JUDGMENT OF THE COURT (Fifth Chamber)

18 September 2003 *

In Case C-416/00,

REFERENCE to the Court under Article 234 EC by the Tribunale Civile di Padova (Italy) for a preliminary ruling in the proceedings pending before that court between

Tommaso Morellato

and

Comune di Padova,

on the interpretation of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 and 30 EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward (Rapporteur), A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of the Commission of the European Communities by H. van Lier and R. Amorosi, acting as Agents,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2002,

gives the following

Judgment

1 By decision of 16 October 2000, received at the Court on 13 November 2000, the Tribunale Civile di Padova (Civil District Court of Padua, Italy) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC).

2 Those questions were raised in proceedings brought by Mr Morellato against an order by the Mayor of the commune of Padua instructing him to pay a fine for having infringed the Italian legislation on the marketing of bread obtained by completing the baking of partly baked bread.

National legal framework

3 Law No 580, Disciplina per la lavorazione e commercio dei cereali, degli sfarinati, del pane e delle paste alimentari, of 4 July 1967 (Law laying down rules for the processing and marketing of cereals, flour, bread and pasta) (GURI No 189 of 29 July 1967, p. 4182) (hereinafter 'Law No 580/1967') governs the preparation and marketing of cereals, flour, bread and pasta in Italy.

4 Article 14 of Law No 580/1967, as amended by Article 44 of Law No 146, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee — legge comunitaria 1993, of 22 February 1994 (Law laying down rules for fulfilment of the obligations arising from Italy's membership of the European Community — Community Law 1993) (GURI No 52 of 4 March 1994) provides:

'1. The product obtained by the total or partial baking of dough properly raised and prepared with wheat flour, water and yeast, with or without the addition of kitchen salt (sodium chloride), shall be designated "bread".

2. When it is obtained by partial baking, the product referred to in paragraph 1 must be separately prepackaged and provided with a label which bears the information required by the provisions in force and, in a clear and readable form, the designation "bread" followed by the words "partly baked" or any other equivalent expression. The label shall also bear a warning that the product must be baked before being eaten, as well as suitable baking methods.

3. In the case of a deep-frozen product, the label shall include, in addition to the information specified in paragraph 2, information required under the legislation in force concerning deep-frozen products, as well as the word "deep-frozen".

4. Bread obtained by completing the baking of partly baked bread, whether deep-frozen or not, shall be distributed and put on sale after it has been packaged and labelled with the information provided for by the legislation on food products, separately from fresh bread and bearing the information necessary to inform consumers of the nature of the product.

5. For a product which is not intended for the final consumer, the provisions laid down in Article 17 of Legislative Decree No 109 of 27 January 1992 apply.'

5 On 30 May 1995, the Italian Ministry of Industry, Commerce and Crafts sent a 'circular letter' to the Uffici provinciali dell'Industria, del Commercio e dell'Artigianato (provincial offices of industry, commerce and crafts). The Italian Government explained, in reply to a question put by the Court, that that

document is not a circular in the technical sense of the term, which requires publication in the *Gazzetta ufficiale della Repubblica italiana*.

6 It is clear from the Commission's observations that the circular letter was prompted by the commencement of infringement proceedings against the Italian Republic because of the restrictions it placed on the marketing of deep-frozen pre-baked bread. The proceedings were ended on 29 March 1995, precisely because of the imminent adoption of the circular letter.

7 That letter explains how Article 14 of Law No 580/1967 as amended is to be interpreted in order to avoid any incompatibility with Community law. In particular, it states the following:

'Prior packaging of the bread shall make use of bags made of a material which allows the bread to breathe and on which the following information must appear: ingredients, manufacturer and/or producer, principal office of the manufacturer and origin of the pre-baked, deep-frozen bread, expiry date. Where appropriate, the product may be bagged at the time of sale.'

