OPINION OF ADVOCATE GENERAL DARMON
delivered on 10 March 1994 *

Mr President,
Members of the Court,

1. Is legislation of a Member State prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter is higher than 2% compatible with Article 30 of the EEC Treaty and, if not, since its effect is to prevent the importation of products coming from another Member State in which they are lawfully marketed, can it be justified under Article 36?

2. Those are in essence the questions referred to the Court by the Rechtbank van Eerste Aanleg (Court of First Instance) in Ghent (Belgium), ruling in criminal proceedings, which also requests the Court to interpret certain provisions 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 (which I shall refer to as 'the directive'). [1]

3. Allow me to remark that the wording of the order for reference is regrettably laconic. However, I see no need to apply the Court's decision in *Telemarsicabruzzo*, [2] since in the present case the documents before the Court contain the information necessary to enable it to answer the questions.

4. I would submit that, just as in the case which gave rise to the Court's ruling in *Vaneetveld and Le Foyer*, [3]

'... the questions relate to specific technical points and enable the Court to give a useful reply even [if] the national court has not given an exhaustive description of the legal and factual situation.' [4]

* Original language: French.

1 — OJ 1979 L 33, p. 1.

2 — Joined Cases C-320, 321 and 322/90 [1993] ECR I-393. See also the Orders in Case C-157/92 *Banchero* [1993] ECR I-1085 and Case C-386/92 *Monin Automobiles* [1993] ECR I-2049.

3 — Case C-316/93 [1994] ECR I-763.

4 — Paragraph 13.

5. The facts may be briefly summarized. A company by the name of Hema distributes in Belgium bread and other bakery products bought in the Netherlands. In his capacity as manager of one of that company's shops, Mr van der Veldt was summoned before the national court making the reference and charged with having sold bread whose salt content did not comply with Belgian law and with having failed to fulfil his obligation to set out on the labels of bakery products the specific name or the EEC number of the preservative used within the meaning of the directive.

6. Checks carried out on 8 September and 9 November 1988 by food inspectors on samples of the products sold revealed that the bread contained between 2.11% and 2.17% salt whereas Belgian law fixes a maximum salt content of 2%. In addition, the packaging stated that the product at issue contained a 'preservative', whereas Belgian law also required either the specific name or the EEC number to be given (that is, in the present case, according to the submissions of the defendant in the main action, 'propionic acid' or 'E 280').

7. However, the law of the Member State where the bread was manufactured fixes the maximum salt content for bread at 2.5% and, with respect to the ingredients, permits designation of the general category alone, namely, 'preservative'.

8. Before the national court, Mr van der Veldt claimed that the Belgian legislation was incompatible with Community law regarding the free movement of goods.

9. In the first question, the national court asks whether a law prohibiting the marketing of bread whose salt content by reference to the dry matter is higher than 2% constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30.

10. As the Court has consistently held, such legislation is caught by that article if it is

'... capable of hindering, directly or indirectly, actually or potentially, intra-Community trade ...',

according to the well-known test established by the Court in *Dassonville*. [5]

5 — Case 8/74 [1974] ECR 837, at paragraph 5.

11. In *Keck and Mithouard*, [6] the Court found it necessary to narrow the scope of that definition, excluding from then on

'... national provisions restricting or prohibiting certain selling arrangements ... provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' [7]

12. However, staying within what might be termed the 'traditional' limits of its case-law, the Court was concerned to recall that,

'... in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 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*, 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.' [8]

13. In the absence of harmonized Community rules, the Court has consistently held that it is for the Member States to regulate all matters relating to the manufacture and marketing of products, [9] provided that they do not thereby

'... discriminate against imported products or hinder the importation of products from other Member States.' [10]

14. In *Kelderman* the Court stated that

6 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

7 — Paragraph 16.

8 — Paragraph 15, my emphasis.

9 — See in this regard the judgment in 'Cassis de Dijon': Case 120/78 *Rewe-Zentral* [1979] ECR 649, at paragraph 8.

10 — Case 237/83 *Jongeneel Kaas* [1984] ECR 483, at paragraph 13.

