implementation does not require any subsequent intervention of the Member States or Community institutions. Therefore it has direct effect and creates individual rights which courts must protect.

27. Mention must also be made of the consistent case-law in which the Court has resolved the conflict between national law and Community law. The best example is still the *Simmenthal* judgment,[27] in which the Court stated that, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures by their entry into force render automatically inapplicable any conflicting provision of national law.

The Court added that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules, even temporarily, from having full force and effect are incompatible with those requirements which are the very essence of Community law.[28] Finally, the Court concluded that a national court which is called upon, within the limits of its jurisdiction, to apply

25 — ECR I-1433 et seq., point 32.

26 — Case 74/76 *Iannelli and Volpi* [1977] ECR 557, paragraph 13.

27 — Case 106/77 [1978] ECR 629, paragraph 17.

28 — *Ibidem*, paragraphs 22 and 23. This precedent has been confirmed in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraphs 18 and 20; Joined Cases C-10/97 to C-22/97 *In.Co.Ge.'90 and Others* [1998] ECR I-6307, paragraph 21; and Case C-118/00 *Larsy* [2001] ECR I-5063, paragraph 51.

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 provisions 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. [29]

28. Therefore, in accordance with that case-law, national courts are under an obligation to refuse to apply national provisions contrary to Article 28 EC. The national court must resolve the dispute before it in accordance with the Community rule which prohibits measures having equivalent effect, disregarding the conflicting national provision, even if it was adopted subsequently, and it is not necessary for any request to be made for such national provision to be repealed.

29. Moreover the obligation of the national courts to disapply domestic provisions which are incompatible with Community law has been clearly acknowledged by the Italian Constitutional Court in case-law beginning with the *Granital* judgment [30] and upheld in a line of judgments starting on 11 July 1989. [31]

C — *The fifth question*

30. Finally, the Tribunale Civile di Padova asks whether the bread baked in Italy from frozen or non-frozen part-baked bread lawfully manufactured in France, must be able to circulate freely, without restrictions like that imposed by Article 14(4) of Law No 580, which requires that the product be packaged before being put on sale.

31. The answer to this question may be inferred directly from those to the previous questions. As the Italian provision constitutes a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 28 EC and is not justified under Article 30 EC, the bread at issue must be given the benefit of the principle of free movement of goods, without any marketing restriction such as that imposed by Article 14(4) of Law No 580 requiring that the bread should be packaged before being offered for sale.

29 — See, in addition to the *Simmenthal* judgment, paragraph 24: Case 170/88 *Ford España* [1989] ECR 2305 et seq., especially 2308; Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713, paragraph 27; *Morellato*, paragraph 20; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraphs 29 to 33; and Case C-258/98 *Carra and Others* [2000] ECR I-4217, paragraph 16.

30 — Judgment No 170, of 8 June 1984, *Giurisprudenza costituzionale*, 1984, I, p. 1098.

31 — Judgment No 389, of 11 July 1989, *Giurisprudenza costituzionale*, 1989, I, p. 1757. See also Judgments No 1698, of 18 April 1991, *Giurisprudenza costituzionale*, 1991, I, p. 1409, and No 285, of 16 June 1993, *Giurisprudenza costituzionale*, 1993, I, p. 2026.

VIII — Conclusion

32. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions submitted by the Tribunale Civile di Padova:

(1) Article 14(4) of Law No 580 of 4 July 1967, laying down rules for the processing and marketing of cereals, flour, bread and pasta, as amended by Article 44(4) of Law No 146 of 22 February 1994, which requires a trader or distributor to package, before offering for sale, bread baked from frozen or non-frozen part-baked bread, as applied by the Mayor of Padua, constitutes a measure having an effect equivalent to a quantitative measure, prohibited under Article 28 EC, which is not justified by the derogation for the protection of public health provided for in Article 30 EC.

(2) The national courts of the Member States are required to disapply national rules which are contrary to Community law and, specifically, to Article 28 EC.

(3) Bread baked in Italy from frozen or non-frozen part-baked bread lawfully manufactured in France, must be given the benefit of the principle of free movement of goods, without any marketing restriction such as that imposed by Article 14(4) of Law No 580 requiring that the bread should be packaged before being offered for sale.