8 According to the Italian Government, the circular letter must be considered repealed as the result of the change made to Article 14 of Law No 580/1967 as amended by Presidential Decree No 502, Regolamento recante norme per la revisione della normativa in materia di lavorazione e di commercio del pane, a norma dell'articolo 50 della legge No 146 del 22 febbraio 1994, of 30 November 1998 (Presidential decree amending the legislation on the manufacture and

marketing of bread in accordance with Article 50 of Law No 146 of 22 February 1994) (hereinafter 'Decree No 502/1998'). Article 1 of that decree, entitled 'Partly baked bread', states in paragraph 1:

'For the purpose of implementing Article 14(4) of Law No 580 of 4 July 1967, as amended by Article 44 of Law No 146 of 22 February 1994, bread obtained by completing the baking of partly baked bread, whether deep-frozen or not, shall be distributed and put on sale in compartments separate from those for fresh bread, and in pre-prepared packaging displaying, in addition to the information required under Legislative Decree No 109 of 27 January 1992, the following information:

(a) "obtained from partly baked, deep-frozen bread", when referring to a deep-frozen product;

(b) "obtained from partly baked bread", when referring to a product which has not been deep-frozen or frozen.'

9 Article 9 of that decree, entitled 'Mutual recognition', states in paragraph 1:

'The provisions of the present decree and those laid down in Law No 580 of 4 July 1967 shall not apply to bread brought into and put on sale in the national territory when it has been lawfully manufactured and marketed in Member States of the European Union or originates in a country which has acceded to the Agreement on the European Economic Area.'

Main proceedings and questions referred for a preliminary ruling

10 On 26 April 1994, inspectors from an Italian local health unit arrived in Mr Morellato's bakery and observed several different kinds of bread on the shelves

and in receptacles, loose and unpackaged, all of which were the product of on-site baking of pre-cooked, deep-frozen bread which he had imported from France. Labels had been affixed to those shelves and receptacles bearing the name under which it was sold, the information that the bread was produced from a pre-cooked, deep-frozen product, the list of ingredients and the name of the manufacturer and distributor.

11 The inspectors also observed that the bread was placed in a paper bag intended for that purpose and stapled shut only at the moment it was handed over to the buyer and not before it was put on sale, as required under the Italian legislation in force at the time.

12 Accordingly, the Mayor of the commune of Padua issued an order requiring Mr Morellato to pay ITL 1 200 000 on the ground that, as the owner of premises for baking deep-frozen bread, deep-frozen pastry and preparations with a sales point, he had infringed Article 14 of Law No 580/1967, as amended, by selling those products in paper bags which were stapled shut only at the moment they were handed over to the customer.

13 Mr Morellato challenged that order before the Tribunale Civile di Padova. He claimed, *inter alia*, that Article 14 of Law No 580/1967 as amended was contrary to Articles 30 and 36 of the Treaty, in that the national provision restricts, or at least limits, the free movement of goods lawfully manufactured in another

Member State and is not justified by arguments relating to the protection of the health and life of humans within the meaning of Article 36 of the Treaty.

14 Since it had doubts as to the correct interpretation of the relevant Community law, the Tribunale Civile di Padova decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 14(4) of Law No 580 of 4 July 1967 (amended by Article 44(4) of Law No 146 of 22 February 1994), as interpreted by the Mayor of the commune of Padua in the contested order, be regarded as incompatible with Articles 30 and 36 of the EC Treaty in so far as it prohibits the sale of bread obtained by completing the baking of partly baked bread, whether deep-frozen or not (lawfully manufactured in and imported from France), if that bread has not been packaged by the retailer prior to sale?

2. Do Article 14(4) of Law No 580 of 4 July 1967 (amended by Article 44(4) of Law No 146 of 22 February 1994) and its interpretation by the Mayor of the commune of Padua constitute a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the EC Treaty?

3. If so, is the Italian State entitled to rely on the derogation provided for in Article 36 of the EC Treaty for the purpose of protecting the life and health of humans?

4. Is Article 14(4) of Law No 580 of 4 July 1967 (amended by Article 44(4) of Law No 146 of 22 February 1994) to be disapplied by the Italian court?

5. Must bread obtained by completing the baking of partly baked bread, whether deep-frozen or not (lawfully manufactured in and imported from France), accordingly be allowed free movement, not subject to any restriction such as that requiring "prior packaging" laid down in Article 14(4) of Law No 580 of 4 July 1967 (amended by Article 44(4) of Law No 146 of 22 February 1994)?'

Preliminary remarks

15 Neither the parties in the main proceedings nor the Italian Government have submitted written observations to the Court.

16 The file shows that Mr Morellato is being prosecuted for infringement of a provision of national law whose content appears to have been clarified in the circular letter prompted by the infringement proceedings brought by the Commission against the Italian Republic.

