OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 14 November 1990 *

Mr President,
Members of the Court,

1. The defendant in the main proceedings is being prosecuted before the Tribunal de grande instance (Regional Court), Marseille, in his capacity as manager of a company which, in 1982, sold in France pastry products from Italy of a type known as 'panettone' which contained sorbic acid, a preservative whose use is permitted in Italy but not, for that type of product, in France.

2. The national court therefore seeks a preliminary ruling on the following question:

'Is it lawful under Community law to refuse entry into France to a foodstuff lawfully produced and marketed by a Member State on the ground that it contains sorbic acid, a preservative which is permitted under Directive 64/54/EEC of 5 November 1963, as supplemented and amended by Directive 67/427/EEC of 27 June 1967, by Directive 71/160/EEC of 30 March 1971 and by Directive 74/62/EEC of 17 December 1973, but which, under French law, may be used only in a limited number of stipulated foodstuffs, although no overriding reason is given?'

3. It is important to point out first of all, as the Commission rightly does, that the relevant Community law is essentially laid down in Articles 30 and 36 of the EEC Treaty.

4. It is true that Council Directive 64/54/EEC, [1] to which the national court refers, includes sorbic acid among the preservatives whose use may be authorized by Member States, and does not lay down any conditions for its use. But that authorization is not compulsory. The directive constitutes the first stage in the approximation of the relevant laws of the Member States, and Article 1 merely prohibits Member States from authorizing the use of additives other than those listed in the annex, without requiring them to authorize the use of all those which are listed there.

5. That interpretation of Article 1 is confirmed by the Court's case-law. In its judgment in *Grunert*, [2] the Court concluded its analysis of Article 1 of Directive 64/54 by stating that:

'At the present stage in the approximation of national laws relating to preservatives and antioxidants Member States are not bound to authorize for use in foodstuffs all the substances the use of which is permitted by the two directives.'

* Original language: French.

1 — Council Directive of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (OJ, English Special Edition 1963-64, p. 99).

2 — Judgment in Case 88/79 *Ministère public* v *Grunert* [1980] ECR 1827, at p. 1836, paragraph 8.

6. It is therefore necessary to conclude that, at the stage reached in the approximation of laws in 1982, Member States could prohibit the use of a preservative even if it was listed in the Annex to Directive 64/54.

7. There were, however, two limitations.

8. First of all, any such prohibition had to comply with Article 2(2) of the directive, as amended by Directive 67/427/EEC,[3] to which both the defendant in the main proceedings and the Commission devote a number of arguments.

9. That paragraph provides:

'However, the laws of a Member State may totally exclude the use of any of the preservatives listed in the Annex only where there is no technological reason for using such preservative [in] foodstuffs produced and consumed in its own territory.'

10. It is obvious that that article can have no relevance to the present case, since we are dealing with foodstuffs produced outside France. The national court has, moreover, pointed out that the applicable French legislation permits the use of sorbic acid in certain cases.

11. But Member States had also to comply with Articles 30 and 36 of the Treaty. The Court has consistently held that

'the existence of harmonizing directives does not exclude the operation of Article 30 of the Treaty and it is only when Community rules make provision for the full harmonization of all the measures needed to ensure the protection of health and institute Community procedures to monitor compliance therewith that recourse to Article 36 ceases to be justified'.[4]

12. The national measure in issue, a prohibition on the marketing of a foodstuff, clearly hinders the marketing of that foodstuff and therefore undoubtedly constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30, which the Court has interpreted[5] as applying to any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

13. The prohibition could therefore only be justified on grounds relating to the protection of public health, under Article 36 of the Treaty, recourse to which remains available in the light of the abovementioned judgments.

14. The Court, in its case-law, has nevertheless laid down specific conditions in that regard. Those conditions are listed, *inter alia*, in its judgment of 12 March 1987 in *Commission* v *Germany*,[6] the 'Beer' case, in which the following passages appear:

3 — Council Directive of 27 June 1967 on the use of certain preservatives for the surface treatment of citrus fruit and on the control measures to be used for the qualitative and quantitative analysis of preservatives in and on citrus fruit (OJ, English Special Edition 1967, p. 169).

4 — See, *inter alia*, the judgments in Case 247/84 *Motte* [1985] ECR 3887, paragraph 16 and in Case 304/84 *Ministère public* v *Muller* [1986] ECR 1511, paragraph 14.

5 — See the judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

6 — Judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, at p. 1262.

'44 It must be borne in mind, in the first place, that in its judgments in the *Sandoz*, *Motte* and *Muller* cases, cited above, the Court inferred from the principle of proportionality underlying the last sentence of Article 36 of the Treaty that prohibitions on the marketing of products containing additives authorized in the Member State of production but prohibited in the Member State of importation must be restricted to what is actually necessary to secure the protection of public health. The Court also concluded that the use of a specific additive which is authorized in another Member State must be authorized in the case of a product imported from that Member State where, in view, on the one hand, of the findings of international scientific research, and in particular of the work of the Community's Scientific Committee for Food, the *Codex alimentarius* Committee of the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization, and, on the other hand, of the eating habits prevailing in the importing Member State, the additive in question does not present a risk to public health and meets a real need, especially a technical one.

45 Secondly, it should be remembered that, as the Court held in its judgment of 6 May 1986 in the *Muller* case, cited above, by virtue of the principle of proportionality, traders must also be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.

46 It should be pointed out that it must be open to traders to challenge before the courts an unjustified failure to grant authorization . . .'

15. As regards the application of those conditions to the present case, I share, essentially, the Commission's views.

16. The Commission states, first of all, that the amount of additive contained in the product concerned does not exceed the limits laid down in Italian law. The product is therefore one which is lawfully produced and marketed in a Member State.

17. Furthermore, sorbic acid is included in the list of preservatives adopted by Directive 64/54, with no particular conditions as to its use, precisely because it does not in principle present a serious risk to human health. Before the Community legislature includes an additive on such a list, research is carried out to detect any risks to human health presented by the substance concerned. A possible threat to health could only be established, therefore, by circumstances peculiar to the Member State concerned, such as the eating habits of its population.

18. It is clear from the Court's case-law that the burden of producing that proof in the context of the national authorization procedure lies on the national authorities.[7]

7 — See, for example, the judgment in *Muller*, cited above.

19. What are the conclusions to be drawn from those general principles with a view to solving the present case? The Tribunal de grande instance, Marseille, asks quite explicitly whether it is lawful under Community law to refuse entry into France to the foodstuff in question 'although no overriding reason is given', that is to say although the competent authorities of the French Republic have not justified the ban on the sale of that specific foodstuff (which is lawfully produced and marketed in its Member State of origin) on the grounds of a need specific to France to protect public health.

20. If, as seems to be the case here, such grounds have clearly not been stated, should the national court:

(i) of its own motion set aside the prohibition under national law as incompatible with Community law;

(ii) allow the prosecuting authority the opportunity to prove convincingly that 'panettoni made with sorbic acid' are harmful in view of French eating habits; or

(iii) find that, since French legislation provides for the possibility of derogations on a case-by-case basis and no derogation has been granted by the public authorities either on their own initiative or on application by Mr Bellon, the general rule should be applied and the defendant should be convicted?

21. I consider, subject to one reservation with which I shall deal below, that the third course is right.

22. It is clear from the Court's case-law that, as it stands at present, Community law allows Member States in principle to prohibit the use of certain additives. In paragraph 42 of the judgment in the 'Beer' case, [8] the Court stated that

'Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorization granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. Such legislation meets a genuine need of health policy, namely that of restricting the uncontrolled consumption of food additives'.

In the following paragraph of that judgment, the Court then stated that

'the application to imported products of prohibitions on marketing products containing additives which are authorized in the Member State of production but prohibited in the Member State of importation is permissible only in so far as it complies with the requirements of Article 36 of the Treaty as it has been interpreted by the Court'.

23. In paragraphs 44 to 46 of that same judgment, cited above, the Court indicated the requirements arising out of Article 36 of the Treaty with regard to such products. In each of those three paragraphs, the words 'authorization' or 'authorized' is used.

24. It is therefore clear that, if there is no authorization to use sorbic acid in

8 — See footnote 6.

'panettoni', the French courts are entitled to apply the general prohibition laid down in French legislation and convict a defendant who has infringed that prohibition.

25. The only reservation which should be made with regard to that rule is that there must be a suitable procedure enabling importers to obtain, where appropriate, a derogation from that prohibition. The criteria which such a procedure must meet are set out in the passages cited above from the judgment in the 'Beer' case. The second sentence of paragraph 46 of that judgment contains an important proviso. The paragraph is worded as follows:

'It should be pointed out that it must be open to traders to challenge before the courts an unjustified failure to grant authorization. Without prejudice to the right of the competent national authorities of the importing Member State to ask traders to produce the information in their possession which may be useful for the purpose of assessing the facts, it is for those authorities to demonstrate, as the Court held in its judgment of 6 May 1986 in the *Muller* case, cited above, that the prohibition is justified on grounds relating to the protection of the health of its population.'

26. If the authorization applied for is refused, therefore, proof that the additive is harmful must be provided by the competent national authority.

27. Since, in the context of a request for a preliminary ruling, the Court of Justice of the European Communities cannot rule on the compatibility with Community law of a rule of national law, it is for the Tribunal de grande instance, Marseille, to determine whether the procedure set up in France by a Law of 1 August 1905, a Decree of 15 April 1912 amended by a Decree of 12 February 1973, and a Circular of 8 August 1980 (*Journal officiel de la République française* of 25.9.1980, p. 8544), to which the Agent of the French Government referred, meets that requirement or not. If the Tribunal were to decide that the requirement was not met, it should in my opinion conclude that the procedure itself is not in conformity with Community law and discharge the defendant.

28. On the basis of all the foregoing considerations, I propose that the question raised should be answered as follows:

'Articles 30 to 36 of the EEC Treaty do not preclude a Member State from prohibiting the marketing of a foodstuff which has been imported from another Member State where it was lawfully produced and marketed and to which one of the substances listed in the annex to Council Directive 64/54/EEC of 5 November 1963 has been added, provided that it is possible to submit an application for authorization to market that type of foodstuff in the first Member State and that such application can be rejected only under a procedure which in every respect meets the criteria laid down by the Court in its judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227.'