OPINION OF ADVOCATE GENERAL MISCHO
delivered on 22 October 1998 *

1. Mr van der Laan, the defendant in the main proceedings, runs a company marketing meat products, Th. S. v. d. Laan International, based in Almelo in the Netherlands. It distributes three meat products in Germany via the company Bentheimer Fleischwarenvertriebs GmbH, based in Bad Bentheim. The question of their compliance with German legislation is the subject of the main proceedings.

2. Those products are produced in Holland and are lawfully on the market there. They are labelled as follows:

'Lupack:

Dutch formed shoulder ham composed of shoulder ham pieces, without fat or rind; product containing 75% pork meat.

Ingredients: pork meat, water, salt, sugar substances, stabiliser E 450(a), antioxidant E 301, preservative E 250.

Bristol:

Meat product: Dutch shoulder ham [1] without fat or rind.

Ingredients: pork meat, salt, sugar substances, stabiliser E 450(a), antioxidant E 301, preservative E 250.

Benti:

Dutch formed shoulder ham, composed of shoulder ham pieces, without fat or rind. Product containing 70% pork meat.

* Original language: French.

1 — According to the order for reference, the label reads 'Holländischer Vorderschinken', or Dutch shoulder ham. The word 'shoulder' has been omitted from the French translation of the order for reference and does not appear in the report for the hearing either.

Ingredients: pork meat, water, salt, sugar substances, stabiliser E 450(a), antioxidant E 301, preservative E 250.'

3. Mr van der Laan was fined DM 7 500 by the Landkreis Grafschaft Bentheim (Grafschaft Bentheim District Local Authority) under an administrative fine order. The Public Prosecutor's Office with territorial jurisdiction then requested that criminal proceedings be brought.

4. The Landkreis and the Public Prosecutor's Office consider that the designation of the products at issue is misleading and that they differ so markedly from commercial practice that labelling within the meaning of Paragraph 17(1)(2b) of the Lebensmittel- und Bedarfsgegenständegesetz (German Law on Foodstuffs and Items of Daily Use, hereinafter the 'LMBG') is no longer possible. The defendant in the main proceedings has therefore infringed the applicable domestic provisions, in particular the prohibition of fraudulent misrepresentation laid down in Paragraph 17(1)(2b)(5) of the LMBG in conjunction with the German Food Code guidelines for meat and meat products.

5. The relevant provisions of the LMBG are worded as follows:

'Paragraph 17: Prohibitions intended to protect against fraudulent misrepresentation

(1) it is prohibited

...

2. (b) to place on the market in the course of business, without sufficiently precise labelling, foodstuffs the composition of which does not correspond to accepted standards, thus diminishing their value to a not inconsiderable degree, in particular their nutritional value and the level of customer satisfaction they offer ...

5. to place on the market in the course of business foodstuffs with a misleading name, specification or presentation or to promote foodstuffs generally or in an individual case with a misleading description or other statements. In particular, fraudulent misrepresentation is committed:

(a) when effects are attributed to foodstuffs which they are not scientifically known to have or which have not been adequately scientifically proven,

(b) when misleading names, specifications, descriptions or other statements are used concerning the origin, quantity, weight, date of manufacture or packaging and shelf life of the foodstuffs or concerning other circumstances that are also key factors in evaluating the foodstuff,

(c) when the foodstuffs are presented as if they were a medicine.

...

Paragraph 33: German Food Code

(1) The German Food Code is a collection of guidelines describing the manufacture, composition or other characteristics of foodstuffs which are of importance to the marketable nature of those foodstuffs.

(2) The guidelines shall be adopted by the German Food Code Commission, taking into account international standards on foodstuffs recognised by the Federal Government.

(3) The guidelines shall be published by the Federal Minister with the agreement of the Federal Ministers for Justice, Food, Agriculture and Forests and Economic Affairs. The publication of guidelines may be refused or withdrawn on grounds of law or fact.

...

Paragraph 47(a) — Products originating in other Member States or other States party to the European Economic Area Agreement.