17 The Court asked the Italian Government to explain whether that circular letter could affect the legal basis of the measures adopted by the Mayor of the commune of Padua against Mr Morellato, having regard, if relevant, to the principle that the least rigorous criminal law at any particular time should apply. The reply by the Italian Government states that the circular letter was repealed by Decree No 502/1998 but does not make clear how that repeal affects Mr Morellato's situation.

18 In those circumstances, the Court must assume that the Mayor was authorised to impose a penalty on Mr Morellato on the basis of the provisions of national law referred to by the national court in its questions.

First to third questions

19 By its first to third questions, the national court essentially asks whether the requirement for prior packaging imposed by the law of a Member State on the sale of bread obtained by completing the baking, in that Member State, of partly baked bread, whether deep-frozen or not, that has been imported from another Member State constitutes a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the Treaty. If the answer is in the affirmative, that court also wishes to know whether that requirement can be justified by reasons relating to the protection of the health and life of humans within the meaning of Article 36 of the Treaty.

Observations to the Court

20 The Commission, which was alone in submitting written observations, first points out that the packaging of the type of bread at issue in the main proceedings prior to its being put on sale is not covered by any Community legislation and that the requirement to package in that way is laid down in the legislation of only one Member State, namely the Italian Republic.

21 That requirement imposes an additional burden and cost on the tradesmen concerned and is therefore liable to discourage the import into Italy of pre-baked

bread and amounts to a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

22 The Commission adds that the requirement for prior packaging must be considered to affect the bread manufacturing process and, accordingly, to amount to a specific characteristic of that product as referred to in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097).

23 In addition, the Commission maintains that this requirement, in so far as it is not imposed on other kinds of bread such as fresh bread, which may freely be sold loose and packaged at the time of sale, mainly affects imported products. It therefore gives rise to unjustified discrimination between the various types of bread, to the advantage of fresh bread, a typically local product which is generally baked and sold on the same day, whether its manufacture is artisanal or industrial. Since ready-to-eat bread is highly perishable, pre-baked bread is almost the only type of bread likely to be the subject of intra-Community trade.

24 As regards a possible justification for the obstacle thus identified, the Commission states that the public-interest objective of protecting human health and life cannot justify the requirement at issue in the main proceedings.

25 While it is of the opinion that certain requirements for prior packaging could perhaps be justified by the need to protect consumers, *inter alia* with the aim of providing them with sufficiently clear and complete information on the type of

product being offered for sale, even before they express any desire to purchase, it considers that in any event the requirement at issue in the main proceedings is disproportionate in that regard.

Reply of the Court

26 In order to answer the first to third questions, it is first necessary to establish whether the national legislation at issue in the main proceedings falls within the scope of application of Article 30 of the Treaty, as interpreted by the Court in *Keck and Mithouard*, cited above, to which the Commission referred in its observations.

27 In paragraph 16 of that judgment, the Court ruled that national provisions restricting or prohibiting certain selling arrangements are not likely to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the judgment in *Dassonville* (Case 8/74 [1974] ECR 837), 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.

28 Subsequently, the Court has classified provisions concerning the place and hours of sale of certain products, the manner of advertisement and certain marketing methods as provisions restricting or prohibiting selling arrangements within the meaning of that judgment (see Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, and Case C-254/98 *TK-Heimdienst* [2000] ECR I-151). On the other hand, the Court has never held that where national

provisions, whilst regulating certain aspects of the sale of products, also require the products to be modified, these provisions are concerned with selling arrangements within the meaning of *Keck and Mithouard*.

29 In that regard, it should be remembered that the need to alter the packaging or the labelling of imported products prevents such requirements from constituting selling arrangements within the meaning of the judgment in *Keck and Mithouard* (Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 37, and Case C-12/00 *Commission* v *Spain* [2003] ECR I-459, paragraph 76).

30 Accordingly, legislation of a Member State which prohibits a product that is lawfully manufactured and marketed in another Member State from being put on sale in the first Member State without being subjected to new packaging of a specific type that complies with the requirements of that legislation cannot be held to concern selling arrangements within the meaning of *Keck and Mithouard*.

31 The Court has pointed out that the reason why legislation imposing certain selling arrangements falls outside the scope of Article 30 of the Treaty is that it is not such as to prevent the access of imported products to the market of that Member State or to impede it any more than it impedes the access of domestic products (*Keck and Mithouard*, paragraph 17, and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).

32 The distinctive feature of the main proceedings is that the product put on sale by Mr Morellato was imported at a stage when its production process was not yet finished. In order to be able to market the product in Italy as bread ready for consumption, it was necessary to complete the baking of the pre-baked bread imported from France.

33 The fact that a product must, to a certain extent, be transformed after importation does not in itself preclude a requirement relating to its marketing from falling within the scope of application of Article 30 of the Treaty. It is possible that, as in the main proceedings, the imported product is not simply a component or ingredient of another product but in reality constitutes the product that is intended for marketing as soon as a simple transformation process has been carried out.

34 In such a situation, the relevant question is whether the requirement for prior packaging laid down in the legislation of the Member State of import makes it necessary to alter the product in order to comply with that requirement.

35 In the present case, nothing in the file indicates that it was necessary for the pre-baked bread, as imported into Italy, to be altered in order to comply with that requirement.

36 In those circumstances, the requirement for prior packaging, since it relates only to the marketing of the bread which results from the final baking of pre-baked bread, is in principle such as to fall outside the scope of Article 30 of the Treaty, provided that it does not in reality constitute discrimination against imported products.

37 In this respect, where there is no manufacture of the product at issue in the Member State of import, such a requirement, although it applies without distinction, disadvantages imported products only, in that it discourages their import or makes them less attractive to the final consumer. If that were the case,

which it is also for the national court to determine, that requirement would constitute an obstacle to imports and would therefore be caught by the prohibition in Article 30 of the Treaty, unless it could be justified by a public-interest objective which takes precedence over the requirement for the free movement of goods.

38 As is clear from the wording of the third question referred, the sole justification relied on in the main proceedings is the protection of the health and life of humans within the meaning of Article 36 of the Treaty.

39 Neither the national court nor the Italian Government has provided information showing that the fact that the bread sold by Mr Morellato was not packaged prior to being put on sale represents a risk to health.

40 The Italian Government in particular has explicitly acknowledged, in response to a question put to it by the Court, that the amendments made to Article 14 of Law No 580/1967 were not based on food safety requirements or consumer protection considerations, but merely on the fact that pre-baked bread, whether deep-frozen or not, which is marketed after baking is completed is too competitive in relation to bread manufactured according to artisanal methods.

41 In those circumstances, if it were held in the main proceedings that an obstacle exists, it could not be justified for reasons relating to the protection of the health and life of humans within the meaning of Article 36 of the Treaty.

42 The answer to the first to third questions must therefore be that a requirement for prior packaging imposed by the law of a Member State on the sale of bread obtained by completing, in that Member State, the baking of partly baked bread, whether deep-frozen or not, that has been imported from another Member State does not constitute a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the Treaty, provided that it applies without distinction to both national and imported products and that it does not in reality constitute discrimination against imported products.

If the national court, in examining these matters, finds that that requirement results in an obstacle to imports, then it cannot be justified by reasons relating to the protection of the health and life of humans within the meaning of Article 36 of the Treaty.

Fourth and fifth questions

43 By its fourth and fifth questions, the national court essentially asks whether national courts are required to ensure the full effect of Article 30 of the Treaty by disapplying on their own initiative domestic provisions which do not comply with that article.

44 It is clear from the case-law of the Court that the response to the questions thus reformulated must be affirmative (see, *inter alia*, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-358/95 *Morellato* [1997] ECR I-1431, paragraph 18).

45 The answer to the fourth and fifth questions must therefore be that national courts have an obligation to ensure the full effect of Article 30 of the Treaty by disapplying on their own initiative domestic provisions which do not comply with that article.

Costs

46 The costs incurred by the Commission, which has 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 questions referred to it by the Tribunale Civile di Padova by decision of 16 October 2000, hereby rules:

1. The requirement for prior packaging imposed by the law of a Member State on the sale of bread obtained by completing, in that Member State, the

baking of partly baked bread, whether deep-frozen or not, that has been imported from another Member State does not constitute a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), provided that it applies without distinction to both national and imported products and that it does not in reality constitute discrimination against imported products.

If the national court, in examining these measures, finds that that requirement results in an obstacle to imports, then it cannot be justified by reasons relating to the protection of the health and life of humans within the meaning of Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

2. National courts have an obligation to ensure the full effect of Article 30 of the Treaty by disapplying on their own initiative domestic provisions which do not comply with that article.

Timmermans Edward La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 18 September 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber