JUDGMENT OF THE COURT (Fifth Chamber)

6 November 2003 *

In Case C-358/01,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by refusing access to the Spanish market under the name of 'limpiador con lejía' ('cleaner with bleach') or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 grams per litre, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and P. Jann, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 September 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by refusing access to the Spanish market under the name of 'limpiador con lejía' ('cleaner with bleach') or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 grams per litre, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC.

Legal framework

Community legislation

2 Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

3 Under Article 1 of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1), Member States must notify the Commission of any steps taken to prevent the free movement or placing on the market of a particular model or type of product lawfully produced or marketed in another Member State.

National legislation

4 Article 2(2) of Royal Decree No 3360/1983, as amended by Decreto Real No 349/1993 por el que se modifica la Reglamentación técnico-sanitaria de la lejía (royal decree amending technical and health regulations governing bleach) of 5 March 1993 (BOE No 94 of 20 April 1993, p. 1251; hereinafter 'the royal decree'), defines 'lejía' (bleach) as a solution of alkaline hypochlorite containing a concentration of active chlorine that must be not less than 35 g/l and not greater than 100 g/l.

5 Article 5 of the royal decree provides that the chlorine content must be of between 35 g/l and 60 g/l in order for the bleach to bear the words 'suitable for disinfecting drinking water'.

6 Article 17 of the royal decree contains a clause regarding mutual recognition according to which 'the requirements as to composition shall not apply to products coming from intra-Community trade which are lawfully manufactured and marketed in the Member State of origin. Provided that it does not pose a risk to human health or affect the application of Article 36 of the Treaty establishing the European Community, the products in question may be marketed in Spain with the name registered for use in the country of manufacture or, failing that, with a name consecrated by lawful and constant use in the Member State of manufacture, accompanied by a sufficiently precise description enabling the purchaser to know its true nature'.

7 The first 'supplementary provision' under the royal decree contains provisions referring to cases in which 'bleach' is a constituent element of another product. Its first paragraph is worded as follows:

'[T]he term "bleach" may appear on the label of a product as a constituent element in addition to other substances making up that product provided that the concentration of active chlorine hypochlorite corresponds to the concentration prescribed for bleach by law and must bear the words "not suitable for purifying drinking water".'

8 In a memorandum of 7 April 1998, the Instituto nacional del consumo (national consumers' institution; hereinafter 'the national institution') stated that, where

the person responsible for the placing on the market of such products wished to take advantage of the mutual-recognition clause, it should make the following available to the authorities:

— a label clearly stating the true concentration of active chlorine;

— sufficient evidence to show that the products concerned have the same disinfecting power as conventional bleach products;

— certified evidence that those products are marketed in the country of origin.

9 On the basis of that memorandum, the Consejería de Economía y Empleo de la Comunidad de Madrid (Council for the economy and employment of the Community of Madrid) imposed penalties on undertakings which marketed products on whose labelling appeared the words 'cleaner with bleach' but whose active chlorine concentration was less than 35 g/l. That body took the view that, although lawfully marketed in the Member State of origin, those products could not bear the term 'bleach' on the label since they did not meet the criteria regarding the minimum active chlorine content required by Spanish legislation on bleach.

Pre-litigation procedure and procedure before the Court

10 The Commission states that it was not until a complaint was lodged that it became aware of the difficulties encountered by certain operators wishing to import into Spain cleaning products containing bleach coming from other Member States in which they are lawfully manufactured and marketed. Those

difficulties are reportedly caused by the manner in which the Spanish authorities, in particular the national institution and the autonomous community of Madrid, interpret the royal decree.

11 The inquiry into that complaint resulted in a letter of formal notice being sent to the Kingdom of Spain on 4 November 1999 in which the Commission claimed that the former had failed to fulfil its obligations under Article 28 EC et seq. by refusing access to the Spanish market under the name 'limpiador con lejía' or similar to products lawfully manufactured and marketed in other Member States.

12 In its reply of 28 December 1999, the Kingdom of Spain forwarded to the Commission a report of the Ministerio de Sanidad y Consumo (Ministry of health and consumer affairs). The report made it clear that the marketing of bleach or other products containing bleach which did not have the minimum hypochlorite content required under Spanish law was authorised only if the products were lawfully manufactured, consumers were informed of the products' actual active chlorine content and the products had the same disinfecting power as bleach products which complied with the abovementioned content level.

13 On 17 February 2000, the Commission sent a second letter of formal notice to the Kingdom of Spain in which, after observing that the decisions to refuse access to the Spanish market adopted by the autonomous community of Madrid constituted measures derogating from the principle of the free movement of goods within the Community, it found that the Kingdom of Spain had failed to fulfil its obligations under Decision No 3052/95 by failing to notify it of those decisions.

14 In the absence of any reply from the Spanish authorities to the subsequent letter, the Commission, taking the view that the infringement was still continuing, sent a reasoned opinion on 24 July 2000 to the Kingdom of Spain calling on it to take the measures necessary to comply with that opinion within two months from its notification. In that reasoned opinion, the Commission referred to procedures initiated by the autonomous community of Madrid with a view to imposing a penalty on certain operators wishing to import cleaning products containing bleach.

15 The reasoned opinion concludes that 'the Kingdom of Spain has failed to fulfil its obligations under Article 28 of the EC Treaty by adopting measures, such as ("como") the penalties imposed in Joined Cases 28/802/97-A and 28/063/98-A and in Case 28/801/97-A and the memorandum of 7 April 1998, which obstruct access to the Spanish market under the name of "limpiador con lejía" or similar of products lawfully manufactured and marketed in another Member State, and under Decision No 3052/95 for failing to notify those measures to the Commission'.

16 By letter transmitted by electronic mail of 1 August 2000, the Spanish authorities notified the Commission, pursuant to Decision No 3052/95, of the measures which they took with regard to bleach.

17 Next, by letter of 30 November 2000, the Spanish Government replied to the reasoned opinion, reiterating its arguments relating to consumer protection and pointing out that it considered the notification required by Decision No 3052/95 as having been complied with since the national measure concerning bleach was justified by the objective of protecting consumers and was not disproportionate.

18 Taking the view that the Kingdom of Spain had not brought to an end its infringement of Article 28 EC, the Commission decided to bring the present action.

19 The Commission claims that the Court should:

— declare that, by refusing access to the Spanish market under the name of 'limpiador con lejía' or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 g/l, the Kingdom of Spain has failed to fulfil its obligations under Article 28 of the EC Treaty;

— order the Kingdom of Spain to pay the costs.

20 The Kingdom of Spain contends that the Court should:

— [this head of claim seeking a declaration that certain data should be treated with confidentiality is no longer relevant];

— declare the application inadmissible or, in the alternative, restrict it to the procedures initiated by the autonomous community of Madrid with a view to imposing penalties and dismiss it;

— in the alternative, dismiss the application;

— order the Commission to pay the costs.

Admissibility

Arguments of the parties

21 The Spanish Government raises an objection of inadmissibility inasmuch as there is a lack of coordination between the pre-litigation stage and the procedure before the Court.

22 The Commission allegedly altered and extended the subject-matter of the dispute during the procedure before the Court. In the supplementary letter of formal notice and in the reasoned opinion, the Commission concentrated on the procedures initiated by the autonomous community of Madrid with a view to imposing a penalty on certain undertakings whilst, in the application, the form of order sought by the Commission does not relate only to those procedures (including the decisions taken in the context of those procedures), but is instead drawn up in vague and extremely general terms. The Spanish Government adds that there is no mention in the application of the minimum quantity of active chlorine per litre of bleach.

23 In the alternative, should the Court find the application admissible, the Spanish Government requests that the complaint relating to failure to comply with

Article 28 EC be restricted to the penalties imposed by the autonomous community of Madrid in the context of the procedures mentioned in the preceding paragraph.

24 The Commission submits that the arguments of the Spanish Government are based on a misunderstanding of the reasoned opinion. It concerns, in general, the fact that the Spanish authorities refuse to give access to the Spanish market under the name of 'limpiador con lejía' or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 g/l, and that the pre-litigation procedure was not restricted to the administrative penalties imposed by the autonomous community of Madrid. Those penalties and the memorandum of 7 April 1998 were cited only by way of example, as is clear from the wording itself of the reasoned opinion.

25 The differences between the wording of the operative part of the reasoned opinion and the form of order sought in the application did not entail, according to the Commission, alteration of the subject-matter of the proceedings. Moreover, the Commission submits that the result of such reformulation is in line with the practice frequently observed by the Court which consists in its drawing up the operative part of its judgments in abstract terms without necessarily mentioning the provision or specific instance giving rise to the dispute.

Findings of the Court

26 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in

particular, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10, and Case C-228/00 *Commission* v *Germany* [2003] ECR I-4139, paragraph 25).

27 The letter of formal notice from the Commission to the Member State concerned and the reasoned opinion issued by the Commission delimit the subject-matter of the proceedings, so that it cannot thereafter be extended. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55).

28 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited (see, to that effect, Case C-191/95 *Commission* v *Germany* cited above, paragraph 56).

29 The Court has also held that, although the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 15).

30 However, in the present case, the Commission cannot be criticised for having set out the subject-matter more extensively in its application than it had done during the pre-litigation procedure.

31 In the letter of formal notice the Commission had first of all clearly indicated that the procedure concerned the refusal to grant access to foreign products to the Spanish market and that such refusal arose from the way in which the Spanish authorities interpret the royal decree. The decisions of the autonomous community of Madrid are mentioned in the supplementary letter of formal notice. That subsequent letter sets out, in addition, the complaint regarding the failure to comply with the notification obligation provided for in Article 1 of Decision No 3052/95.

32 Next, in the reasoned opinion, the Commission arrives at the conclusion that the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC, first, by adopting measures which obstruct access to the Spanish market under the name of 'limpiador con lejía' or similar of products lawfully manufactured and marketed in another Member State and, secondly, under Decision No 3052/95 by failing to notify it of the abovementioned measures. It is only by way of example ('como') that it mentions the penalties imposed in Joined Cases 28/802/97-A and 28/063/98-A and in Case 28/801/97-A and the memorandum of 7 April 1998.

33 Finally, although the form of order sought in the application is drawn up in a slightly different way to the wording of the letters of formal notice and the reasoned opinion, it nevertheless reproduces the arguments put forward during the pre-litigation stage. The form of order sought no longer mentions the decisions of the autonomous community of Madrid but makes clear, as is evident from the abovementioned decisions, that the minimum concentration of active chlorine less than which access to the Spanish market is to be refused is 35 g/l.

34 It follows that the Commission has not extended or altered the subject-matter of the dispute during the procedure but has merely abandoned the complaint relating to the failure to notify, pursuant to Article 1 of Decision No 3052/95, the national measures in issue.

35 Furthermore, there is nothing to indicate that the Spanish authorities have not had available all the necessary information to enable them to put their case properly.

36 Given that the Commission has made use of the penalties imposed by the autonomous community of Madrid only by way of example, there is no need for the Court to restrict the scope of the application to those sanctions.

37 The plea of inadmissibility must therefore be dismissed in its entirety and the action declared admissible.

Substance

38 It is not disputed by the parties and is, moreover, expressly admitted by the Spanish Government that refusal to grant access to the Spanish market under the name 'limpiador con lejía' or similar to products lawfully manufactured and marketed in other Member States where their chlorine content is less than 35 g/l constitutes a measure having equivalent effect within the meaning of Article 28 EC. It is also common ground that active chlorine content for cleaning products has not been harmonised at Community level.

39 The parties however disagree as to whether that obstacle to the free movement of goods may be justified in the light of public health or consumer protection.

Arguments of the parties

40 The Spanish Government states that the only way adequately to control micro-organisms such as salmonella, campylobacter and escherichia coli is by using sound cleaning and disinfection procedures both at work and at home. That is all the more important where, in Spain, the ambient temperature is relatively high during most of the year. It is therefore essential as regards protection of public health to ensure a minimum active chlorine content of 35 g/l. Since the royal decree applies indifferently to domestic and to imported products, there is no arbitrary discrimination nor hidden restriction on intra-Community trade.

41 So far as concerns consumer protection, the Spanish Government submits that Spanish consumers traditionally recognise bleach for its whitening and disinfecting properties. Furthermore, affixing a label including the term 'bleach' when the active chlorine content of the hypochlorite solution is substantially less than the limits prescribed by law infringes the right of consumers to be clearly and precisely informed of the nature of the product being marketed in view of the choice available to them and the use to which they intend to put it. Such a product does not satisfy the characteristics required under the legislation governing bleach.

42 The Commission points out that consumer protection could be ensured by measures other than those consisting in reserving certain sales names, for example use of the term 'bleach', for products having specific characteristics. Other measures, such as the affixing of an appropriate label mentioning the nature and the characteristics of the product on sale, would be less restrictive of the marketing within one Member State of products coming from another Member State which comply with the standards required in the latter State.

43 Moreover, the interpretation of the royal decree advocated by the Spanish authorities renders meaningless the mutual-recognition clause the purpose of which is precisely to enable the marketing in Spain of bleach and particularly of products containing bleach which do not meet the requirements laid down by Spanish legislation but which satisfy those of other Member States in which they are lawfully manufactured and marketed.

Findings of the Court

44 It is settled case-law that Article 28 EC prohibits obstacles to the free movement of goods, in the absence of harmonisation of national laws, which are the consequence of applying to goods coming from other Member States, where they are lawfully manufactured and marketed, rules that lay down requirements to be met by those goods (such as those relating to their name, form, size, weight, composition, presentation, labelling and packaging), even if those rules apply to national and imported products alike (Case C-14/00 *Commission* v *Italy* [2003] ECR I-513, paragraph 69, and the case-law cited therein).

45 In order for protection of public health to justify the obstacle found, it must be established that products lawfully manufactured and marketed in Member States other than the Kingdom of Spain under the name 'limpiador con lejía' or similar where their active chlorine content is less than 35 g/l pose a risk to public health.

46 It cannot be claimed that a cleaning product whose active chlorine content is less than 35 g/l poses, of itself, a risk greater than that of similar products having a minimum active chlorine content of 35 g/l and whose marketing is authorised. Indeed, since active chlorine is a dangerous substance, the less of it a product contains, the less harmful it is likely to be to public health.

47 Even supposing that an active chlorine content of 35 g/l or greater were necessary for certain types of disinfection, it does not follow that any product whose active chlorine content is less than that figure constitutes a danger to public health. It must none the less be acknowledged that such cleaning products are not suitable for use for that type of disinfection.

48 The risk which could be linked to such a product therefore arises rather from the danger that a consumer might use it inappropriately or for purposes other than those for which it was intended.

49 In that respect, it must be stated, as the Commission has pointed out, that the Spanish legislation as applied by the national authorities is disproportionate to the objective of protecting consumers.

50 The affixing of a label containing information on the nature and main characteristics of the product, including its active chlorine content, appears altogether sufficient to inform consumers of the properties and composition of products such as those in issue in the present case.

51 The Spanish Government argues that, in Spain, consumers expect the active chlorine content of bleach to be not less than 35 g/l. They would therefore be misled if cleaning products which did not fulfil that expectation could be marketed in Spain.

52 However, the fact that the consumers of a Member State have very definite views regarding the composition or the characteristics of a given product is, in principle, not such as to justify obstacles to the free movement of goods.

53 The Court has held that the 'reference consumer' is an average consumer who is reasonably well informed and reasonably observant and circumspect (see, with regard to foodstuffs, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31). That test, based on the principle of proportionality, also applies in the context of the marketing of cosmetic products where a mistake as to the product's characteristics cannot pose any risk to public health (Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 28, and Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 31).

54 However, the Spanish Government has not been able to establish that there exist significant differences between the legibility and intelligibleness of labels on foodstuffs or cosmetics, on the one hand, and cleaning products, on the other, the alleged effect of which is that the disinfecting properties of the latter would not be correctly appreciated by consumers on reading the label. So far as concerns disinfecting products, it is essential that consumers should be informed of the active chlorine content of such products, whether it be less or greater than 35 g/l.

55 The Spanish Government none the less points out that, so far as concerns bleach, an error with regard to the level of sodium hypochlorite could have harmful consequences for the health of a consumer since the latter is counting on a disinfectant effect which the product does not possess.

56 Even if that were the case, the Spanish Government has not established the reason why an average consumer who is reasonably well informed and reasonably observant and circumspect should make such a mistake with regard to bleach when the same kind of mistake, equally harmful to health, is not committed as a result of misreading information on the labels of other products.

57 In that connection, Community legislation relating to the classification, packaging and labelling of dangerous preparations lays down the labelling requirements for dangerous preparations which manufacturers of bleach-based cleaning products must comply with if they wish to market them in Spain (see, in particular, Council Directive 88/379/EEC of 7 June 1988 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1988 L 187, p. 14) and Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1999 L 200, p. 1) repealing and replacing Directive 88/379 from 30 July 2002). Article 7 of Directive 88/379 specified the information which must appear clearly and indelibly on packaging and provided for the manner in which the chemical name of the substance or substances present in the preparation concerned should be indicated.

58 Where those requirements are met, there is no reason to doubt that the level of safety thus prescribed suffices to guarantee adequate and appropriate protection of consumers.

59 The Spanish Government further maintains that products which have been lawfully manufactured and marketed under the name 'limpiador con lejía' in other Member States do not comply with Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

60 That argument cannot be accepted. The labels affixed to the abovementioned products do not mislead the consumer with regard to the actual properties of those products since they bear the words 'with bleach'. The preposition 'with' ('con') clearly tells the consumer that he is purchasing a product which consists mainly but not exclusively of bleach. The true nature of that product is therefore not hidden from the consumer.

61 It must therefore be held that, by refusing access to the Spanish market under the name of 'limpiador con lejía' or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 g/l, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has been unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by refusing access to the Spanish market under the name of 'limpiador con lejía' (cleaner with bleach) or similar to products lawfully manufactured and marketed in other Member States where their active chlorine content is less than 35 grams per litre, the Kingdom of Spain has failed to fulfil its obligations under Article 28 EC;**

2. **Orders the Kingdom of Spain to pay the costs.**

Edward La Pergola Jann

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass V. Skouris

Registrar President