(1) By way of derogation from the first sentence of Paragraph 47(1), products to which the present Law applies, which are lawfully manufactured and marketed in another Member State of the Community, or another State to the European

Economic Area Agreement, or which come from a non-member country and are lawfully marketed in a Member State of the Community, or in another State party to the European Economic Area Agreement, may be imported and placed on the domestic market, even if they do not comply with the legislation concerning foodstuffs currently in force in the Federal Republic of Germany. The first sentence does not apply to products which

(1) contravene the prohibitions laid down in Paragraphs 8, 24 or 30 or

(2) do not comply with other legal provisions adopted for the purposes of protecting public health, in so far as the Federal Minister has not published a decision of general application in the Bundesanzeiger (Official Gazette) approving marketing of those products in Germany.

(2) Decisions of general application, in accordance with the second sentence of Paragraph 1 of point 2, shall be adopted by the Federal Ministry with the agreement of the Federal Ministries of Food, Agriculture and Forests and Economic Affairs provided that there are no compelling health protection reasons not to do so. They shall be applied for by the person intending to import the products into the country. When assessing the risks that aproduct poses to health, the Federal Ministry must take into consideration international research findings and, in the case of foodstuffs, nutritional habits in the Federal Republic of Germany. Decisions of general application, pursuant to the first sentence are to operate for the benefit of all importers of the products concerned from other Member States or other States party to the Agreement on the European Economic Area.

(3) An exact description of the product and the available documents that are required for the decision shall be attached to the application. The application shall be dealt with within a reasonable time. If a final decision on the application has not been made within ninety days, the applicant shall be informed of the reasons for the delay.

(4) If some foodstuffs are not covered by the provisions of this Law or of the implementing regulations, this must be stated in an appropriate manner if it is necessary to protect the consumer.'

6. The *national court* hearing the case against Mr van der Laan on the basis of the foregoing provisions considered that the application of those provisions by the relevant authorities might be in breach of Article 30 et seq. of the EEC Treaty and therefore referred the fol-

lowing question to the Court for a preliminary ruling:

'Does the application of Paragraph 17(1)(2)(b) or (1)(5) of the Lebensmittel- und Bedarfsgegenständegesetz judgment in conjunction with Numbers 2.19 to 2.3411 et seq. of the Guidelines for meat and meat products of the German Food Code by the Landkreis Grafschaft Bentheim and the Staatsanwaltschaft Osnabrück in the present case contravene Article 30 et seq. of the EC Treaty, that is to say, the prohibition of discrimination laid down there?'

7. As a preliminary point the Commission states that the Court does not have jurisdiction to decide on the application of domestic law when by 'application' is meant connecting an actual set of circumstances to one or more abstract domestic legal rules.

8. In that sense of the term, the 'application' of domestic law is indeed the sole responsibility of the bodies competent under the law of the Member State in question.

9. The fact remains that, with that question, the national court is essentially asking the Court whether Community law should be construed as precluding prohibition of the marketing of the imported products described above under the foregoing national provisions. Such a question unquestionably falls within the Court's jurisdiction.

10. The *Landkreis Grafschaft Bentheim* and the *Osnabrück Public Prosecutor's office* consider that the marketing of the products at issue is in breach of the LMBG for the reasons set out below.

11. First, they argue that the product called 'Bristol' is not a natural product but a formed cured meat product ('Formfleischkochpökelware') which under the German Food Code guidelines for meat and meat products should, like the Lupack and Benti products, have been labelled 'formed shoulder ham composed of ham pieces'. However, as seen above, that product is instead labelled 'Meat product: Dutch shoulder ham without fat and rind'.

12. The Landkreis and the Public Prosecutor's Office call into question the composition of the products.

13. They point out that Lupack and Benti respectively contain only 75% and 70% pork meat. The usual practice is for cured meat

products to contain 100% pork meat. The order for reference does not mention the percentage of pork meat contained in the Bristol product. However, since it states that Bristol has an added water content ranging between 3.7% and 18%, that product cannot contain 100% pork meat either.

