JUDGMENT OF THE COURT (First Chamber)
27 June 1996 *

In Case C-293/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Eerste Aanleg, Turnhout (Belgium), for a preliminary ruling in the criminal proceedings before that court against

Jacqueline Brandsma

on the interpretation of Articles 30 and 36 of the EC Treaty,

THE COURT (First Chamber),

composed of: D. A. O. Edward, President of the Chamber, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Ms Brandsma, by J. M. van Hille, of the Ghent Bar,

— the Netherlands Government, by J. G. Lammers, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Austrian Government, by F. Cede, Botschafter in the Federal Ministry of Foreign Affairs, acting as Agent,

— the Swedish Government, by L. Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and D. Lloyd Jones, Barrister,

— the Commission of the European Communities, by H. van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Brandsma, represented by M. Ryckman, of the Ghent Bar, the Swedish Government, represented by L. Nordling and

E. Brattgård, Departementsråd in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by H. van Lier, at the hearing on 1 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 29 February 1996,

gives the following

Judgment

1 By judgment of 20 October 1994, received at the Court on 28 October 1994, the Rechtbank van Eerste Aanleg (First Instance Court), Turnhout, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 30 and 36 of the Treaty.

2 The questions arose in criminal proceedings brought against Ms Brandsma, in her capacity as the person responsible for the HEMA shop in Turnhout, for infringing Article 8 of the Belgian Royal Decree of 5 June 1975 on the possession, marketing and use of pesticides and plant protection products. Ms Brandsma has been prosecuted for selling a product called 'HEMA Tegelreiniger', used to prevent algae from growing on walls and tiles. No application for authorization has been made to the Belgian Ministry of Public Health in respect of this product, but it has an authorization number in the Netherlands, where it is sold in various large stores belonging to the HEMA group.

3 Considering that the case raised a problem of interpretation of Community law, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Must a legal provision of a Member State prohibiting pesticides for non-agricultural use which have not been previously authorized by the Minister responsible for public health from being marketed, acquired, offered, put on display or sale, kept, prepared, transported, sold, disposed of for valuable consideration or free of charge, imported or used, be regarded as a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, where that national provision has the effect that a pesticide for non-agricultural use lawfully marketed in another Member State may not be imported and sold in the first-mentioned Member State unless prior authorization has been obtained from the Minister responsible for public health in the first-mentioned State?

2. If the answer to the first question is in the affirmative and such provision is contrary to Article 30 of the EEC Treaty, may the first-mentioned Member State, in the circumstances set out above, lawfully rely on the exception set out in Article 36 of the EEC Treaty on grounds of protection of public health in order to maintain the provision in question and avoid the application of the prohibition contained in Article 30 of the EEC Treaty?'

4 As far as the first question is concerned, all the parties agree that the Belgian law must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

5 In this regard, it should be noted that, as the Court has consistently held, legislation such as that applicable in this case constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the

Treaty, since it is capable of hindering, directly or indirectly, actually or potentially, trade between the Member States (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837).

6 In these circumstances, the reply to the first question should be that a legal provision of a Member State prohibiting pesticides for non-agricultural use which have not been previously authorized from being marketed, acquired, offered, put on display or sale, kept, prepared, transported, sold, disposed of for valuable consideration or free of charge, imported or used, constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

7 As far as the second question is concerned, Ms Brandsma avers that the product sold by her has been approved in the Netherlands and satisfies all the requirements of the applicable directives. She cites in this connection Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234), Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201) and Council Directive 78/631/EEC of 26 June 1978 on the approximation of the laws of the Member States relating to the classification, packaging and labelling of dangerous preparations (pesticides) (OJ 1978 L 206, p. 13). Consequently, Article 36 may be relevant only in so far as the requirement for fresh approval goes beyond what is provided for by those directives. Moreover, it would not be permissible under Article 36 of the Treaty for the product in question to be required to be subjected to a fresh approval procedure in Belgium, since public health in that State is sufficiently protected by the grant of authorization in the Netherlands. In addition, counsel for Ms Brandsma made it clear at the hearing that neither HEMA nor his client had lodged any application for approval in respect of the product in Belgium. In any event, the onus is on the Public Prosecutor to establish that the Belgian formality is essential on public health grounds and that the Netherlands approval is insufficient in that regard.

8 The Netherlands, Austrian and Swedish Governments, the United Kingdom and the Commission point out that the product in question comes into the class of biocides, for which there is at present no harmonization directive, but merely a proposal for a directive providing for national approval procedures (OJ 1995 C 261, p. 5).

9 They consider that this case is similar to Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277, and conclude that a national measure requiring prior authorization to market a product is justified on grounds of the protection of public health within the meaning of Article 36 of the Treaty. The United Kingdom and Sweden also mention protection of the environment as a justification.

10 The Court finds that, as Community legislation stands, there is not yet any provision relating to the marketing of biocidal products. For the reasons given by the Advocate General in points 16, 17 and 18 of his Opinion, the directives relied upon by the defendant in the main proceedings are not relevant with regard to the marketing of a product such as HEMA Tegelreiniger. It will therefore be necessary to determine whether a national provision such as the one applicable in the main proceedings can be justified in the light of the derogations referred to in Article 36 of the Treaty.

11 Since biocidal products are used to combat organisms harmful to human or animal health and organisms liable to damage natural or manufactured products, they inevitably contain dangerous substances. As the Netherlands, Austria, Sweden, the United Kingdom and the Commission have rightly observed, in the absence of harmonizing rules, the Member States are free to decide on their intended level of

protection of human health and life and on whether to require prior authorization for the marketing of such products.

12 As the Court held, however, in *Frans-Nederlandse Maatschappij voor Biologische Producten*, at paragraph 14, whilst a Member State is free to require a product of the type in question, which has already received approval in another Member State, to undergo a fresh procedure of examination and approval, the authorities of the Member States are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade and to take account of technical or chemical analyses or laboratory tests which have already been carried out in another Member State.

13 The reply to the second question should therefore be that national legislation prohibiting the marketing of a biocidal product containing dangerous substances, such as the product at issue, without prior authorization from the competent authorities is justified under Article 36 of the Treaty, even if that product has already been authorized for sale in another Member State. The competent authorities are not, however, entitled unnecessarily to require technical or chemical analyses or laboratory tests when the same analyses or tests have already been carried out in that other Member State and their results are available to those authorities or may at their request be placed at their disposal.

Costs

14 The costs incurred by the Netherlands, Austrian and Swedish Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg, Turnhout, by judgment of 20 October 1994, hereby rules:

1. **A legal provision of a Member State prohibiting pesticides for non-agricultural use which have not been previously authorized from being marketed, acquired, offered, put on display or sale, kept, prepared, transported, sold, disposed of for valuable consideration or free of charge, imported or used, constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EC Treaty.**

2. **National legislation prohibiting the marketing of a biocidal product containing dangerous substances, such as the product at issue, without prior authorization from the competent authorities is justified under Article 36 of the EC Treaty, even if that product has already been authorized for sale in another Member State. The competent authorities are not, however, entitled unnecessarily to require technical or chemical analyses or laboratory tests when the same analyses or tests have already been carried out in that other Member State and their results are available to those authorities or may at their request be placed at their disposal.**

Edward Sevón Wathelet

Delivered in open court in Luxembourg on 27 June 1996.

R. Grass D. A. O. Edward

Registrar President of the First Chamber