'The extension to imported products of a requirement that they contain a specific amount of dry matter may prevent bread originating in other Member States from being marketed in the State concerned. It may make it necessary to vary the method of manufacture according to the place where the bread is to be sold and thus impede the movement of bread lawfully produced in the Member State of origin if identical manufacturing standards are not prescribed in that State', [11]

and went on to conclude that such a measure was likely to hinder trade.

15. The same conclusion is unavoidable here. The legislation in dispute absolutely prohibits the marketing of products from another Member State unless they are manufactured in accordance with the rules laid down by the importing Member State. Thus, it falls within the scope of Article 30.

16. Let me therefore address the second question, which concerns the possibility of such legislation being justified on the ground of protecting public health.

17. It should be recalled that the Court has consistently held that recourse to Article 36 of the Treaty is only ruled out if the rules relating to the products concerned have been harmonized, as the Court stated, moreover, in *Tedeschi* v *Denkavit*: [12]

'... Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.' [13]

18. This is precisely an area where harmonized rules have yet to be introduced, so that the Community law applicable has remained unchanged since the judgment in *Kelderman* to which I referred, in which the Court observed that

'... in the absence of common or harmonized rules on the making and marketing of bread it is for Member States to regulate all matters relating to the composition, making and mar-

11 — Case 130/80 [1981] ECR 527, at paragraph 7; see also the judgment in Case 94/82 *De Kikvorsch* [1983] ECR 947, at paragraph 8.

12 — Case 5/77 [1977] ECR 1555. See also, in this regard, the judgments in Case 35/76 *Simmenthal* [1976] ECR 1871, at paragraph 36, and Case 251/78 *Denkavit* [1979] ECR 3369, at paragraph 14.

13 — Paragraph 35.

keting of that foodstuff on their own territory.' [14]

19. The question is thus whether a measure of this kind, having equivalent effect to a quantitative restriction, may be justified with regard to the criteria of necessity and proportionality on the basis of one of the derogations specified in Article 36 or, since the legislation concerned applies to both domestic and imported products alike, in terms of one of the imperative requirements recognized by the Court in connection with Article 30.

20. In *Debus* [15] the Court considered whether the national rules at issue, which applied to domestic and imported products alike, might

'... be justified on grounds of the protection of human health, as provided for in Article 36 of the Treaty.' [16]

21. It should be noted that the power of the Member States to rely on the grounds listed in that article is not unfettered since, according to the Court's judgment in *Commission* v *Hellenic Republic*, [17] that provision

'... lays down an exception — falling to be construed strictly — to the rule that goods should be able to move freely within the Community, which constitutes one of the fundamental principles of the common market.' [18]

22. In view of that narrow approach, the Court later defined more closely the terms and the scope of the derogations listed in Article 36.

23. First of all, in *De Peijper*, [19] the Court pointed out that national rules or practices which restrict imports

'... are only compatible with the Treaty to the extent to which they are necessary for the effective protection of health and life of humans' [20]

14 — Paragraph 5.

15 — Joined Cases C-13 and 113/91 [1992] ECR I-3617.

16 — Paragraph 12. See also, in this regard, the judgment in Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647, paragraph 14.

17 — Case C-205/89 [1991] ECR I-1361.

18 — Paragraph 9.

19 — Case 104/75 [1976] ECR 613. See also the judgment in Case 54/85 *Mirepoix* [1986] ECR 1067, at paragraph 13, and the judgment in Case C-42/90 *Bellon* [1990] ECR I-4863, at paragraph 11.

20 — Paragraph 16.

and that

'National rules or practices do not fall within the exception specified in Article 36 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much.' [21]

24. Since this concerns an exception to the principle of the free movement of goods, the Court has also held that

'... it is for the 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 serious risk to public health.' [22]

25. In the light of that statement, what must now be examined is whether national legislation which prohibits the marketing of bread whose salt content by reference to the dry matter is higher than 2%, even when this bread has been lawfully made and marketed in another Member State, meets those criteria.

26. It may of course seem strange in the context of a reference for a preliminary ruling to consider such legislation in the light of the criteria of necessity and proportionality, but the Court followed just this course in *Debus*, [23] even though the Advocate General had expressed the view in his Opinion that it was a matter for the national court to decide.

27. In the case which gave rise to that judgment, the Italian legislation prohibited the marketing of beers which contained a particular quantity of sulphur dioxide. The Court declared that

'... Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude national legislation which prohibits the marketing of beers imported from another Member State, where they are lawfully marketed, if they contain a quantity of sulphur dioxide greater than 20 mg per litre.' [24]

28. It is true that, in that case, Italy defended its legislation whereas in the present case Belgium has refrained from lodging written submissions or from taking part in the oral proceedings. However, the arguments put forward in justification of the legislation in

21 — Paragraph 17.

22 — Paragraph 40 of judgment in Case 227/82 *Van Bennekom* [1983] ECR 3883.

23 — Footnote 15, above. See also the most recent relevant judgment, in Case C-315/92 *Clinique and Estée Lauder* [1994] ECR I-317.

24 — Paragraph 30 and the operative part of the judgment.

dispute are reproduced in the defence lodged by the defendant in the main action, thus enabling the Court to provide the national court with a useful reply.

29. Let me speak plainly. It does not seem to me that the reasons cited by the Ministry of Health, in its letter of 6 August 1990 to the Ghent Public Prosecutor, and repeated word for word in the submissions lodged by the defendant in the main action, amount to an adequate justification of that kind of prohibition.

30. They include the following statement:

'If the level permissible in the Netherlands were retained, the daily intake would amount to 3.1 g, which represents — not counting those who eat bread in large quantities — a daily increase of 0.6 g of salt for the average person. The Belgian authorities with responsibility for public health are of the opinion that the levels permitted in the Netherlands are too high.' [25]

31. That is no more than general conjecture: the national authorities have not really demonstrated that increasing salt intake by such an amount poses a risk for public health.

32. It is true that in *Melkunie* [26] the Court acknowledged that a potential risk for consumers justified the adoption of restrictive legislation on trade, since it held that

'... national legislation seeking to ensure that at the time of consumption the milk product in question does not contain micro-organisms in a quantity which may constitute a risk merely to the health of some, particularly sensitive, consumers, must be considered compatible with the requirements of Article 36.' [27]

33. However, the potential risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research and, as the Court emphasized in the following terms in *Commission* v *Germany*, the so-called 'German Beer Case', [28]

25 — Page 14 of the French translation of the submissions lodged by the defendant in the main action (p. 10 of the original).

26 — Case 97/83 [1984] ECR 2367.

27 — Paragraph 18, last sentence.

28 — Case 178/84 [1987] ECR 1227.

'... in particular the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO and the World Health Organization.' [29]

34. If the public health risk has not been adequately established, it seems to me that the sort of legislation described by the national court must be classified as a measure having equivalent effect to a quantitative restriction, of a kind that cannot be justified under Article 36.

35. Consequently, in my opinion the first two questions call for the following reply: Articles 30 and 36 of the EEC Treaty must be interpreted as precluding national legislation prohibiting the marketing of bread and other bakery products of which the salt content by reference to the dry matter is higher than 2%, if they have been imported from another Member State in which they are lawfully manufactured and marketed.

36. It is time, therefore, to address the third question, which concerns the scope of certain provisions of the directive.

29 — Paragraph 52.

37. Let me call back to mind the circumstances which led the national court to make the reference for a preliminary ruling. When samples of bakery products were removed by the Ghent food inspectors, it was noted that the labelling was inadequate because the word 'preservative' was the only information set out on the packaging of the products in question, with no mention of the specific name or of the EEC number as is required by the legislation at issue. Netherlands law, in fact, only requires the general category to be designated, that is to say, in the present case, 'preservative'.

38. Article 6(5)(b) of the directive provides that

'... — ingredients belonging to one of the categories listed in Annex II must be designated by the name of that category, followed by their specific name or EEC number.'

39. Annex II specifically refers to preservatives and the second indent of Article 22(1) provides in essence that the marketing of any product which fails to comply with the directive must be prohibited.

40. However, since the directive was to serve as a preliminary harmonizing measure [30] until such time as comprehensive legislation was enacted, it allowed Member States an option, expressly laid down by Article 23(1), which stated:

'By way of derogation from the second indent of Article 22(1), Member States may make implementation of the provisions relating to the following matters optional:

(a) the designation, provided for in the second indent of Article 6(5)(b), of the specific name or EEC number of the ingredients belonging to one of the categories listed in Annex II.'

41. In fact, it is only with effect from 20 June 1992 that the Member States have had to make it compulsory for labelling to meet the requirements prescribed by Article 6(5)(b), since Directive 79/112 was amended by Council Directive 89/395/EEC [31] which deleted Article 23 and (by Article 2) removed as from that date the option just mentioned. [32]

42. Was it permissible, then, for a Member State to retain until 20 June 1992 legislation which only required the designation 'preservative'?

43. Was the importing Member State which required such information justified in prohibiting the marketing of a product coming from another Member State which did not do so?

44. It should be borne in mind that the obligation to state certain information on a product, in so far as it may compel the manufacturer or importer to adjust the mode of presentation, tends to make marketing of that product in other Member States more difficult and thereby to affect intra-Community trade.

30 — See in particular the eighth recital.

31 — Council Directive of 14 June 1989 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1989 L 186, p. 17).

32 — For the sake of completeness, it should be noted that Commission Directive 93/102/EC of 16 November 1993, amending Directive 79/112/EEC, extended the list of products covered by Annex II and prohibits trade in products which do not comply with effect from 30 June 1996 (OJ 1993 L 291, p. 14).

45. In *Fietje*, [33] the Court found that

'Although the extension to imported products of an obligation to use a certain name on the label does not wholly preclude the importation into the Member State concerned of products originating in other Member States or in free circulation in those States it may none the less make their marketing more difficult, especially in the case of parallel imports.' [34]

46. Of course,

'... recourse to Article 36 ceases to be justified only if, pursuant to Article 100, Community directives provide for the complete harmonization of national laws', [35]

but in this instance, as I have pointed out, harmonization had still only been partially achieved.

47. Since the measure in dispute is applicable to national and imported products alike, it is possible that the obligation to designate on the packaging of the products sold the general category, followed by the specific name or the EEC number of the ingredients contained, may be justified on one of the grounds referred to in Article 36 or by an imperative requirement.

48. The question was discussed by both the Commission and the defendant in the main action primarily in the light of consumer protection, that is to say, an imperative requirement, and both took the view that designation of the general category ensured adequate protection.

49. It is easy to understand the position taken by the defendant in the main action, but that of the Commission is altogether surprising, given that the legislation enacted by the Council is consistent on this point with the proposal which the Commission itself had put forward. [36]

50. The Court has also ruled that

'The prohibition of quantitative restrictions on exports and of all measures having equiv-

33 — Case 27/80 [1980] ECR 3839; see also in this regard paragraph 10 of the judgment in *De Kikvorsch*, cited in footnote 11, above.

34 — Paragraph 10.

35 — Case C-39/90 *Denkavit* [1991] ECR I-3069, at paragraph 19.

36 — See Article 6(3)(b) of the Proposal for a Council Directive on the approximation of the laws of Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1976 C 91, p. 3).

alent effect applies ... not only to national measures but also to measures adopted by the Community institutions ...' [37]

51. Thus, in the absence of justification, rules regarding matters such as labelling, even when laid down by a directive, must comply none the less with the requirements of Article 30, and, as we have seen, designation of the general category, followed by the specific name or the EEC number, has been mandatory in all Member States since 20 June 1992.

52. The scope of non-mandatory directives has already been explored in the judgment given in *Denkavit* [38] which, although it did not relate to the directive under consideration here, was concerned with a very similar set of circumstances.

53. Let me recall the salient facts of that case. A company called Denkavit wished to import feedingstuffs for animals from the Netherlands without observing the requirement of German law to designate on the packaging the respective percentages of all the ingredients used, in descending order of weight. Netherlands legislation did not make it compulsory to provide that information. Directive 79/373/EEC, and particularly Article 5 thereof, applicable to the facts of the case, permitted the designation of information in that way — by what is termed a 'semi-open' declaration — but did not make it compulsory.

54. When the Court was asked to give a preliminary ruling on the compatibility of such a declaration with the rules of the Treaty, it conceded that the aims of the requirement imposed in this respect by German law were the protection of public health, consumer protection and fair trading, after pointing out that a later directive would in any event render that information obligatory in all the Member States with effect from 22 January 1992.

55. That reasoning may be transposed to the present case.

56. It should be noted that the ingredients referred to in Annex II could not be treated in the same way as products which have been proved harmless. This is all the more true in light of the fact that Article 9 of Directive 64/54/EEC [39] already provided that certain preserving agents '... intended for use in foodstuffs [could be] placed on the

37 — Paragraph 15 of the judgment in Case 15/83 *Denkavit Nederland* [1984] ECR 2171, in which Article 34 of the EEC Treaty had been relied upon.

38 — See citations above, in footnote 35.

39 — Council Directive of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (OJ, English Special Edition 1963-4, p. 99).

market only if their packagings or containers bear ... b) the number and name of the preservative ...' (including propionic acid).

57. The requirement that the specific name or the EEC number appear on the packaging of food products as well as the general category does not seem to be disproportionate to the objective pursued by legislation for the protection of consumers, particularly in view of the multiplicity of preserving agents which those products may contain. Consumers must be able to know *all* the preservatives used and exactly which ones, which means that to give only the general category 'preservative' is demonstrably inadequate.

58. Questions have also been put to the Commission by a Member of the European Parliament regarding the necessity of protecting consumers, who 'are increasingly demanding naturally wholesome products'.

59. In his reply to that question, Mr Bangemann said that

'Council Directive 79/112/EEC of 18 December 1978 on the labelling of foodstuffs ..., as last amended by Directive 91/72/EEC ..., and in particular Articles 3 and 6 thereof, makes it compulsory to indicate a list of ingredients on the labelling of foodstuffs.

The list of ingredients must show all the ingredients contained in the foodstuff, including additives, thus enabling the consumer to make an informed choice.' [40]

60. As the Court observed in its judgment in *Denkavit* of 20 June 1991, to which I have already referred,

'... it is accepted that labelling is one of the means that least restricts the free movement of those products within the Community.' [41]

61. Two final points.

62. Article 100a(3) of the Treaty, added by virtue of the Single European Act, enjoins the Commission to base its proposals in the

40 — Written Question E-2673/93 (OJ 1994 C 46, p. 57).
41 — Paragraph 24.

matter on a 'high level of protection'; so, if labelling is to reach that standard, it must be complete.

63. Finally, the directive was not intended to exacerbate the difficulties stemming from the disparities between the laws of the various Member States. Quite the contrary: the introduction of harmonized rules has primarily affected not the principle of providing information, but the detail in which, according to Community law, it must be provided — generic and/or specific — a matter which had been left to the discretion of the Member States, at least until 20 June 1992. Since that date, which is when the 1978 directive entered into force, it has no longer been necessary for the trader to endeavour to meet all the requirements prescribed by the importing States with regard to labelling. All he will have had to do, to export freely, is to designate on the packaging of his products those ingredients covered by Community legislation.

64. I therefore propose that the Court should rule as follows:

(1) Articles 30 and 36 of the EEC Treaty must be interpreted as precluding national legislation prohibiting the marketing of bread and other bakery products of which the salt content by reference to the dry matter is higher than 2%, if they have been imported from another Member State in which they are lawfully manufactured and marketed.

(2) The obligation imposed by the legislation of a Member State to designate on the packaging of foodstuffs the general category to which the ingredients contained belong, followed in each case by the specific name or EEC number, is justified by the requirements of consumer protection for the purposes of Article 30 of the EEC Treaty.