JUDGMENT OF THE COURT (Fifth Chamber)
26 October 1995 *

In Case C-51/94,

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, and Angela Bardenhewer, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Regierungsrat at the same Ministry, acting as Agents,

defendant,

APPLICATION for a declaration that, by requiring that in order to be marketed in Germany foodstuffs containing an ingredient which is not in conformity with the traditional German recipe must carry a trade description with an additional statement indicating that the substance in question has been used, even if that substance is already included in the list of ingredients, the Federal Republic of

* Language of the case: German.

Germany has failed to fulfil its obligations under Article 30 et seq. of the EC Treaty and Articles 5, 6 and 16 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann, P. Jann and L. Sevón, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 May 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 February 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by requiring that in order to be marketed in Germany foodstuffs containing an ingredient which is not in conformity with the traditional German recipe must carry a trade description with an additional statement indicating that the substance in question has been used, even if that substance is

already included in the list of ingredients, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 et seq. of the EC Treaty and Articles 5, 6 and 16 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1; hereinafter 'the Directive').

The German legislation

2 Paragraph 17 of the Lebensmittel-und Bedarfsgegenständegesetz (the German Law of 15 August 1974, currently in force, on foodstuffs and products for human consumption; hereinafter 'the LMBG') provides that:

'(1) It is prohibited,

...

2. to sell without sufficiently precise labelling,

(a) ...

(b) foodstuffs whose composition does not correspond to commercial practice in a manner which diminishes their utility or value to a significant degree, in particular their nutritional value and the level of customer satisfaction they offer, or

(c) foodstuffs whose appearance could lead the purchaser to believe that they are of a superior quality than in fact they are;

...

5. to sell foodstuffs with a name, specification or a presentation which may mislead the purchaser ... In particular, the consumer may be misled

...

(b) if the names, specifications, presentation, representations or other claims employed to indicate the origin of foodstuffs, their quantity, weight, date of manufacture or packaging, their durability or other elements of importance for establishing their quality, do so in a manner likely to mislead ...'

3 Paragraph 47(1) of that Law provides that:

'Products to which the present Law applies, and which do not comply with the legislation in force in the Federal Republic of Germany concerning foodstuffs, may not be imported into territory falling within the scope of the present Law ...'

4 The Law of 18 December 1992 amending the legislation on foodstuffs introduced a new Paragraph 47a in the LMBG, which applies to products from other Member States and has been in force since 1 January 1993. According to that provision:

'(1) By way of derogation from the first sentence of Paragraph 47(1), products to which the present Law applies, which are lawfully manufactured and marketed in another Member State of the European Community, or which come from a non-member country and are lawfully marketed in a Member State of the European Community, may be imported and placed on the domestic market even if they do not comply with the legislation concerning foodstuffs currently in force in the Federal Republic of Germany.

...

(4) If foodstuffs do not comply with the present Law, that fact should be mentioned on the label in an appropriate manner, to the extent required for the protection of consumers.'

The facts

5 The foodstuffs at issue in the present case are, on the one hand, 'hollandaise' sauce and 'béarnaise' sauce and, on the other hand, certain biscuits and pastry products containing an additive called E 160 F.

6 At the time when the Commission initiated the pre-litigation procedure, the German authorities, on the basis of Paragraph 17(1)(5) of the LMBG, prohibited the marketing of hollandaise sauce or béarnaise sauce prepared from vegetable fats on

the ground that consumers were led to believe that those products had been made with butter and eggs in accordance with the recipe traditionally followed in Germany.

7 While the pre-litigation procedure was still in progress, the marketing of those products became possible provided that an additional statement appears on the label specifying that they contain vegetable fats.

8 Likewise, in the case of the biscuits and pastry products containing E 160 F — which gives the product an intense colour — the German authorities, on the basis of Paragraph 17(1)(2)(b) and (c) of the LMBG, require an additional statement on the label so that the consumer is not left with the impression that the product contains eggs or that it contains more eggs than is the case.

9 In both cases, the requirement in question applies to products manufactured in Germany as well as to products imported from other Member States. Neither the Commission nor the other Member States were informed of the legislation in question.

10 In its reasoned opinion of 6 August 1992, concerning E 160 F, the Commission expressed the view that the Federal Republic of Germany had infringed Article 30 of the Treaty and Articles 6 and 16 of the Directive. In its reasoned opinion of 14 January 1993, concerning hollandaise and béarnaise sauces, the Commission further stated that, by requiring those specific statements to be displayed, the Federal Republic of Germany had infringed Article 30 et seq. of the Treaty and Article 5 of the Directive.

11 Article 5(1) of the Directive provides that the name under which a foodstuff is sold must be the name 'laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused'.

12 Article 6 of the Directive lays down the conditions in accordance with which ingredients must be listed on the labelling of products. Under the first subparagraph of Article 6(6), in the absence of Community provisions, 'national provisions may lay down that the name under which a specific foodstuff is sold is to be accompanied by mention of a particular ingredient or ingredients'. Pursuant to the second subparagraph of Article 6(6), the procedure laid down in Article 16 applies to any such national provisions.

13 Article 16 provides that:

'Where reference is made to this article, the following procedure shall apply:

(1) When a Member State maintains the provisions of its national laws, it shall inform the Commission and the other Member States thereof within a period of two years after notification of this Directive;

(2) Should a Member State deem it necessary to adopt new legislation, it shall notify the Commission and the other Member States of the measures envisaged and give the reasons justifying them. The Commission shall consult the Member States within the Standing Committee on Foodstuffs if it considers such consultation to be useful or if a Member State so requests.

Member States may take such envisaged measures only three months after such notification and provided that the Commission's opinion is not negative.

In the latter event, and before the expiry of the abovementioned period, the Commission shall initiate the procedure provided for in Article 17 in order to determine whether the envisaged measures may be implemented subject, if necessary, to the appropriate modifications.'

Infringement of Articles 6 and 16 of the Directive

14 The Commission complains that the Federal Republic of Germany has made it obligatory in certain cases to provide an additional statement in the trade description, without having followed the information procedure laid down in Article 16 of the Directive. In so doing, it has infringed Articles 6 and 16 thereof.

15 The Federal Republic of Germany, on the other hand, denies having infringed any of those provisions. It submits that the notification procedure laid down therein only applies to provisions of national law which require, in respect of 'a specific

foodstuff', that the presence of a particular ingredient or of a number of particular ingredients be indicated alongside the trade description. That is not true of Paragraphs 17 and 47a(4) of the LMBG which, following in this respect Article 2 of the Directive, establish a general rule for the protection of consumers, the scope of which is not confined to specific foodstuffs. Furthermore, the measures adopted by the authorities in individual cases for the implementation of those provisions do not constitute 'provisions' within the meaning of the Directive.

16 In that connection it should be noted that only the reasoned opinion of 6 August 1992, concerning E 160 F, mentions infringement of Articles 6 and 16 of the Directive. Furthermore, in paragraph 12 of that opinion, the Commission refers to 'that German provision', which must be interpreted as a reference to Paragraph 17 of the LMBG, which is the only provision of German law previously indicated in the opinion.

17 It is clear from Article 6(6) that the provisions of Community and national law to which it refers must concern specific foodstuffs and 'a particular ingredient or ingredients'. It is not, therefore, directed at general provisions such as Paragraphs 17 and 47 of the LMBG, even though, in practice, their application by the competent authorities may result in requiring that additional statements appear on the labelling beside the trade description, indicating the use of a particular ingredient or ingredients.

18 In view of the foregoing observations, the complaint alleging infringement of Articles 6 and 16 of the Directive must be rejected.

Infringement of Article 30 of the Treaty and Article 5 of the Directive

19 In the Commission's view, the requirement that the trade description of the products at issue carry an additional statement indicating that they were not made in

accordance with the traditional German recipe is incompatible with Article 5 of the Directive and Article 30 et seq. of the EC Treaty.

20 As regards Article 30, the Commission submits that the German legislation deprives the imported product of a trade description to which it is entitled in the Member State of manufacture and compels it to bear another, less well known and not so highly regarded by the consumer, which may make the product more difficult to market in Germany and thus hinder, at least indirectly, trade between Member States.

21 According to the Commission, a restriction of that nature is not necessary in order to attain an objective which is justified under Community law, particularly that of consumer protection, relied on by the defendant.

22 The German Government, on the other hand, while admitting that the requirements in dispute constitute hindrances to the free movement of goods, views those hindrances as justified by the need to protect consumers and to ensure fair trading.

23 As regards the first objective, the German Government contends that consumers often buy foodstuffs without undertaking a scrupulous examination of the product, their choice of which is determined by 'reference criteria' such as the trade description and the additional information accompanying it.

24 Consequently, if, in the case of the hollandaise and béarnaise sauces at issue, there were no requirement to display the statement in dispute, the consumer could be led to buy those products in the belief that they had been manufactured in accordance with the traditional German recipe, that is to say, with eggs and butter, when in fact vegetable fats have been used.

25 The same holds true of the incorporation of the additive or colorant called E 160 F in biscuits and pastry products. Where E 160 F is present, it is essential that its presence be specifically indicated by way of additional information in the trade description, since the intense yellow colouring of the finished product, by suggesting that the product contains a heavy concentration of egg yolk, would be misleading for the consumer.

26 The Federal Republic of Germany further contends that, in the case of certain products, there is an obligation even under Community law to display particular information beside the trade description and that, contrary to the submissions of the Commission, the particular requirements laid down in that connection by German law do not serve to detract from the products at issue. The sole purpose of such requirements is to draw the attention of German consumers to the presence of certain ingredients which they do not expect to find.

27 As regards the need to ensure fair trading, the German Government submits that the use of ingredients such as vegetable fats, which are less expensive than eggs and butter, enables the manufacturers of imported products to enjoy a position of considerable competitive advantage. In view of the fact that consumers do not sufficiently distinguish between the various methods of manufacture, that advantage is unacceptable.

28 That argument cannot be accepted.

29 According to settled case-law, in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 of the Treaty include obstacles to the free movement of goods where they are the consequence of applying rules

that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging) to goods from other Member States where they are lawfully manufactured and marketed, even if those rules apply without distinction to all products, unless their application can be justified by a public interest objective taking precedence over the free movement of goods (see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15).

30 The requirements at issue in the present case, which are applicable to domestic and imported products without distinction, concern the labelling and packaging of the products in question. They therefore constitute measures having equivalent effect, prohibited by Article 30 of the EC Treaty, unless they can be justified in accordance with the case-law referred to above.

31 It should be noted in that connection that, in the absence of Community harmonization — as in the present case — national measures which are necessary in order to ensure that products are accurately described are compatible with Article 30 et seq. of the Treaty, provided that they avoid any confusion on the part of consumers and ensure fair trading (see, in particular, Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 11).

32 Consequently, it should first be determined whether, as the German Government submits, the requirements at issue are necessary in order to ensure that consumers are correctly informed.

33 Admittedly, it cannot be ruled out that in certain cases the requirement that an additional statement accompany the trade description is necessary in order to avoid any confusion on the part of consumers. A requirement of that nature, which is moreover laid down in Article 6(6) of the Directive, is nevertheless unjustified in the present case.

34 As the Advocate General rightly observed at point 39 of his Opinion, consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the Directive. Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue.

35 Secondly, it must be determined whether the measures at issue are justified by the need to ensure fair trading, which, according to settled case-law, may also justify hindrances to the free movement of goods (see *inter alia* Case 182/84 *Miro* [1985] ECR 3731).

36 Contrary to the submission of the German Government, it does not follow that, because consumers do not sufficiently distinguish between the various methods of manufacture, the competitive advantage which certain producers may derive from the use of less expensive products cannot be regarded as permissible. As observed above, for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which, pursuant to Article 6 of the Directive, must appear on the labelling; in any case, as the Advocate General observed at point 40 of his Opinion, it is open to producers to draw the attention of such consumers to the fact that traditional ingredients are used.

37 It follows that the requirements at issue are not necessary in order to ensure consumer protection and fair trading and that they are therefore incompatible with Article 30 of the Treaty.

38 So far as concerns Article 5(1), the Commission takes the view that, having regard to the Directive taken as a whole, that provision does not permit Member States to require that the trade description should also include particulars not called for by the objective of providing the consumer with accurate information, thus precluding the marketing of domestic or imported products which, like the products at issue, do not differ in any essential respect from the products generally known in the Community under the same trade description.

39 The Federal Government, on the other hand, considers that the provision in question permits the national legislature of a Member State to take account of the manner in which a particular trade description is perceived by most people in that State so as to ensure that consumers are provided with accurate information concerning the true nature and composition of the products in question.

40 In that connection, it is sufficient to note that the requirement laid down in Article 5(1) of the Directive to the effect that any additional particulars accompanying the trade description must be necessary for the information of consumers also follows from Article 30 of the Treaty and that, consequently, this point cannot constitute a separate ground of challenge.

41 It must be concluded that, by requiring that béarnaise sauce and hollandaise sauce made with vegetable fats and certain pastry products containing the additive 'E 160 F' should, in order to be marketed in Germany, carry a trade description with an additional statement indicating that the substance in question has been used, even if that substance is already included in the list of ingredients referred to in Article 6 of the Directive, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful in all essential respects, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by requiring that béarnaise sauce and hollandaise sauce made with vegetable fats and certain pastry products containing the additive 'E 160 F' should, in order to be marketed in Germany, carry a trade description with an additional statement indicating that the substance in question has been used, even if that substance is already included in the list of ingredients referred to in Article 6 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty;

2. Dismisses the remainder of the application;

3. Orders the Federal Republic of Germany to pay the costs.

Edward Moitinho de Almeida

Gulmann Jann Sevón

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber