JUDGMENT OF THE COURT (Fifth Chamber)
14 July 1994 *

In Case C-17/93,

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

J. J. J. Van der Veldt

on the interpretation of Articles 30 and 36 of the EEC Treaty and 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: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg (Rapporteur), Judges,

Advocate General: M. Darmon,
Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Mr Van der Veldt, by J. M. van Hille and P. Vlaemminck, of the Ghent Bar,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Van der Veldt, represented by M. Ryckman, of the Ghent Bar, and the Commission at the hearing on 20 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 10 March 1994,

gives the following

Judgment

1 By judgment of 15 January 1993, received at the Court on 20 January 1993, the Rechtbank van Eerste Aanleg (Court of First Instance) Ghent, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 30 and 36 of that Treaty and 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 'Directive 79/112').

2 Those questions were raised in criminal proceedings against Mr Van der Veldt, who was charged with having sold on the Belgian market 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.

3 It emerges from the written observations submitted by Mr Van der Veldt to the Court that Hema-Belgique, the company for which he manages a shop in Ghent, imports practically all its products, including bread and other bakery products, from the Netherlands.

4 Checks carried out on 8 September and 29 November 1988 by food inspectors on samples of products sold in the Ghent shop disclosed that the bread contained between 2.11% and 2.17% salt, whereas the Belgian Royal Decree of 2 September 1985 concerning bread and other bakery products (*Belgisch Staatsblad* of 7 November 1985), adopted pursuant to the Law of 24 January 1977 on the protection of consumer health with respect to foodstuffs and other products (*Belgisch Staatsblad* of 8 April 1977), permits no more than 2%. Furthermore, although the word 'preservative' appeared on the packaging of the products in dispute, neither the specific name of the ingredient used, namely 'propionic acid', nor its EEC-number, 'E 280', was stated, contrary to the requirements of the Belgian Royal Decree of 13 November 1986 (*Belgisch Staatsblad* of 2 December 1986), which also gives effect to the Law of 24 January 1977.

5 That provision transposes into Belgian law the second indent of Article 6(5)(b) of Directive 79/112, according to which:

'... — 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'.

One of the categories expressly listed in Annex II of Directive 79/112 is that of preservatives.

6 According to the second indent of Article 22(1) of Directive 79/112, Member States were required, no later than four years after notification of the directive, to make such amendments to their laws as were necessary to prohibit trade in those products which did not comply with the directive's provisions. However, by way of derogation from that rule, Article 23(1)(a) allowed Member States to make implementation of the second indent of Article 6(5)(b) optional, that is to say, they were not obliged to require the designation of the specific name or EEC number of the ingredients belonging to one of the categories listed in Annex II. The Netherlands exercised that option.

7 Subsequent to the events which gave rise to the main proceedings, the option was removed with effect from 20 June 1992 by Article 2 of Council Directive 89/395/EEC of 14 June 1989 amending Directive 79/112/EEC (OJ 1989 L 186, p. 17, hereinafter 'Directive 89/395').

8 In view of the fact that the products at issue were lawfully manufactured and marketed in the Netherlands, where the maximum salt content for bread is 2.5% and where additives may simply be designated by the term 'preservative', that is to say, by the name of the general category given in Annex II to the Algemeen Aanduidungsbesluit (Warenwet) (Decree on the Labelling of Goods (Law on Goods)), the Rechtbank van Eerste Aanleg, Ghent, considered it necessary, to enable it to give judgment, to submit the following questions to the Court of Justice:

'1. Must national legislation prohibiting the sale of bread whose maximum salt content by reference to the dry matter is higher than 2% be regarded as a quantitative restriction or a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, if, by reason thereof, bread which has been lawfully marketed in another Member State and whose salt content by reference to the dry matter is higher than 2.5% cannot, when imported into the

first Member State mentioned, be sold, on the ground that its salt content exceeds the maximum limit of 2% which the law there permits?

2. If the answer to the first question is in the affirmative and if the legal provision referred to infringes Article 30 of the EEC Treaty, may the first Member State mentioned, in the circumstances set out above, rely on the derogation provided for in Article 36 of the EEC Treaty for the purposes of protecting public health in order to maintain the measure in dispute notwithstanding the prohibition contained in Article 30 of the EEC Treaty?

3. Pursuant to Article 23(1)(a) 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), Member States need not require compliance with the provisions concerning 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 to that directive (particularly preservatives), reference to the general category thus being sufficient.