14. The Landkreis and the Public Prosecutor's Office conclude that, for that reason alone, the products at issue differ so markedly from commercial practice that labelling within the meaning of Paragraph 17(1)(2b) of the LMBG is no longer be possible and that those products cannot therefore be lawfully marketed in Germany.

15. The national authorities also raise the fact that the muscle-meat protein content is between 87.9 and 88.1% in Bristol and is 87.9% in Benti, which is 'much lower' than the 90% minimum required by the German Food Code.

16. In addition, the samples examined had a protein content in the fat-free part ranging from 15% to 18.2% in Bristol and from 16.6% to 17.2% in the case of Lupack, which was 'a not inconsiderable deviation from' the 19% minimum required by the German Food Code.

17. Lastly, the added-water content ascertained of between 3.7% and 18% in Bristol and 8.7% and 10.6% in Lupack was far above the added water content prescribed for cured meat products.

Assessment

18. The question posed by the national court amounts, therefore, to asking whether Article 30 of the Treaty allows the national authorities to prevent the marketing of products of this type in order to protect consumers whose expectations regarding such products differ appreciably from the characteristics of the products at issue.

19. The Court has consistently held [2] that in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable without distinction to domestic and imported products, can be justified as being necessary in accordance with one of the grounds of public interest set out in Article 36 of the Treaty, such as the protection of the health of persons, or imperative requirements

2 — See, for instance, Case 178/84 *Commission* v *Germany*, the *Beer* case [1987] ECR 1227, paragraph 28, and Case 298/87 *Smanor* [1988] ECR 4489, paragraph 15.

relating *inter alia* to consumer protection. Nevertheless such regulations must be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restrict free trade.

20. The first point to make is that there are no common or harmonised rules concerning the manufacture or marketing of ham products, apart from the provisions contained in the legislation on intra-Community trade in meat products (see Council Directive 92/5/EEC of 10 February 1992 amending and updating Directive 77/99/EEC on health problems affecting intra-Community trade in meat products and amending Directive 64/433/EEC [3]). However, that legislation does not define the composition of cured products or formed shoulder ham.

21. It is also apparent from the documents in the case that the products at issue are lawfully manufactured and marketed in the Netherlands.

22. Third, it must be pointed out no public health considerations have been invoked. The national court even states that a general decision was taken on 28 October 1992 allowing the products at issue to be put on the market despite the presence of an additive not permitted in Germany.

23. The Commission points out that the criticisms made by the German authorities in respect of the water content of the products in question, as well as their protein content, have no foundation in the provisions of the German Food Code appended to the order for reference, although the latter is deemed to codify accepted standards and is invoked by those same authorities in support of their construction of the expectations of German consumers.

24. The Commission further argues that the German Food Code contains only guidelines ('Leitsätze'). It its view, the binding effect of these guidelines is uncertain.

25. It is, in fact, permissible in the light of these factors to question the precise legal basis in domestic law of the action brought by the Landkreis and the Public Prosecutor's Office in the main proceedings.

26. However, I share the Commission's conclusion on this matter that it is not for the Court to decide whether the position of one

3 — OJ 1992 L 57, p. 1.

of the parties to the main proceedings is or is not justified in national law. The Court is only required to provide the national court with the information to enable it to determine the correct interpretation of Community law in the context of the case before it.

27. It is clear from the settled case-law of the Court that, where products lawfully manufactured and marketed in another Member State are involved, consumers can generally be protected by measures less restrictive than a prohibition, in particular by means of adequate labelling, providing proper information on the composition of the product in question.

28. A case that may be cited in support of this is Deserbais, [4] in which the Court held that Community law precludes the legislation of a Member State which made the right to use the trade name of a type of cheese subject to the observance of a minimum fat content from being applied to products of the same type imported from another Member State when those products had been lawfully manufactured and marketed in that Member State and consumers were provided with proper information.

29. The Court followed the same line of reasoning in *Bonfait*, [5] which concerned Dutch rules whose effect was to impede the importation of prepared meat products from Germany on the grounds that they exceeded a maximum water content. Here too, it was held that consumers could be protected by proper labelling.

30. Since the latter case mirrors, as it were, the present case, the same reasoning should be applied. This is especially true in that the national court states that German consumers have no firm expectation regarding the composition of the products at issue as they are not traditional products.

31. It should therefore be accepted, as the Court did in its judgment in the *Commission* v *Germany* case, [6] cited by Mr van der Laan, that consumers will first read the list of ingre-

4 — Case 286/86 *Deserbais* [1988] ECR 4907.

5 — Case C-269/89 *Bonfait* [1990] ECR 4169.

6 — Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599.

dients. If that list clearly shows the composition of the product, the risk of consumers being misled is sufficiently minimal as not to justify an obstacle imposed on the marketing of those products.

32. It is therefore necessary to ascertain whether the labelling of products in question provides consumers with enough information so that Article 30 of the Treaty would preclude the national authorities from impeding their marketing.

33. In the particular area of the labelling of foodstuffs, the requirements of Article 30 of the Treaty are expressed by 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 [7] (hereinafter 'the Labelling Directive'), as amended by Commission Directive 91/72/EEC of 16 January 1991. [8] It is settled case-law that if the national measure in question falls within the scope of rules of secondary law, it is in the light of those rules that the requirements of Community law must be ascertained.

34. Article 2 of the Labelling Directive states that:

'1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production.'

Article 3 states that:

'1. In accordance with Articles 4 to 14 and subject to the exceptions contained therein,

7 — OJ 1979 L 33, p. 1.
8 — OJ 1991 L 42, p. 27.

indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

(1) the name under which the product is sold,

(2) the list of ingredients,

...'

Under Article 5(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.'

Article 6(5) is worded as follows:

'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".

However:

— added water and volatile products shall be listed in order of their weight in the finished product; the amount of water added as an ingredient in a foodstuff shall be calculated by deducting from the total amount of the finished product the total amount of the other ingredients used. This amount need not be taken into consideration if it does not exceed 5% by weight of the finished product.'

Lastly, Article 15 provides that:

'1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.

2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:

— protection of public health,

— prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,

— protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.'

35. The basic principle laid down by the Labelling Directive in Article 2, cited above, is therefore that labelling that could mislead the consumer to a material degree as to the characteristics of the foodstuff and, in particular, as to its nature, identity and composition, is prohibited. To that end, Articles 3 and 5 of the Labelling Directive lay down a number of conditions that labelling must meet regarding both the name under which the product is sold and the list of ingredients.

36. Let us examine those two points in turn.

Name under which products are sold

37. It is not disputed that no Community provision lays down the name under which the products in question should be sold.

38. The national court states that all three products are 'Dutch formed shoulder ham composed of shoulder ham pieces'.

39. That name appears on the Lupack and Benti products but not on the Bristol product, which is called a 'meat product: Dutch

shoulder ham without fat or rind'. That might indeed give the impression that it is a natural product composed of a single piece of shoulder ham. However, formed shoulder ham is composed of shoulder ham pieces pressed together to imitate natural ham. Those two products are therefore undeniably different in nature.

40. Neither can the allusion to Bristol's provenance in the term 'Dutch' be deemed to enable the consumer to deduce that it is a formed shoulder ham.

41. On the other hand, the label states that it is a 'meat product' (in French: 'produit à *base* de viande', literally a meat-*based* product). A particularly well-informed consumer could possible infer from that that Bristol is not purely and simply composed of a single piece of shoulder ham, but that it also contains other ingredients and has been prepared.

42. The fact remains that it is not easy for the average consumer to realise from the name under which Bristol is sold that it is a formed ham.

43. I therefore share the Commission's opinion that Bristol's labelling is such as could mislead the consumer within the meaning of Article 2 of the Labelling Directive.

Ingredients

44. First of all, the products Lupack and Benti are criticised for not containing 100% pork meat, Lupack containing only 75% and Benti 70%, whereas in Germany similar products would always contain 100% pork meat.

45. It is stated that Lupack contains between 8.7% and 10.6% added water and therefore differs from the expectation of German consumers of zero added water content.

46. As far as Benti is concerned, no information is provided as to the added water content, but the inference from its lower pork meat content is that the added water content of the product must be at least the same as that of Lupack.

47. It is not disputed, however, that the labelling of the products at issue lists without any ambiguity the ingredients used in their composition, in particular, it gives the pork meat percentage and mentions the fact that water is an ingredient. On the subject of water content, it can be seen from reading Article 3(1) in conjunction with Article 6(5)(a) of the Labelling Directive that added water, as an ingredient, must appear as such on the label where it exceeds 5% by weight of the finished product.

48. The Labelling Directive also states that the ingredients, which must be listed, are to appear in descending order of weight. The fact that the labelling on Lupack and Benti mentions water second on the list of ingredients therefore tells the consumer that the percentage of water in the product's composition is between 5% and 25% in the case of Lupack and between 5% and 30% in the case of Benti and that water is the products' second main ingredient after pork meat.

49. The presentation of the ingredients of the abovementioned two products cannot therefore be criticised with regard to the Labelling Directive. Even if it were established that the average German consumer had a specific expectation that there would be no water in the products at issue, which the referring court states was not the case, the consumer was able to ascertain that the product differed from that expectation and so could not be misled within the meaning of the Labelling Directive.

50. The presence of an ingredient, added water, not provided for by German legislation, is in fact sufficiently clear from the list of ingredients so that it does not have to be included in the name under which the product is sold.

51. The presentation of the two products at issue, as described above, therefore complies with the Labelling Directive on those two points. It is therefore not open to the German authorities to find that there is a risk that consumers could be misled. This is true even if those authorities were to consider that consumers' expectations would lead them to attribute to that product a composition that it did not have. The real or assumed content of those expectations is irrelevant in the context of the Labelling Directive.

52. Labelling that indicates the name under which a product is sold and the ingredients used in its composition, in accordance with the methods laid down for that purpose by the Labelling Directive, could not be considered nevertheless to be potentially misleading with regard to the composition of the product.

53. To leave such a possibility open would run counter to the primacy of Community law and would compromise the achievement of the objectives of the Labelling Directive, namely to 'contribute to the smooth functioning of the common market' by reducing ingredients caused by the differences between

the Member States' provisions on the labelling of foodstuffs. [9]

54. It is true that the recitals in the preamble to the Labelling Directive clearly highlight the Directive's non-exhaustive nature. [10] As a result, Member States have the right to continue to lay down national provisions in this area, subject to a Community procedure. [11]

55. Article 15, cited above, of the Labelling Directive lays down the conditions under which Member States may adopt additional national provisions. Of the three cases set out in Article 15(2), only the second, namely the prevention of fraud, concerns us here. As we have seen, there is in fact no alleged danger to public health in this case. Neither is the protection of intellectual property, nor protection of indications of provenance or registered designations of origin, cited in the third indent of Article 15(2), raised in this case.

56. Admittedly, the Landkreis Grafschaft Bentheim also raises in its observations the competitive disadvantage suffered by national producers in having to comply with a zero added water content, while producers based in other Member States could avoid that rule.

57. While it is true that the Court has held that fair trading is a mandatory requirement justifying restrictions on imports, [12] it is nonetheless clear from the case-law of the Court that that interest does not warrant a prohibition on trading when, as in the case in point, the products involved are lawfully manufactured and marketed in another Member State and the consumer is provided with proper information. [13]

58. At this point in the discussion, the problem boils down to ascertaining whether the national rules on which the action of the German authorities is based might be considered to be non-harmonised national provisions justified on grounds of prevention of fraud, within the meaning of Article 15(2) of the Labelling Directive.

59. In other words, could the German authorities, despite the fact that the labelling of the products Benti and Lupack was not such as could be misleading within the meaning of Article 2 of the Labelling Directive, neverthe-

9 — See the first three recitals in the preamble.

10 — See the tenth and fourteenth recitals in particular.

11 — See the tenth recital and Article 15, cited above.

12 — See, for instance, the *Beer* case, cited above in footnote 2.

13 — See, for instance, the *Bonfait* case, cited above, paragraphs 16 and 17.

less take the view that the prevention of fraud under Article 15(2) did in this instance justify imposing additional requirements on those products on the grounds that they differed excessively from accepted standards in Germany? The national measures in question would therefore be justified by the fact that, even if the labelling at issue were not objectively misleading, it could mislead the average German consumer because of his or her specific and precise expectations.

60. If that were the case, it would be necessary to examine the application of Article 30 of the Treaty to the national measures in question, and in particular to determine whether they are justified by the mandatory requirement of consumer protection.

61. However, such an analysis is not justifiable in the present case.

62. As shown above, the main purpose of the Labelling Directive is to identify the requirements that have to be met by product labelling so as not to be considered misleading. Its provisions would be wholly lacking in effectiveness if the national authorities were entitled to consider labelling that complied with the Labelling Directive as being capable of misleading the consumer as to the product's composition.

63. The non-exhaustive nature of the Labelling Directive, and hence the fact that a Member State may apply or adopt additional national measures, under the substantive and procedural conditions laid down in Articles 15 and 16 thereof, has no effect at all on this conclusion.

64. That freedom allowed to Member States cannot be exercised in such a way as to render the provisions of the Labelling Directive meaningless.

65. Article 15(2) indeed states that the application of non-harmonised national provisions concerning the prevention of fraud must not be 'liable to impede the application of the definitions and rules laid down by this Directive'. However, that is precisely the result that would be achieved if additional national requirements were to be applied, with regard to indication of the product's composition, to labelling meeting the Directive's requirements relating to that indication.

66. The national measures permitted by the Labelling Directive within the context of 'prevention of fraud' for the purposes of that Directive can therefore only concern matters not addressed by the Directive or by other provisions of secondary legislation. In particular, they cannot concern the indication of the ingredients making up the product unless otherwise specified in the Directive.

67. Accordingly, if the German authorities were to consider that consumers required precise information on the water content of such products where it was particularly high, they would be entitled to require an indication to that effect, subject to complying with certain conditions laid down by the Labelling Directive. Article 7 thereof states in this regard that, in the absence of Community provisions, national provisions may stipulate, for certain ingredients, compulsory indication of a quantity as a percentage or in absolute terms. These provisions are to be adopted in accordance with the procedure laid down in Article 16 of the Directive, which involves informing the Commission and other Member States within a certain time-limit and obtaining the agreement of the Commission.

68. In the absence of provisions adopted in accordance with that procedure, the inevitable conclusion is that, with regard to the ingredients used in the composition of the products Lupack and Benti and the name under which those products are sold, Community law does not allow the German authorities to make the above claims.

69. The product Bristol warrants a specific comment. In contrast to the two other products, the labelling on Bristol does not list water as an ingredient. However, as seen above, the Labelling Directive requires that water be mentioned if it constitutes 5% of the finished product. In this case, the failure to mention water would be a breach of the Directive whatever consumers' expectations might be in that respect.

70. It is therefore for the referring court to ascertain whether, in this particular instance, the quantity of added water does, in the majority of cases, exceed 5% by weight of the finished product. That court has in fact already stated in the order for reference that the water content of the product varies between 3.7% and 18%.

Protein content

71. The other charges brought by the Landkreis and the Public Prosecutor's Office in the main proceedings concern the protein content of the products Lupack, Bristol and Benti, whether that be the protein content in the fat-free part in the case of the first two or the muscle-meat protein content in the case of the last two. As the Commission has rightly stated, these are not an ingredient of the product but one of its qualities. Therefore, the protein content does not have to appear on the list of ingredients provided for in Articles 3 and 5 of the Labelling Directive.

72. None the less, the information provided on this subject must also comply with Article 2 and must therefore not be misleading. Consequently, it must not lead the consumer to

believe that these products have a certain protein content when that is not actually the case.

73. As the labelling at issue does not mention the protein content, consumers could only be misled in this particular instance if the nature of the products was such that they had a firm expectation with regard to such content and if the labelling failed to draw consumers' attention to the fact that the products Lupack, Benti and Bristol did not meet that specific expectation.

74. The national court pointed out that German consumers had no specific expectation with regard to the composition of the products at issue. It would therefore be extremely surprising if, by contrast, they did have a specific expectation with regard to the protein content in the fat-free part or the muscle-meat protein content.

75. Furthermore, even accepting that there were expectations on the part of the consumer as to the protein content of formed ham, it would be extraordinary if those expectations were so specific that consumers would consider themselves misled if they bought a product in which the relevant contents were 2%, or less, below the minimum adopted by the German authorities.

76. A further point to make in this connection is that the provisions of the German Food Code included in the documents before the Court make no mention of such a requirement, even though that Codex is supposed to reflect accepted standards.

77. I therefore conclude from this that the absence of labelling concerning the protein content in the fat-free part or the muscle-meat protein content is not a breach of the Labelling Directive. As that Directive does not contain any precise provisions regarding indications of those contents, the necessary approach, following the above line of reasoning, is to establish with regard to the requirements of Article 30 of the Treaty whether the German provisions on those contents may be considered to be non-harmonised, additional national provisions, falling within the scope of Article 15 of the Labelling Directive and not concerning matters already addressed by that Directive.

78. I consider that consumer protection cannot justify, in this particular instance, a requirement for additional labelling to draw consumers' attention to the difference between their possible expectations as to the protein content of formed ham and the characteristics of the products at issue.

79. The differences raised by the German authorities between the percentages measured and the standard that those authorities apply, even assuming that that standard actually corresponded to consumers' expectations, are extremely small and therefore sufficiently insignificant not to have to be specifically pointed out to the consumer. As the Commission states, a *de minimis* interpretation should be applied in the present case.

80. What is more, a situation in which labelling in compliance with the provisions of the Labelling Directive, whose main aim, it should be said, is to protect consumers from fraud, could nonetheless be considered to be misleading under a national provision must logically remain exceptional, as indeed is implied by the wording of Article 15(2). It follows that any national provisions are only applicable in the alternative. The conditions of application of national provisions must therefore be interpreted narrowly. In this particular case, the documents before the Court provide no reason to believe that the situation is exceptional.

81. It should be noted that the Commission points out, for the sake of completeness, that it appears from the documents before the Court that the labelling of the products at issue does not include a visible and legible reference to the national standard or legislation authorising the name under which the products are sold.

82. Such a requirement does, however, arise from Directive 92/5, Annex B, Chapter V (Wrapping, packaging and labelling), which states that:

'4. In addition to the requirements 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 ... the following information ... must be visible and legibly displayed on the wrapping or on the label of meat products:

...

— the sales description followed by a reference to the national standard or legislation ... authorising it.'

83. However, it is clear from the question referred to the Court that it is limited to the charges brought by the national authorities and does not therefore include failure to comply with the foregoing. That failure may indeed be included amongst the other infringements of the German rules on labelling, which the national court expressly states are not the subject of the order for reference.

Conclusion

84. On the basis of the foregoing, I would propose that the Court give the following answer to the national court:

(1) Article 30 of the EC Treaty precludes the legislation of a Member State from impeding the marketing of foodstuffs lawfully manufactured and sold in another Member State on grounds relating to consumer protection and information where those foodstuffs are labelled in accordance with the provisions 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, particularly those relating to the name under which the product is sold and the list of ingredients.

(2) The use of a name under which the product is sold which does not enable the purchaser in the country in which it is marketed to ascertain the actual nature of the foodstuff is contrary to Articles 2 and 5 of Directive 79/112.

If water has been added to the foodstuff and the quantity added represents over 5% by weight of the finished product, there will be a breach of Article 3 in conjunction with Article 6 of Directive 79/112 if the indication 'water' is absent from the list of ingredients.