OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 24 November 1987 *

Mr President,
Member of the Court,

1. The Treaty infringement proceedings to which this Opinion relates were initially brought to obtain a declaration that

(1) by prohibiting the importation from other Member States of pasteurized milk and unfrozen pasteurized cream intended for human consumption, and

(2) by requiring heat-treated cream and milk-based drinks to be manufactured in Great Britain only from milk produced in Great Britain and, in Northern Ireland, only from milk produced in Northern Ireland, the United Kingdom had failed to fulfil its obligations under Article 30 of the Treaty and Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products. [1]

2. During the course of the proceedings, the Commission abandoned its second submission after the United Kingdom had repealed the relevant legislation.

3. In order to avoid the need to return to this subject later, I should like to say at this stage that, pursuant to Article 69 (4) of the Rules of Procedure, the costs relating to this part of the application should be paid by the United Kingdom, whose conduct justified the Commission's partial discontinuance.

4. As regards the first part of the application, it should be noted that the United Kingdom concedes that the contested legislation, which is described in detail in the Report for the Hearing, is contrary to Article 30 of the Treaty. [2] The question therefore remains to be considered whether, as the United Kingdom contends, it is justified under Article 36 for reasons relating to the protection of human health and life.

5. Before considering that question, I must however express a view on the United Kingdom's statement to the effect that the Commission changed the subject-matter of the action during the course of the proceedings. What happened was that on 5 August 1985, that is to say 15 days before the Commission's application was lodged, the Council adopted Directive 85/397/EEC on health and animal-health problems affecting intra-Community trade in heat-treated milk, [3] that is to say milk which has been pasteurized, sterilized or treated at an ultra-high temperature (UHT). That directive is intended to approximate the relevant laws of the Member States by laying down Community rules concerning production, treatment and transport and by setting up a Community control system. By virtue of Article 16 of the directive, it must be transposed into the legislation of the

* Translated from the French.

1 — Official Journal, English Special Edition, 1968 (1), p. 176.

2 — In that connection, I would refer to the judgment of the Court of 14 December 1979 in Case 34/79 *Regina* v *Henn and Darby* [1979] ECR 3795, in which it is stated that Article 30 'applies also to prohibitions on imports inasmuch as they are the most extreme form of restriction' and that 'the expression used in Article 30 must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36' (paragraph 12).

3 — Official Journal 1985, L 226, p. 13.

Member States by 1 January 1989 at the latest.

6. Needless to say, there was no reference to that directive in the reasoned opinion, and in its rejoinder the United Kingdom levels the criticism that the Commission changed the subject-matter of the application by stating that even before that date the United Kingdom was no longer entitled to prohibit imports of pasteurized milk which satisfied the standards laid down in that directive. According to the United Kingdom, by so doing the Commission failed to comply with the procedural requirements specific to actions for the failure of a Member State to fulfil its obligations, by virtue of which the subject-matter of the application must be settled before proceedings are brought before the Court and the reasoned opinion and the application must be founded on the same grounds and submissions. [4]

7. In my view, that argument is unacceptable. On the one hand, it was the United Kingdom which, in its defence, sought to secure an advantage from the existence of that directive by drawing attention to the disparities between the national rules and the need for a Community control system; in its reply the Commission answered that argument merely by stating that it would be paradoxical, to say the least, if products which already conformed with the requirements of the directive could still be regarded as a danger to public health at the present time and be denied entry into the United Kingdom when that would no longer be the case as from 1 January 1989.

8. Moreover, from the time of the letter calling upon the United Kingdom to submit its observations to the time of the Commission's reply in these proceedings, the infringement alleged by the Commission (in other words the subject-matter of the application) remained the same, namely the United Kingdom's prohibition of imports of pasteurized milk and unfrozen pasteurized cream.

9. We can now consider that substance of the case. The Court has in the past firmly established that

'in the absence of harmonization in this field, it is for the Member States to determine . . . the level at which they wish to ensure that human life and health are protected'.

But they may only do so

'with due regard to the requirements of the free movement of goods', [5] that is to say 'within the limits imposed by the Treaty'. [6]

10. The fact is that 'the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States'. Since it allows derogations from the fundamental principle of the free movement of goods, it authorizes 'restrictive measures . . . only in so far as they are "justified", that is to say necessary in order . . . to ensure the protection of human health and life'. [7]

11. That is not however the case, where 'the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much'. [8]

4 — See for example the judgment of 15 December 1982 in Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, paragraph 14.

5 — See for example the judgment of 6 June 1984 in Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 18, and more recently the judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 41.

6 — See the judgment of 20 May 1976 in Case 104/75 *De Peijper* [1976] ECR 613, paragraph 15. See also the judgment of 15 July 1982 in Case 40/82 *Commission* v *United Kingdom* [1982] ECR 2793: '. . . the effects of health policy on imports from other Member States cannot exceed the limits laid down by Community law' (paragraph 34).

7 — See for example the judgment of 12 July 1979 in Case 153/78 *Commission* v *Germany* [1979] ECR 2555, paragraph 5.

8 — See for example the judgments in *Melkunie* and *De Peijper*, *supra*, paragraphs 12 and 17 respectively.

12. Obviously, a total prohibition of imports is the most restrictive obstacle to trade. The issue in this case is, therefore, whether it is the only effective way of protecting public health, having regard to the characteristics of the product in question.

13. An interesting precedent in that respect is to be found in the judgment of the Court of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, which concerned the United Kingdom's regulations on the importation and marketing of UHT milk and cream.

14. In that case too the United Kingdom had contended that the total prohibition of imports, which in fact derived from the obligation to re-treat and repackage imported UHT milk within the territory of the United Kingdom, was the only way of effectively protecting the health of consumers and was therefore justified under Article 36 of the Treaty.

15. In essence it based that view on the same considerations as in this case, namely 'the disparities in the laws of the Member States relating to the production and treatment of . . . milk, . . . the varying degree of application of those different laws and . . . the impossibility of exercising control over the production cycle of . . . milk in the other Member States from collection at the farm to packing and distribution'. It also stated that 'such control is indispensable for ensuring that the milk obtained is free of any bacterial or virus infection' (paragraph 24).

16. As far as the present case is concerned, the United Kingdom takes the view that those considerations apply with even greater force since the pasteurization of milk offers considerably less substantial guarantees than ultra high temperature treatment, an inadequacy which should therefore be offset by supplementary precautions throughout the production cycle, from the farm to the final consumer. For that purpose, border checks do not provide sufficient guarantees and moreover would involve delays which would render the imported milk unfit for consumption.

17. It is true that in the judgment in Case 124/81 the Court rejected the United Kingdom's arguments on grounds which to a considerable extent related to the specific features of the production and packaging of UHT milk (see paragraphs 25 to 27).

18. The fact nevertheless remains that the Court recognized in that judgment that the United Kingdom, in its concern to protect human health, could secure guarantees equivalent to those prescribed for its domestic production, without recourse to a total prohibition of imports (paragraph 28).

19. That seems to me to be the case in these proceedings too.

20. The United Kingdom should at least provide for the possibility of allowing imports of pasteurized milk and unfrozen pasteurized cream originating in another Member State and produced and marketed under objective conditions identical to those which it has adopted for itself. In other words, milk producers in the other Member States should have an opportunity of proving that the pasteurized milk produced by them fulfils the conditions laid down in the United Kingdom legislation. However,

that possibility is denied them since they are confronted by a total prohibition of imports, irrespective of the quality of the milk sold by them.

21. There is absolutely no need for the United Kingdom to be able to make checks itself at every stage of production in the other Member States in order to ensure that its legislation is properly complied with.

22. As the Court also pointed out in paragraphs 30 and 31 of its judgment of 8 February 1983, provision could be made, within the framework of cooperation between the authorities of the Member States, for substantiating documents or certificates issued by the competent authorities in the exporting Member States to certify that the products in question comply with the United Kingdom requirements. By thus creating a presumption of the conformity of the imported products with the requirements of the legislation of the importing country, those documents would facilitate and simplify frontier checks, without thereby precluding the United Kingdom authorities 'from carrying out controls by means of samples to ensure observance of the standards which it has laid down, or from preventing the entry of consignments found not to conform with those standards'.

23. That is what the United Kingdom did, following the judgment of the Court in the UHT milk case, by preparing, in consultation with the Commission and the various Member States, a model public-health certificate to be signed by the competent authorities in the exporting Member State and to accompany milk imported into the United Kingdom (see Appendix 9 to the defence). At first sight there is nothing to prevent such a system from being applied to pasteurized milk and unfrozen pasteurized cream. It would be sufficient to amend slightly paragraph 4 of the certificate entitled 'Guarantees as to the heat treatment process'.

24. It should also be noted that the great majority of the United Kingdom legislative and quasi-legislative measures applicable to the various phases of the production cycle are not specific to the production of pasteurized milk. The controls concerning the health of the cattle, conditions on the farms, requirements as to the handling, transport and distribution of raw milk apply regardless of the type of heat treatment (sterilization, pasteurization, ultra-high-temperature treatment) which it will subsequently undergo.

25. It seems to me in particular that the dairies which are now exporting UHT milk to the United Kingdom under the certificate to which I referred earlier should be allowed to export pasteurized milk to the United Kingdom after a straightforward check of their pasteurizing methods and facilities.

26. Moreover, a system of certificates and inspections to ensure compliance with standards has also been introduced by the Council directive of 5 August 1985 specifically in order to promote intra-Community trade in heat-treated milk in compliance with the requirements laid down by it regarding production, collection, treatment and transport. I confess that I am very amenable to the Commission's reasoning to the effect that pasteurized milk which already conforms to the requirements of that directive should be able to be imported into the United Kingdom now even though the period for the implementation of the directive has not yet expired. Products which will be regarded as not constituting any danger to health as from 1 January 1989 should also be so regarded at the present time.

27. It would not be a question of giving effect to the directive in question before the

time prescribed for its implementation has elapsed, but merely of accepting that pasteurized milk complying with agreed common standards offers sufficient guarantees to ensure effective protection of human health.

28. As regards the possibility of carrying out certain tests (in particular establishing the total count of any bacteria contained in the milk, for which a period of 1 to 3 days appears to be necessary) with sufficient rapidity, the following observations may be made. As from 1 January 1989, Article 7 (3) of the directive of 5 August 1985 will apply; it provides that 'as a general rule, checks and inspections shall be carried out at the place of destination of the goods or at another suitable place, provided that in the latter case the place chosen interferes as little as possible with the routing of the goods. The checks and inspections referred to in paragraphs (1) and (2) may not unduly delay the passage of the goods and their placing on the market, or cause delays which might adversely affect the quality of the milk'.

29. The United Kingdom stated in paragraph 3.14 of its defence that at the present time, in the case of domestic production, 'the sampling of heat-treated milk is carried out at dairies or at the retail point of sale by environmental health officers or by trading standards officers'.

30. It would therefore be sufficient for those officers to extend their checks to imported pasteurized milk. The milk will in any case have been subject to controls in the country of origin (from the farm until bottling) and will be accompanied by a health certificate.

31. The risk that imported milk not conforming to the standards might already have reached consumers' tables when the result of the checks carried out at the retailers' premises are known is therefore somewhat hypothetical.

32. We should not lose sight of the fact that in this case the product to be imported is not one containing chemicals whose effects on the human organism have not yet been studied scientifically in sufficient depth. On the contrary it is a product which has undergone treatment designed specifically to remove any danger to health. In its defence, the United Kingdom itself referred to the definition given on page 33 of the 1981 International Dairy Federation Bulletin according to which 'pasteurization is a process applied to a product with the object of minimizing possible health hazards arising from pathogenic micro-organisms associated with milk by heat treatment which is consistent with minimal chemical, physical and organoleptic changes in the product'.

33. The agent for the United Kingdom contended, however, that the Commission had not been able to prove that any other Member State was at present able to give a guarantee that milk pasteurized on its territory already complied with the United Kingdom standards or those laid down in the directive.

34. In that connection it should be pointed out in the first place that the United Kingdom should have indicated specifically in what respects it considered the guarantees and controls prescribed in the other Member States to be insufficient,[9] rather

9 — See judgment of 8 November 1979 in Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369, paragraphs 24 and 28.

than confining itself to emphasizing the disparities existing in that connection as between the other Member States themselves and between the United Kingdom and the other Member States. The fact that the relevant national rules are different does not mean that they cannot be equivalent.

35. In response to that same argument, the Commission stated at the hearing that 80% of the milk pasteurized in the Irish province of Leinster could be classified in bands A and B of the total bacterial count system established by the Milk Marketing Board (page 17 of the defence) but could not be exported to the United Kingdom and that a Luxembourg dairy fulfilled the United States of America quality standards, which are particularly severe, and had therefore secured an exclusive contract to supply milk and dairy products to the American armed forces stationed in Germany.

36. Those statements, for which no written evidence was provided, cannot of course be regarded as decisive. But the fact is that neither the Commission nor the United Kingdom seems to have approached the other 11 Member States or their dairies for the purpose of carrying out a systematic investigation and accordingly it cannot be stated with certainty that none of those dairies could satisfy the conditions laid down in the United Kingdom legislation or in the directive.

37. As I have already indicated, the continental dairies authorized to export UHT milk to the United Kingdom fulfil requirements which are regarded as satisfactory by the United Kingdom authorities regarding the condition of the milk before it is treated (see in that connection paragraph 5 of the form of certificate contained in Appendix 9 to the defence). The possibility cannot therefore be ruled out that, after verification of the pasteurization methods used by them, those dairies could also be regarded as meeting the United Kingdom standards in that respect.

38. But above all we must raise the following basic question: if it were established that no other Member State was in fact able to offer the guarantees demanded by the United Kingdom, would the United Kingdom be entitled to maintain an absolute prohibition of imports?

39. In that connection, it must be noted in the first place that a total prohibition of that kind is liable to discourage any application for authorization to supply the market, since any application would automatically be met with a negative response, regardless of the arguments put forward in support of it.

40. It should then be borne in mind that a total prohibition without limitation as to time, justified by circumstances existing at a particular moment, would render the situation immutable and make it impossible, for an indefinite period, to achieve one of the principle aims of the Treaty, namely the free movement of goods.

41. Finally, the Court has consistently held that the prohibition contained in Article 30 of the Treaty also refers to rules which are potentially liable to hinder intra-Community trade. It is not necessary for an undertaking in another Member State actually to show that it was interested in exporting the goods in question and was in a position to do so.

42. To summarize, my view is therefore that a Member State may not, by law or regulation, prevent an exporter from another Member State from furnishing proof that his product satisfies the rules of the country of importation.

43. Moreover, the Court has already held in its judgment of 28 January 1986 in Case 188/84 *Commission* v *France* [1986] ECR 419) that a Member State

'is not entitled to prevent the marketing of a product originating in another Member State which provides a level of protection of the health and life of humans equivalent to that which the national rules are intended to ensure or establish. It is therefore contrary to the principle of proportionality for national rules to require such imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the Member State in question'.

44. It is therefore hardly conceivable that the total prohibition of imports of pasteurized milk laid down in the United Kingdom legislation could be justified under Article 36.

45. It might, however, be objected that it would not be reasonable to require the United Kingdom to establish a new system based on bilateral collaboration with the Member States which are prepared to furnish the requisite guarantees a few months before the entry into force of a directive harmonizing legislation in that area.

46. It must however be stated in that connection that the Commission sent a warning letter to the United Kingdom on 2 February 1984 and the latter could therefore have remedied the situation during that same year.

47. Moreover, it must not be forgotten that

'... the Court has consistently held, for example in the judgment of 7 February 1973 in Case 39/72 *Commission* v *Italy* [1973] ECR 101, that the subject-matter of an action brought under Article 169 of the Treaty is established by the Commission's reasoned opinion and even where the default has been remedied after the period prescribed in the second paragraph of that article has elapsed, an interest still subsists in the action. That interest may in particular consist in establishing the basis for a liability which a Member State may incur towards those to whom rights accrue as a result of that failure.' [10]

48. Finally — and this is the most important point — the United Kingdom is at liberty to transpose Directive 85/397/EEC into its national law at any time before 1 January 1989. If it does so, it will thereby put an end to its infringement (the absolute prohibition) without having to establish a transitional regime, and at the same time will be sure that only milk pasteurized in accordance with the standards of the directive will enter its territory.

Conclusion

49. I therefore propose that the Court should uphold the Commission's conclusions as set out in its reply and should order the United Kingdom to pay the costs.

10 — Judgment of 17 June 1987 in Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6; judgment of 5 June 1986 in Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraphs 8 and 9; and judgment of 20 February 1986 in Case 309/84 *Commission* v *Italy* [1986] ECR 599, paragraph 18.