   (a) May a Member State which has nevertheless made the designations provided for in the second indent of Article 6(5)(b) compulsory prohibit the sale of products which have been lawfully marketed in another Member State where, pursuant to Article 23(1)(a), those designations are not compulsory, but on which the designations required by the first Member State are not provided? In other words, does the first State have the right to exclude the products in question from the free movement of goods as defined by Article 30 of the EEC Treaty?

   (b) If Article 30 continues to apply in every respect to a product that is not in conformity with its legislation, may the first-mentioned Member State, by relying on Article 36 of the EEC Treaty, exclude the application of Article 30 thereof on the ground that the designations referred to in the

second indent of Article 6(5)(b) are not set out on the packaging of the product, even though they are compulsory in that Member State, which is not the case in the Member State where the product is lawfully marketed?'

The first question

9 The first question put by the national court is whether national legislation prohibiting the marketing of bread and other bakery products 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 of the Treaty, if it is also applied to imports of products which have been lawfully manufactured and marketed in another Member State.

10 As the Court has consistently held, in the absence of common or harmonized rules on the making and marketing of bread and other bakery products, it is for Member States to regulate all matters relating to the composition, making and marketing of those foodstuffs on their own territory, provided that they do not thereby discriminate against imported products or hinder the importation of products from other Member States (see Case 130/80 *Kelderman* [1981] ECR 527 and Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483).

11 The extension to imported products of a requirement that they contain no more than a specific amount of salt, calculated by reference to the dry matter, may prevent bread and other bakery products originating in other Member States from being marketed in the State concerned. It may make it necessary, if identical manufacturing standards are not prescribed in those States, to vary the method of manufacture according to the place where the bread or bakery product in question is to be sold and thus impede the movement of products lawfully produced and marketed in the Member States of origin.

12 Accordingly, it should be stated in reply to the first question that national legislation prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter exceeds the maximum permitted level of 2%, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

The second question

13 The second question is whether a rule such as that at issue in the main proceedings is to be regarded as justified under Article 36 of the Treaty on public health grounds.

14 The Belgian rule in dispute was adopted in pursuance of the Law of 24 January 1977, mentioned above, whose purpose, as its title indicates, is to protect consumer health.

15 Since it concerns an exception to the principle of the free movement of goods, it is for the national authorities to demonstrate that their rules are consistent with the principle of proportionality, that is to say, that they are necessary in order to achieve the declared purpose, which in the present case is the protection of public health.

16 In that regard, the Belgian Ministry of Health, in its letter of 6 August 1990 to the Ghent Openbaar Ministerie (Public Prosecutor's Office), which is repeated word for word in the written observations submitted by Mr Van der Veldt, confines itself to the statement that 'the Belgian authorities with responsibility for public health are of the opinion that the levels permitted in the Netherlands are too high'. The Ministry points out that, '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'.

17 General conjecture of that nature does not prove that increasing salt intake by such an amount poses a risk for public health. It is true that, as the Court has already held (see Case 97/83 *Melkunie* [1984] ECR 2367), the fact that there is a risk to consumers is sufficient to make legislation of the kind at issue compatible with the requirements of Article 36. However, the risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research (see, in particular, Case 178/84 *Commission* v *Germany* [1987] ECR 1227).

18 In neglecting to produce scientific data on the basis of which the Belgian legislature would have been justified in enacting and retaining the measures at issue, the Belgian authorities have failed to demonstrate the risk to public health of a salt content in excess of 2%.

19 Furthermore, instead of prohibiting and penalizing the marketing of bread and other bakery products whose salt content is higher than 2%, the Belgian legislature could have prescribed suitable labelling to give consumers the desired information regarding the composition of the product. The protection of public health would thus have been ensured without such serious restrictions on the free movement of goods.

20 It follows from all the foregoing considerations that the Belgian authorities have failed to prove that the legislation at issue is necessary in order to protect consumer health and that it goes no further than is necessary in order to achieve that aim. The legislation in dispute is therefore incompatible with the principle of proportionality.

21 Accordingly it should be stated in reply to the second question that rules such as those at issue in the main proceedings are likely to hinder trade between Member States and cannot be regarded as justified under Article 36 of the Treaty on the ground of protecting public health.

The third question

22 The third question is, in essence, whether in the context of Directive 79/112 a Member State which had made it compulsory to designate — as provided for by the second indent of Article 6(5)(b) — the specific name or EEC number of the ingredients listed in Annex II to the directive, was entitled to rely on the imperative requirement of protecting consumers or on one of the grounds listed in Article 36 of the Treaty in order to prohibit the marketing of a product from another Member State which, by exercising the option allowed for in Article 23(1)(a) of that directive, required merely designation of the general category 'preservative'.

23 It should first of all be noted that the obligation to mark on the packaging of products sold the specific name or EEC number of the preservative makes it more difficult to import products from other Member States where no such obligation is imposed. Consequently, as has been consistently held (see, in particular, Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 and Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649), an obligation of that sort is in principle caught by the prohibition in Article 30 of the Treaty.

24 Secondly, according to the Court's decision in Case 76/86 (*Commission* v *Germany* [1989] ECR 1021), it follows from Article 30 et seq. of the Treaty that national legislation, adopted in the absence of common or harmonized rules, applicable to both domestic products and to products imported from other Member

States where they are lawfully manufactured and marketed, is compatible with the Treaty only in so far as it is necessary on grounds of public interest listed in Article 36 or in order to satisfy imperative requirements relating, in particular, to the protection of consumers.

25 Lastly, it is clear from the judgment in Case 5/77 (*Tedeschi* v *Denkavit* [1977] ECR 1555) that recourse to Article 36 ceases to be justified only where, in application of Article 100 of the Treaty, Community directives provide for the complete harmonization of national laws. It must therefore be conceded that, so long as the laws of Member States relating to a particular field have not been harmonized, the corresponding national legislation may restrict the principle of free movement to the extent that those restrictions are justified on one of the grounds listed in Article 36 of the Treaty or by imperative requirements.

26 In the present case, Directive 79/112 represents, as follows specifically from its first and eighth recitals, only the initial stage of a harmonization process which is designed progressively to eliminate all obstacles to the free movement of foodstuffs resulting from the differences which exist between the laws, regulations and administrative provisions of the Member States with respect to the labelling of those products.

27 Moreover, since the rule in dispute in the main proceedings is applicable to domestic and imported products alike, it must be considered whether it may be justified by imperative requirements — in this case, protecting consumers — or on one of the grounds referred to in Article 36 of the Treaty.

28 As is apparent from the sixth recital in the preamble to Directive 79/112 and from the second recital in Directive 89/395, which makes it compulsory to mark on the

packaging of foodstuffs either the specific name or the EEC number of the ingredients, the prime consideration for any rules on the labelling of foodstuffs should be the need to inform and to protect the consumer. That implies that the latter should be able to know the exact nature of all the ingredients used.

29 As a reflection of those concerns, the purpose of the obligation to designate on the packaging of bread and other bakery products either the specific name or the EEC number of the preservatives is, therefore, to ensure the protection of consumers, which is recognized by the case-law of the Court as being an imperative requirement.

30 Nevertheless, an obligation of that kind must be fulfilled by means which are not out of proportion to the desired result and which hinder as little as possible the importation of products which have been lawfully manufactured and marketed in other Member States.

31 Those requirements are satisfied by the obligatory designation of either the specific name or the EEC number of the preservative: to designate only the general category 'preservative' would be inadequate, particularly in view of the multiplicity of preserving agents which the products in question may contain. Furthermore, the Court has already observed (see Case C-39/90 *Denkavit Futtermittel* v *Land Baden-Württemberg* [1991] ECR I-3069, at paragraph 24) that labelling is one of the means that least restricts the free movement of products within the Community.

32 Accordingly, it should be stated in reply to the third question that, in the context of Directive 79/112, a Member State which had made it obligatory to designate, as provided by the second indent of Article 6(5)(b), either the specific name or the EEC number of the ingredients listed in Annex II to the directive, was entitled to rely on the imperative requirement of protecting consumers in order to prohibit the marketing of a product from another Member State which had chosen to exercise the option allowed by Article 23(1)(a) of that directive and to require only designation of the general category 'preservative'.

Costs

33 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending 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 referred to it by the Rechtbank van Eerste Aanleg, Ghent, by judgment of 15 January 1993, hereby rules:

1. **National legislation prohibiting the marketing of bread and other bakery products whose salt content by reference to the dry matter exceeds the maximum permitted level of 2%, when applied to products which have been lawfully manufactured and marketed in another Member State, constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty.**

2. **Rules such as those at issue in the main proceedings are likely to hinder trade between Member States and cannot be regarded as justified under Article 36 of the EEC Treaty on the ground of protecting public health.**

3. **In the context 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, a Member State which had made it obligatory to designate, as provided by the second indent of Article 6(5)(b), either the specific name or the EEC-number of the ingredients listed in Annex II to that directive, was entitled to rely on the imperative requirement of protecting consumers in order to prohibit the marketing of a product from another Member State which had chosen to exercise the option allowed by Article 23(1)(a) of that directive and to require only designation of the general category 'preservative'.**

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 14 July 1994.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber