JUDGMENT OF THE COURT (Fifth Chamber)
6 May 1986 *

In Case 304/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the cour d'appel, Colmar, for a preliminary ruling in the proceedings pending before that court between the

Ministère public

and

(1) Claude Muller,

(2) Kampmeyer-France SARL,

(3) Comité national des associations populaires familiales et syndicales

on the interpretation *inter alia* of Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (Official Journal 1974, L 189, p. 1),

THE COURT (Fifth Chamber)

composed of: U. Everling, President of the Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Claude Muller and Kampfmeyer-France SARL, by Lise Funck-Brentano and Françoise Jemoli,

* Language of the Case: French.

the German Government, by Martin Seidel and Ernst Röder,

the Italian Government, by Pier Giorgio Ferri,

the French Government, by R. Abraham,

the Commission of the European Communities, by Michel Van Ackere,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 25 October 1984, which was received at the Court on 21 December 1984, the cour d'appel, Colmar, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs and on the interpretation of Articles 30 to 36 of the EEC Treaty.

2 Those questions were raised in criminal proceedings brought against Kampfmeyer-France SARL in the person of its manager, Claude Muller. Kampfmeyer had imported from the Federal Republic of Germany a special primary preparation called 'Phénix' used in the manufacture of pastry products. The preparation, which was lawfully marketed in the Federal Republic of Germany, contained the emulsifying agent E 475 (polyglycol esters of fatty acids). The use of that agent in foodstuffs is not authorized in France. The fact that the imported product

contained the substance was not mentioned on the packaging which, however, bore the words 'conforms to French legislation'.

3 It appears from the documents before the Court that French legislation (Decree of 15 April 1912, JORF of 29 June 1912) prohibits the use of any chemical substance in foodstuffs unless authorized by inter-ministerial order. No such authorization had been granted for the use of the emulsifier E 475. A circular of 8 August 1980 (JORF of 25 September 1980) specifies the information to be provided in applications for authorization; applicants must show that the addition of the substance in question is in the interests of users and consumers and that the substance is harmless in normal use.

4 On those facts the tribunal correctionnel, Strasbourg, by judgment of 13 October 1983, found Mr Muller guilty of the offences of deception in relation to the contents of a product and adulteration of foodstuffs, imposed a fine on him, ordered him to pay damages and ordered the publication of its judgment in the press.

5 Mr Muller appealed against that judgment, relying on the provisions of Directive 74/329 and Article 30 of the Treaty. In order to be able to assess the merits of his arguments, the cour d'appel, Colmar, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is the effect of Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs to prevent a Member State from prohibiting the use of one of the substances listed in Annex I thereto, and, if not, in what circumstances may such a prohibition be permitted under Community law?

(2) May a Member State which has properly prohibited the use of one of the substances listed in Annex 1 prevent the importation and marketing in its national territory of a product containing such a substance manufactured in another Member State in conformity with Community legislation on grounds

other than those set out in Article 8 (4) of the Directive of 18 June 1974 without infringing Article 30 of the Treaty of Rome?'

The first question

6 This question is concerned with the interpretation of Directive 74/329, the objective of which is to approximate national laws and, as a first stage, to establish 'a single list of . . . agents which may be authorized by the Member States for the treatment of foodstuffs' (fourth recital). During a second stage, the Council must determine the foodstuffs to which the substances may be added and the conditions under which they may be added (sixth recital and Article 4). So far, however, the Council has not adopted any measure to that effect.

7 Article 2 (1) of the directive states that 'Member States shall authorize the use as emulsifiers, stabilizers, thickeners and gelling agents in foodstuffs intended for human consumption, of only those substances listed in Annex I and where appropriate, only under the conditions specified therein.' Article 5 of the directive provides that Member States may, for a maximum period of one year, suspend the authorization to use any substance listed in Annex I or reduce the maximum authorized level if the use or level of the substance in foodstuffs might endanger human health. Article 8 sets out labelling rules for the substances covered by the directive; according to Article 8 (4), Member States may no longer prohibit the introduction into their territory and the marketing of such substances for the sole reason that they consider the labelling inadequate if it satisfies the conditions laid down in Article 8.

8 All the parties who have submitted observations agree that it is clear from the aforementioned articles, taken as a whole, that Directive 74/329 does not require the Member States to accept the substances listed in the directive in every case. They disagree, however, about the discretion which the Member States enjoy to prohibit the use of one of those substances.

9 Mr Muller, Kampfmeyer and the German and Italian Governments take the view that it is apparent from the aim of the directive that such a prohibition must be based on reasons relating to the protection of human health and confined to specific foodstuffs. Any general and absolute prohibition of any one of the relevant substances is therefore not permitted.

10 On the other hand, the French Government takes the view that the list of additives in Annex I to the directive is limitative only and does not oblige the Member States to authorize the use of each of the additives. Consequently, although Member States may no longer authorize substances except those appearing on that list, they may prohibit their use, even entirely, if they consider them dangerous for the health of the consumer.

11 The Commission agrees that a Member State may prohibit, even entirely, the use of any one of the substances listed in the directive as far as foodstuffs originating in its territory are concerned. However, it considers that such a prohibition may not be imposed on foodstuffs presenting no danger to health imported from other Member States in which they are lawfully marketed. The Commission also points out that the Member States' freedom to prohibit the use of the substances in question is restricted by the special provisions of Articles 5 and 8 of the directive and by the provisions of the Treaty on the free movement of goods.

12 As stated above, Directive 74/329 is intended to achieve only partial harmonization as regards the additives in question; the conditions governing their use are to be determined at the Community level only at a subsequent stage. In merely specifying the emulsifiers, stabilizers, thickeners and gelling agents 'for use in foodstuffs' it allows the Member States to lay down their own rules on the use of such agents, particularly as regards the foodstuffs in which they may be used and the conditions for their use. Nevertheless, it is clear from the scheme of the directive and from other rules of Community law that the power of the Member States to adopt such rules is not unlimited.

13 In that respect it should be pointed out in the first place that Article 5 of the directive allows a Member State which has authorized the use in foodstuffs of any of the substances listed in Annex I to suspend such authorization or restrict its scope only for reasons relating to the protection of human health and for a restricted period pending a final decision by the Council. Moreover, Article 8 (4) excludes a prohibition of that kind based solely on inadequate labelling if the labelling satisfies the conditions laid down in that article.

14 Secondly, as the Court held most recently in its judgment of 10 December 1985 in Case 247/84 *Motte* [1985] ECR 3887, 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. Consequently, when prohibitions on the use of substances listed in Annex I to the directive are applied to products imported from other Member States, Articles 30 *et seq.* of the Treaty, with which the second question is concerned, must be observed.

15 The answer to the first question must therefore be that Council Directive 74/329 of 18 June 1974 does not prevent a Member State from prohibiting the use of one of the substances listed in Annex I thereto, provided that the conditions laid down in Articles 5 and 8 of the directive and, as regards the application of the prohibition to foodstuffs imported from other Member States, in Articles 30 *et seq.* of the Treaty, are observed.

The second question

16 As regards the second question, concerning the interpretation of Articles 30 *et seq.* of the Treaty, it cannot be denied that the application of national legislation of the kind in question in the main proceedings to products imported from other Member States in which they are lawfully marketed may impede intra-Community trade and thus constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. It is nevertheless necessary to consider whether, in view of the only partial Community harmonization in the field of food additives, the national legislation may be justified on grounds of the protection of human health within the meaning of Article 36 of the Treaty.

17 Mr Muller and Kampfmeyer argue in that respect that, according to the case-law of the Court, derogations from the principle of the free movement of goods and in particular derogations relating to the protection of public health must be interpreted strictly. More specifically, as far as emulsifying agent E 475 is concerned, they take the view that no ground of public health exists which allows a Member State to prevent the marketing of a product incorporating that agent in conformity with the terms of Directive 74/329. The substance is not harmful in itself; moreover, the Community's Scientific Committee for Food has recognized that it has many advantages, both for the user and the consumer. In any event, the burden of proving circumstances justifying a derogation from the principle of the free movement of goods rests on the Member State whose legislation is responsible for the obstruction.

18 The French Government argues that, as far as food additives are concerned, the national authorities have the right and the duty to ensure that the health of consumers is protected by taking account of their eating habits. As far as emulsifying agent E 475 is concerned, there are serious doubts that it is harmless in view of the specific eating habits of the French population. It is clear from a recent survey carried out in France that there is a risk that the daily acceptable intake proposed by the Community's Scientific Committee for Food will be exceeded in France, particularly in children, who are major consumers of pastry products.

19 The Commission maintains that a general prohibition on the importation and marketing of products lawfully marketed in another Member State on the ground that they contain one of the agents listed in Directive 74/329 is excessive if the addition of the agent in question remains within limits which are acceptable in the light of international scientific knowledge. As regards more particularly emulsifying agent E 475, the Community's Scientific Committee for Food recognizes that it has a number of technological advantages, especially when used in bakery products, and has concluded that a daily intake of 25 mg per kilogram of bodyweight is acceptable.

20 It is necessary to point out first of all that the parties are agreed that, although the substances referred to in Directive 74/329 are not harmful in themselves, their consumption beyond a certain level may create a risk to human health. That is

moreover confirmed by the fact that the Community legislature has proposed that the foodstuffs to which the substances may be added and the maximum acceptable intakes should be determined during a second stage in the approximation of national laws. It appears from the documents before the Court that in the present state of scientific research there is uncertainty as to the critical thresholds of harmfulness since such thresholds vary according to the quantities of additives absorbed with all the food eaten and thus depend to a large extent on eating habits in the various Member States.

21 As the Court has held, *inter alia* in its judgment of 14 July 1983 in Case 147/82 *Sandoz* [1983] ECR 2445 and of 10 December 1985 in Case 247/84 *Motte* in such circumstances it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure in the light of the specific eating habits of their own population, having regard, however, to the requirements of the free movement of goods within the Community.

22 It must also be observed that in Directive 74/329, as in the other basic directives on food additives, conceived along similar lines, great prudence is shown in regard to the potential harmfulness of such substances, the underlying principle being that the uncontrolled consumption of additives with food should be restricted as far as possible. That principle, which must be regarded as meeting a legitimate aim of health policy, is applied in such a way that only additives for which there is a real need, particularly of a technological or economic nature, are allowed in foodstuffs for humans.

23 It follows that, as it stands at present, Community law does not prevent a Member State from prohibiting the marketing of foodstufs from other Member States to which such substances have been added. However, the principle of proportionality which underlies the last sentence of Article 36 of the Treaty requires that any such prohibition be restricted to what is necessary to attain the legitimate aim of protecting health. Consequently, authorizations to market such products should be granted when they are compatible with that aim.

24 It is for the Member States to consider, in the context of factual assessments which they must undertake in that regard, whether the marketing of foodstuffs containing additives may present a risk to public health and whether there is a real need for the additives in the particular foodstuffs. In applying those criteria they must take account of the results of international scientific research and in particular of the work of the Community's Scientific Committee for Food viewed in the light of the eating habits prevailing in the importing Member State.

25 It is for the competent national authorities to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty and, in particular, to show that the marketing of the product in question creates a risk to public health and, as the case may be, that the addition of the substances in question does not meet a real need.

26 For those reasons the answer to the second question must be that Articles 30 to 36 of the Treaty do not prevent a Member State from prohibiting the marketing of foodstuffs to which one of the substances listed in Annex I to Directive 74/329 of 18 June 1974 has been added and which have been imported from other Member States in which they were lawfully marketed. However, the marketing of such foodstuffs must be authorized, under a procedure easily accessible to manufacturers and traders, if the addition of the substance in question meets a genuine need and presents no danger to public health. It is for the competent national authorities to show in each case, in the light of national eating habits and with due regard to the results of international scientific research, that the rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty.

Costs

27 The costs incurred by the German, French and Italian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings 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 submitted to it by the cour d'appel, Colmar, by judgment of 25 October 1984, hereby rules:

(1) Council Directive 74/329 of 18 June 1974 does not prevent a Member State from prohibiting the use of one of the substances listed in Annex I thereto, provided that the conditions laid down in Articles 5 and 8 of the directive and, as regards the application of the prohibition to foodstuffs imported from other Member States, in Articles 30 et seq. of the Treaty, are observed.

(2) Articles 30 to 36 of the Treaty do not prevent a Member State from prohibiting the marketing of foodstuffs to which one of the substances listed in Annex I to Directive 74/329 of 18 June 1974 has been added and which have been imported from other Member States in which they were lawfully marketed. However, the marketing of such foodstuffs must be authorized, under a procedure easily accessible to manufacturers and traders, if the addition of the substance in question meets a genuine need and presents no danger to public health. It is for the competent national authorities to show in each case, in the light of national eating habits and with due regard to the results of international scientific research, that the rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 6 May 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber